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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF THE  
STATE OF IOWA

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JANUARY AND MAY  
TERMS, 1918.

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BY  
U. G. WHITNEY  
REPORTER

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VOLUME 183

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1919

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STATE OF IOWA

NOV 20 1919

# JUDGES OF THE COURTS

during the time of these reports, from which appeals may be taken to the Supreme Court.

(NAMES ARRANGED IN ORDER OF SENIORITY OF SERVICE.)

## DISTRICT COURTS.

- First District*, two judges—HENRY BANK, JR., Keokuk; WILLIAM S. HAMILTON, Ft. Madison.
- Second District*, four judges—\* F. W. EICHELBERGER, Bloomfield; C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, two judges—HIRAM K. EVANS, Corydon; THOMAS L. MAXWELL, Creston.
- Fourth District*, three judges—† JOHN F. OLIVER, Onawa; † DAVID MOULD, Sioux City; GEORGE JEPSON, Sioux City; JOHN W. ANDERSON, Onawa (1915); W. G. SEARS, Sioux City (1915).
- Fifth District*, three judges—J. H. APPLIGATE, Guthrie Center; WILLIAM H. FAHEY (1911), Perry; LORIN N. HAYS (1911), Knoxville.
- Sixth District*, three judges—K. E. WILLCOCKSON, Sigourney; JOHN F. TALBOTT, Brooklyn; HENRY SILWOLD, Newton.
- Seventh District*, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport; † LAWRENCE J. HORAN, Muscatine.
- Eighth District*, one judge—RALPH P. HOWELL, Iowa City.
- Ninth District*, five judges—† HUGH BRENNAN, Des Moines; W. H. McHENRY, Des Moines; LAWRENCE DE GRAFF, Des Moines; CHARLES A. DUDLEY, Des Moines; WM. S. AYRES, Des Moines; HUBERT UTTERBACK, Des Moines.
- Tenth District*, three judges—† FRANKLIN C. PLATT, Waterloo; GEORGE W. DUNHAM, Manchester; CHAS. W. MULLAN, Waterloo; H. B. BOIES, Waterloo.
- Eleventh District*, three judges—R. M. WRIGHT, Ft. Dodge; † C. G. Lee, Ames; † C. E. ALBROOK, Eldora; H. E. FRY, Boone (1915); EDWARD M. MCCALL, Nevada (1915).
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—A. N. HOBSON, West Union; WILLIAM F. SPRINGER, New Hampton.
- Fourteenth District*, two judges—D. F. COYLE, Humboldt; N. J. LEE, Eatherville.
- Fifteenth District*, five judges—A. B. THORNELL, Sidney; ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; THOMAS ARTHUR, Logan; JOSEPH B. ROCKAFELLOW, Atlantic.
- Sixteenth District*, two judges—† FRANK M. POWERS, Carroll; M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, three judges—F. O. ELLISON, Anamosa; MILO P. SMYTH, Cedar Rapids; JOHN T. MOFFIT, Tipton.
- Nineteenth District*, two judges—ROBERT BONSON, Dubuque; JOHN W. KINTZINGER, Dubuque.
- Twentieth District*, two judges—JAMES D. SMYTH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; W. D. BOIES, Sheldon.

## SUPERIOR COURTS.

- Cedar Rapids*—CHARLES B. ROBBINS.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—PAUL G. NORRIS.
- Keokuk*—W. L. McNAMARA.
- Oelwein*—JOHN R. BANE.
- Perry*—W. W. CARDELL.
- Shenandoah*—GEO. H. CASTLE.

\* Died, Oct. 11, 1914.

† Retired, Dec. 31, 1914.

‡ Resigned, April 27, 1914.

## JUDGES OF THE SUPREME COURT.

---

BYRON W. PRESTON, Chief Justice, Mahaska County.

SCOTT M. LADD, O'Brien County.

SILAS M. WEAVER, Hardin County.

WILLIAM D. EVANS, Franklin County.

FRANK R. GAYNOR, Plymouth County.

BENJAMIN I. SALINGER, Carroll County.

TRUMAN S. STEVENS, Fremont County.

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## OFFICERS OF THE COURT.

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H. M. HAVNER, *Attorney General*, Iowa County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF THE  
STATE OF IOWA  
AT  
DES MOINES, JANUARY AND MAY TERMS, 1918

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JOHN S. MONAHAN et al., Appellants, v. ROSE RODERICK  
et al., Appellees.

**WILLS: Probate, Establishment and Annulment—Undue Influence**

- 1 —Jury Question. Evidence concededly presenting a jury question on the issue of testator's mental competency to execute a will, may strongly influence the submission of the issue of undue influence.

**EVIDENCE: Opinion Evidence—Conclusions—Wills—Influence Over**

- 2 Testator. It is error to permit a contestant to state that proponent had great influence over testatrix, yet nonprejudicial when the fact of such influence abundantly and without controversy appears from other portions of the record.

**TRIAL: Reception of Evidence—Order of Proof—Belated Offer—**

- 3 Wills. Evidence that contestant had defrauded testatrix may be admissible as bearing on the reason for ignoring contestant

in the will, and as rebutting the plea of undue influence; yet such evidence is properly rejected when withheld by proponent until the surrebuttal of the case.

**APPEAL AND ERROR: Presentation and Reservation of Grounds—**

- 4 **Exceptions—Waiver.** He who duly excepts to the refusal of the court to receive evidence on a certain subject-matter, waives any error in such ruling by failing to enter any objections to an instruction which informs the jury that such subject-matter is wholly immaterial to the issues in the case.

**EVIDENCE: Opinion Evidence—Nonexpert Witness—Insufficient**

- 5 **Detail of Facts—Wills.** It is not prejudicial error to permit a nonexpert witness, on an insufficient detail of facts, to give an inconsequential opinion as to the soundness of mind of a person.

**EVIDENCE: Opinion Evidence—Nonexpert Witness—Detail of**

- 6 **Facts—Sufficiency.** The detail of facts which will qualify a nonexpert witness to give an opinion as to the unsoundness of mind of a person, is sufficient, if such detail is as to matters somewhat out of the ordinary, and of a nature such as to attract attention to the mental condition of the person in question.

**EVIDENCE: Opinion Evidence—Physicians—Opinion without De-**

- 7 **tail of Facts.** A physician, though not an expert in mental diseases, may, without a detail of facts, give his opinion as to the mental soundness of a person professionally treated by him.

*Appeal from Polk District Court.*—CHAS. A. DUDLEY, Judge.

MARCH 12, 1918.

THIS is a contest over the will of Ann Monahan. The proponents are two sons of the testatrix, and the contestants, two daughters. There was a verdict for the contestants. The proponents have appealed.—*Affirmed.*

*Cummins, Hume & Bradshaw, Hugh Brennan, and Frank T. Jensen, for appellants.*

*J. H. Patton, for appellees.*

EVANS, J.—I. The activities of the litigation and of the trouble leading up thereto have been conducted mainly by



John S. Monahan, for the proponents, and by Rose Roderick for the contestants. The testatrix died at Des Moines, in January, 1916. The will under contest was made June 29, 1915. The property involved consists, in the main, of a 200-acre farm in Adair County, where the testatrix had lived for many years. She was over eighty years of age at the time the will was made. She was of strong character in her day, but was unlearned, and unable to read and write. She had been a widow for some years prior to her death. She had six children: Tom, William, Peter, John, Rose, and Mary.

The contest of the will was based upon two grounds: (1) That the testatrix was mentally incompetent to make a will; (2) that she was unduly influenced, more particularly by her son John S. Monahan. Both issues were submitted to the jury, and a general verdict rendered in favor of the contestants. In April, 1915, a guardian had been appointed for the testatrix, and the guardianship was in force up to the time of her death.

The first ground of reversal urged by the appellants is that there was no evidence of undue influence, and that such issue should not have been submitted to the jury. It is conceded that there was sufficient evidence to go to the jury on the question of mental competency, and especially in view of the presumption obtaining by reason of the guardianship proceeding. In January, 1915, the testatrix had made a will, whereby she devised her property equally among her six children, who were, at that time, all living. Her son William was under guardianship in another part of the state, and account of that fact was taken in making provision for him. Her son Tom lived in Polk County. John lived in Seattle, Washington, and Peter, in Canada. The daughter Rose lived in Polk County, and the daughter Mary in Adair County. For some years, the testatrix and her son Tom had made their home with the daughter Rose, in Des

Moines. The son Tom looked after his mother's business, and aided her in all necessary ways. More or less aid was also rendered by the daughter Rose. In the spring of 1915, the son Tom became sick, and died from his illness on May 13th. The son John left home about twenty years ago. He was for four years in the navy, and sailed the world. Afterwards, he took up his residence at Seattle, Washington, and engaged in various occupations there, being at last a member of the fire department of that city. He made occasional visits to his mother. About the first of April, 1915, he visited her at the Roderick home. This was at the time of Tom's illness, and such illness was partly the occasion for the visit. John's own evidence, as a witness, shows him to have been aggressive in temperament, and very suspicious of his sister Rose. He had been quite active in correspondence in demanding from her information as to the state of his mother's affairs, and had been quite resentful at the meagerness of the information received. The following, quoted from his own testimony in chief, is illustrative of much that transpired between him and his sister, which culminated in the will of June 29, 1915.

"Before this time, Rose and I had a quarrel through a letter. They claimed they were going to keep it for evidence against me. I hope they do. That was before I came home this last time, with reference to the affairs of my mother. Exhibit No. 3 and Exhibit No: 3-A are a letter written to me by my sister Mrs. Roderick, with reference to what I had been asking,—a letter as to what was going on. I asked Mrs. Roderick some question which she did not answer. This letter, Exhibit No. 3, will refer to a couple of letters dated some time earlier, where I intended to show that I asked questions which I did not think were answered when they should have been. Rose had not been answering letters as I thought she should, and I was suspicious that she was not telling mother what I wanted her to; so I wrote a letter

to Miss Mame Curry (her name is Mrs. Frankson now). Inside, I had a letter addressed to mother, and I asked her to read mother that letter, and to get mother's answer and write me. Some way, Mrs. Roderick got the letter, and Exhibit 3 is her answer back. In this letter I wrote to mother through Mame Curry, I asked who was doing mother's business, and asked concerning some money she had,—how much money she had in the bank. I think the letter was dated about the fore part of December, 1914, and I said that I was suspicious that there was some crooked business going on; that I could not accuse anybody of doing anything out of the way, but Rose had not answered my letters promptly to the questions that I asked, and I thought I was entitled to know that."

He arrived at his sister's home on the first of April, and spent several days there. He accused her freely of wrongful conduct, professed his suspicions, demanded explanations, and accepted none. He rented a house for his mother in another part of the city, and he and his mother occupied the same for nearly three months. They left the Roderick home about the 7th or 8th of April. According to his testimony, he took charge of his mother's business; he found the balance in the bank too small; he found many checks which he could not understand, and which his mother did not understand. He talked bitterly concerning his sister to his mother; he asked her about her will and asked her to send to Adair County for it. The will under consideration was made June 29, 1915, by a reputable attorney. John was not present when it was made. Its provisions gave the property to the four children other than Rose. On July 1st, mother and son started on a trip to Canada to the home of Peter, where John left her and returned to Seattle. The testatrix stayed at Peter's home until December, when she returned to Des Moines, and died there, a month later. The foregoing is a mere outline of what appears from the tes-

1. WILLS: probate, establishment and annulment: undue influence: jury question.

timony of the proponent John. There are many other details, upon which we cannot dwell. Sufficient to say that we think the evidence was sufficient to justify a submission to the jury of the question of undue in-

fluence. And this is especially so because of the conceded sufficiency of the evidence to show mental weakness. Conduct which might be insufficient to unduly influence a person of mental strength might be sufficient to so operate upon a failing mind. That John had the willing spirit in that direction is beyond debate, upon this record. The fact of undue influence must largely be proved, as a rule, by circumstantial evidence. There are too many significant circumstances in this case to have warranted a directed verdict for the proponents on that issue.

II. The witness Rose Roderick was per-

2. EVIDENCE: opinion evidence: conclusions: wills: influence over testator.

mitted to testify as follows:

"Q. What is the fact, Mrs. Roderick, as to the kind of influence Jack (John) had in regard to your mother, whether great or small? A. Well, certainly it was great."

This question was objected to, as asking for a conclusion of the witness; and the objection was overruled. Complaint is now made of such ruling. It is strongly urged that the answer of the witness was a mere opinion or conclusion on her part. We are disposed to the view that the appellant's point is well taken. In the state of this record, however, the point is entirely technical, and without prejudice. The border line between fact and conclusion is not very well defined. Facts, so called, usually involve some degree of opinion and conclusion. Naturally, the border line questions are troublesome. The question here is close to the border line. The form of the question is, of course, less objectionable than if it had asked whether John had influenced his mother to do a particular act. Upon the record

in this case, it appears, practically without dispute, from the testimony of both sides, including that of the proponent as a witness, that he did have great influence upon his mother. This is not saying that it was sinister or wrongful. Neither did the question objected to imply that. Concededly, the mother turned over to John all her business, stated to various persons that she had done so, and trusted him implicitly. The fact, therefore, that this witness was permitted to say that John had great influence over his mother, added nothing substantial to the evidence, and could not fairly be deemed prejudicial, in any sense.

III. The proponent called John S. Monahan in surrebuttal. The following occurred:

3. TRIAL: reception of evidence: order of proof: belated offer: wills.

"Q. What do you know, if anything, about your mother getting the money on those checks you have testified to? (Objected to by contestants as not surrebuttal. Objection sustained. Proponents except.)"

Later, during the examination of the same witness, the following occurred:

"Mr. Gwin: Now we offer, read, and introduce in evidence the checks from 5 to 45, inclusive.

"Mr. Patton: They are objected to as not surrebuttal, incompetent, irrelevant, and immaterial.

"The Court: You may offer and read in evidence those checks which he identified as the checks which he showed Mrs. Roderick that morning.

"Mr. Fagan: Exhibits 29, 38, 35, 33, 23, 20, 14, 16, 25, 19 and 22; also Nos. 5 and 13.

"The Court: Those may be offered in evidence. (Contestants except.)"

Thereupon the following occurred:

"Mr. Patton: At this time, contestant Rose Roderick asks that all the checks pertaining to her mother's estate

be offered and received in evidence, and that she be given an opportunity to explain each and every check that goes before this jury.

"The Court: I am going to say to you gentlemen that I am going to tell this jury that they are not to consider these checks at all. You are just wasting the time of the court and wasting the time of the jury. I am going to tell them that that don't enter into this controversy. If there is a failure to account for this money, at a proper proceeding and a proper place these parties can account for it. So far as bearing upon this contest, they have no bearing whatsoever."

The subject here involved had been first touched at the close of the contestants' rebuttal by cross-examination of the witness Rose Roderick, as follows:

"Mr. Fagan: The proponents now offer and introduce and read in evidence Exhibits 5 to 45 inclusive, being the checks identified by the witness as being the ones over which she and her brother J. S. Monahan had their trouble, and which checks she says were turned over to her as a part of the cross-examination of this witness, and further, as the checks identified by the witness J. S. Monahan.

"Mr. Patton: Objected to as not cross-examination, incompetent and immaterial, the checks not being properly identified.

"The Court: So far as determining this controversy, I do not think that these checks are material, and for that reason I will sustain the objection to those checks. You have the question of the controversy over them, but the objection to the checks is sustained."

The ruling of the court here indicated is made the basis of an error relied upon for reversal. The argument in support thereof is that the evidence was material, as bearing upon the question whether the daughter Rose Roderick had defrauded or wronged her mother. If she had, this of it-

self would have been a sufficient reason for discriminating against her, and would have rebutted the presumption of undue influence. Much authority is cited and argument devoted to this proposition. We think the argument thus put forward by the appellant is sound. But we think it clear, also, that the argument is not available to the appellant as a ground of reversal. If the introduction of these checks was material to the proof of wrongful administration of her mother's business by the contestant, Rose, their offer should not have been deferred until the surrebuttal of the case. That was a ground of the objection made to it, and it was a sufficient ground for sustaining the ruling of the court. The proponents had closed their main case and the contestants had closed their rebuttal, before this particular question was precipitated at all. At the close of contestants' rebuttal, the proponents had touched the question in the cross-examination of Rose Roderick. The objection made to it there was that it was not cross-examination. It is not claimed now that it was. So that the ruling of the court was, technically at least, correct. But it does appear from some remarks made by the judge to the attorneys that he did not deem the controversy material, and that he would so state to the jury. That this statement by the court indicated an erroneous view may be conceded. Nevertheless, it will be noted from what we have quoted above that the court did not exclude evidence of the controversy or of the merits thereof. The court said:

4. APPEAL AND  
ERROR: presentation and reservation of grounds: exceptions: waiver.

"You have the question of the controversy over them, but the objection to the checks is sustained."

The checks are not included in this record, and we have no way of knowing that they would throw any light upon any particular testimony which had been offered. The final ruling of the court was that certain of the checks were admitted.

Thereupon, the contestants asked that *all* the checks be admitted, and that the contestants be permitted to explain them all. The court thereupon made the statement last quoted by us above. It will be noted that he there advised the attorneys of what he proposed to instruct the jury on the subject. He did so instruct the jury in Instruction 18. No exceptions were taken to this instruction by either party. The appellants are therefore foreclosed from now raising such question. The instruction stands as the law of the case.

- IV. Complaint is made of the testimony
5. EVIDENCE: opinion evidence: nonexpert witness: insufficient detail of facts: wills.

of certain nonexpert witnesses, on the general ground that there was no proper foundation laid as a basis for their opinions. The first of these is the witness Proctor. He testified to the fact that Mrs. Monahan had been in his office half a dozen times, accompanied by other members of the family. On one occasion, she was there for the purpose of having a land contract of some importance drawn by the witness. Mrs. Roderick and others were with her. The situation was explained by Mrs. Roderick. Proctor asked Mrs. Monahan's approval of the explanation. She said:

"I don't know anything about it. I am too old to do any business, and whatever Mr. and Mrs. Roderick said is all right with me."

Nevertheless, a little later, the witness read to Mrs. Monahan the contract as prepared, and received from her the same statement as before.

It will be conceded that this was a rather meager basis for any opinion of mental unsoundness. But the witness did not express such an opinion. His answer in full was as follows:

"Well, I did not detect that she was of unsound mind in any way. She was an old person, about eighty years old I think, and getting quite feeble; and she admitted, herself,



that she was too old to transact any business, and she did not take any part at all in the business that was transacted in her matters in regard to this contract, and she said that she left everything to Mr. and Mrs. Roderick. So, drawing my conclusion from that, I should think that her mental strength was not sufficient, probably, to go ahead and make the contract."

The foregoing was a mere repetition of what he had already testified to. The only opinion expressed was contained in the last sentence. That was so qualified and inconsequential that it could not be deemed prejudicial, without extreme technicality.

The witness Cutler was also examined by the contestants. He was a plumber, and had called at the home, at the request of Mrs. Roderick, to do some plumbing. This included the putting of a sink in the home. He testified:

"I told her Mrs. Roderick had sent me down to make an estimate on some plumbing work, run the water in and put in a sink, and some stuff; and Mrs. Monahan said she didn't know anything about it, and that she was too old to do business, and for me to go over and see Mrs. Roderick. I went over and got Mrs. Roderick, and we talked the matter over, and they showed me where they wanted the fixtures. I took the measurements, and told them that I would make an estimate."

Two or three days later, the witness returned, to do the work. He testified:

"I told Mrs. Monahan I was coming down to do the work, and she wanted to know who ordered me to do it. I told her, Mrs. Roderick. She said, 'All right, if Mrs. Roderick ordered you to do it, go ahead and do it.' She said she didn't know if it was all right to place the sink where we

6. EVIDENCE:  
opinion evi-  
dence: nonex-  
pert witness:  
detail of  
facts: suf-  
ficiency.

had talked about. I went over and got Mrs. Roderick, and came back."

He testified further that, while he was doing the work. Mrs. Monahan talked to him continuously about her family troubles, though he was an entire stranger to her. The descriptive facts thus stated by the witness, though by no means conclusive, nor perhaps very persuasive, were yet fairly sufficient to attract attention to her mental condition. The conduct stated was rather out of the ordinary, and was sufficient, we think, to permit the witness to base an opinion thereon.

Dr. Sanders was examined as a witness for the contestants. He purported to qualify as an expert. He was a regular practicing physician, and had attended the testatrix as such. He had also been the attending physician of the son Tom in his last illness, and had frequently seen the testatrix during his attendance upon Tom. The following question was put to him:

"Q. Doctor, I will ask you, basing your answer upon your associations with Mrs. Monahan and your conversations with her and your observations of her conduct, the things which she said and your observation of her physical condition and her mental condition, whether or not, during the period covered by your testimony, Mrs. Monahan was of sound mind?

"Mr. Gwin: That is objected to for the reason that the witness is incompetent, and for the further reason that the facts stated by the witness would not warrant a physician or an expert in testifying in the affirmative to the question propounded.

"The Court: I think that is a good objection to that question, Mr. Patton. Are you putting him on here as a nonexpert or an expert?

7. EVIDENCE:  
opinion evi-  
dence: phys-  
icians: opinion  
without detail  
of facts.

"Mr. Patton: I qualified him,—I undertook to qualify him as an expert."

The answer was "No." This testimony was further explained on cross-examination as follows:

"Mrs. Monahan did not have a lesion of the brain. I did not make any examination to see. She did not have delusions or hallucinations. What I mean is that her mind was weakened from age or infirmities or sickness, that was all. It was not normal, I don't think. It was just a decline, a breaking up of the tissues, just old age, senility. I could not say as she had it in the worst form. In my experience, I have treated cases or observed cases of senility,—not what you call senile dementia, but just senility alone. Senile dementia is a further advancement of the disease or decay. I don't think she had dementia, but she was more like what we call feeble-minded. I treated her for chronic constipation."

The argument now made by appellant is that the witness, being nonexpert, should not have been permitted to express his opinion of mental unsoundness, inasmuch as he had not stated the facts upon which he based such opinion. As already indicated, the witness purported to qualify as an expert. It is not pointed out in appellant's argument where in the attempted qualification was deficient. It did appear in the cross-examination that the witness was not a specialist in mental diseases. This would not necessarily destroy his expert character. The boundaries of the field of expert knowledge are somewhat indefinite. There are varying degrees, also, of expert knowledge upon any subject. A regular practicing physician is usually regarded as expert, at least to some extent, and for some purposes. We see no reason to say that he is not qualified, as such, to give an opinion as to the feeble-minded condition of a patient under his care.

It is true that the trial court admitted this testimony

upon a ground that is quite untenable. The court held, in effect, that the question was proper, because it asked the opinion of the witness whether the mind of the testatrix was *sound*, and did not ask whether it was unsound. The theory seemed to be that it would not have been proper to ask this witness for an opinion whether the mind of the testatrix was unsound. Of course, the negative answer of the witness in effect reduced the question to that very form. Naturally, the reason thus given for the ruling is assailed in argument by the appellant. The reason was bad, but the ruling was proper.

The foregoing are the important questions presented for our consideration. The record is voluminous. Many minor alleged errors are assigned and argued. We cannot deal with them in detail without extending our opinion unduly. None of the instructions given by the court were excepted to by appellants, and this meets a number of their assignments of error. A careful consideration of all the errors specified as grounds of reversal satisfies us that none of them can fairly be sustained. The record satisfies us that the trial below was essentially fair, and the verdict is fairly supported by the evidence. The judgment below will, therefore, be—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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ALEXANDER MULLEN, Appellant, v. D. P. CRAWFORD,  
Appellee.

**BROKERS:** Compensation—Fraud of Principal—Evidence—Sufficiency. Evidence reviewed, and held insufficient to show that the principal, in order to avoid the payment of a commission, had fraudulently availed himself of the efforts of the broker.

*Appeal from Polk District Court.*—W. H. McHENRY, Judge.

MARCH 12, 1918.

THIS is an action at law by a real estate agent to recover a commission for an alleged sale of real estate for the defendant. At the close of plaintiff's evidence, there was a directed verdict for the defendant. The plaintiff has appealed.—*Affirmed.*

*J. G. Myerly*, for appellant.

*M. E. Penquite* and *Miller & Wallingford*, for appellee.

EVANS, J.—The plaintiff is a real estate agent in Des Moines. The defendant was the owner of a farm of 120 acres in Polk County, which he had listed for sale with various agencies, including the plaintiff. The price at which the same was listed to the plaintiff was \$150 an acre net to the defendant, and a commission of two per cent. Two or three months later, the defendant himself sold his farm to one Dora Raymond. The plaintiff does not claim that he produced this customer, but he does claim that there was certain collusion between the defendant and two or three other persons to bring about a sale of the defendant's land to one Efner, and that Efner was a customer of the plaintiff's. The facts relied upon by the plaintiff as showing such collusion or conspiracy are substantially as follows: He had learned that a certain 80-acre farm belonging to Efner, of Newton, was for sale, and he proposed to defendant, Crawford, that he would try to get a trade for him. He wrote to Efner. His only reply was a telephone message from A. H. Raymond, a real estate agent of Newton, to the effect that he was representing Efner. There was some talk of a proposed trade. Later, another telephone conversation was had with Raymond, whereby he transmitted an offer to trade the Efner 80 for the Crawford 120, and \$2,000. This proposition being submitted to Crawford, it was rejected. This was in September, 1915. Later, in No-

vember, 1915, the defendant, Crawford, received an offer from Dora Raymond, wife of A. H. Raymond, of \$145 an acre for his farm, and he accepted the offer. Some time later, through A. H. Raymond, Crawford also purchased the Efner farm, for \$20,000. Still later, Raymond traded the Crawford farm to Efner for land in South Dakota. Still later, Efner traded the Crawford farm to Altemeyer, the deed therefor being later made from Dora Raymond to Altemeyer. The plaintiff used as his witnesses Dora Raymond, Efner, and Altemeyer. Their testimony discloses no collusion. There is a certain harmony to be found in the successive deals that was well calculated to excite the suspicion of the plaintiff. But this is somewhat accounted for by the fact that all the deals were brought about through Raymond. Altemeyer's testimony shows that he had talked with Raymond about buying the Crawford farm as early as November, 1915, although he did not actually obtain it until some weeks thereafter. Raymond's knowledge of Altemeyer's readiness to buy may have stimulated the purchase of the farm by his wife. There is no claim by plaintiff that Raymond owed him any duty, as subagent or otherwise. Whatever plans Raymond worked through, there is no evidence that would warrant a finding that the defendant had anything to do with them, or knew in advance what they were, except the mere fact that he sold to Raymond's wife his own farm, and that he afterwards bought the Efner farm. It appears affirmatively that all these parties were strangers to the plaintiff. Nor does it appear that the defendant had any previous acquaintance with any of them. There is no motive apparent why the defendant should enter into any conspiracy. If the plaintiff had furnished to the defendant a customer at \$150 per acre net, it would have been clearly to the defendant's interest to accept it. He was not bound to accept from the plaintiff a customer at a lower price, although he was at liberty to accept a lower

price from another customer. Of course, if the plaintiff had presented a customer ready, able, and willing to buy upon the defendant's terms, then the defendant could not defeat the plaintiff's commission by accepting a smaller price from the purchaser. But such is not the case presented. The theory of the plaintiff is that Efner was his customer, and that the defendant, in effect, sold to him. The evidence is not sufficient to sustain a finding in support of such theory. The trial court, therefore, properly directed a verdict, and its judgment is—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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NATIONAL SEWER PIPE COMPANY, Appellee, v. SMITH-JAYCOX  
LUMBER COMPANY, Appellant.

**CORPORATIONS:** Capital Stock, Etc.—Retirement by Purchase of

- 1 **Goods—Enforceability.** A provision in certificates of stock (transferable only by holder, and on the books of the corporation) to the effect that the holder thereof may employ the stock in payment of the products of the issuing corporation, may not be enforced by a partnership of which the holder is a member, even though, to the knowledge of the corporation, the stock was purchased with partnership funds, and issued to the individual member of the partnership as a matter of convenience.

**PARTNERSHIP:** The Firm, Powers and Property—Distinct Enti-

- 2 **ties.** A partnership is an entity, separate and distinct from the individual members thereof, and contract relations with the individual members, as such, create no privity of contract between the one so contracting and the partnership.

*Appeal from Hamilton District Court.*—E. M. McCALL,  
Judge.

MARCH 12, 1918.

ACTION on account for flue lining and tile purchased by  
Vol. 183 1A.—2

defendant of plaintiff. The jury, by direction of the court, returned a verdict in favor of the plaintiff for the amount claimed. Defendant appeals.—*Affirmed.*

*D. C. Chase*, for appellant.

*Wesley Martin* and *O. J. Henderson*, for appellee.

STEVENS, J.—Plaintiff is a corporation organized under the laws of Iowa, and doing business at Webster City in this state, and the defendant is a copartnership, composed of Benjamin Jaycox and F. A. Smith, doing business at Blairsburg, Iowa. This action is on account for products of plaintiff corporation purchased of it by defendant in 1914. Defendant admits that it purchased the items of merchandise set out in plaintiff's petition, and avers that, on June 30, 1912, and on May 6, 1913, plaintiff issued certain certificates of the preferred stock of plaintiff corporation, of the par value of \$100 each, to Benjamin Jaycox, which contained the following provision:

“After January 1, 1914, each holder of the preferred stock at his option may retire the same at 33⅓% per annum in the products of the company at current prices.”

Defendant further alleged that, at the time of the purchase of said merchandise, Jaycox stated to the secretary of plaintiff company that he desired to pay therefor with the certificates of stock held by him; that, prior to the commencement of this suit, he tendered said stock to the plaintiff's secretary in an amount sufficient to pay the account, but avers that the tender was declined by him. Defendant further alleged that said stock was purchased with the funds of defendant, and taken in the name of Benjamin Jaycox for convenience only, all of which was, at the time, well known to the officers of plaintiff.

At the time of the transactions above referred to, Benjamin Jaycox was in full management and control of



the defendant company, which was engaged in the business of buying and selling lumber, drain tile, and other merchandise. All of the transactions in question were conducted on behalf of the defendant by Mr. Jaycox.

I. It will be observed from the foregoing statement that the four shares of preferred stock were issued by plaintiff to, and held in the name of, Benjamin Jaycox. The evidence showed, however, that same was purchased with the funds of defendant, and carried as assets of the company on its books. The certificates of stock, in addition to the provision above quoted, also provided that same was transferable on the books of the company by the holder thereof, in person or by his authorized attorney, in writing, and upon the surrender of said certificates, properly endorsed. The stock in question had not been transferred to the defendant company, and Benjamin Jaycox appeared on the books of plaintiff as the holder thereof. It is the claim of counsel for defendant that, as the stock was purchased with the funds of defendant, with the knowledge of plaintiff, and for defendant's use and benefit, and taken in the name of Benjamin Jaycox only as a matter of convenience, the defendant is, in reality, the holder thereof, and that plaintiff was bound to receive the same, in accordance with the provision above quoted, in payment of said account.

In a controversy between Benjamin Jaycox and the defendant company involving the ownership or right to the proceeds of said stock, it would, of course, be competent to show that same was purchased with the funds of the company, and taken in the name of Jaycox as a matter of convenience only, and that he held the same in trust for the company; but the controversy here is between the plaintiff corporation and the defendant company, which is not the holder of the stock. The defendant copartnership, although its assets may largely belong to Benjamin Jaycox and its

2. PARTNERSHIP:  
the firm, powers and property: distinct entities.

affairs be managed exclusively by him, is, nevertheless, a separate entity, and is sued as such herein. That a copartnership is a separate entity, and that a judgment against it cannot be levied upon the individual property of its members, see the following authorities: *National City Bank of Chicago v. Fairbank State Bank*, 173 Iowa 489; *Mudge v. Railway Mail Eq. Co.*, 167 Iowa 656; *Capital Food Co. v. Globe Coal Co.*, 142 Iowa 134; *Lansing v. Bever Land Co.*, 158 Iowa 693.

The option to the holder of said stock to surrender the same in payment for the products of the plaintiff company at current prices, at the rate of 33 $\frac{1}{3}$ % thereof per annum, is, by the express terms of the certificates of stock, given to the holder thereof. The holder in this case is Benjamin Jaycox. The purchaser of the merchandise in question was the Smith-Jaycox Lumber Company. We perceive no theory upon which the defendant company, which is not the holder of the shares of stock in question, could avail itself of the privilege therein extended to the holder, even though he be a member of said copartnership. In the absence of agreement to the contrary, a creditor cannot be compelled to receive anything but money in payment of indebtedness due him. 3 Elliott on Contracts, Sections 1925, 1926, 1927.

There was no contractual relation between plaintiff and the defendant as to said shares of stock, and plaintiff at no time appears to have agreed to accept same in payment of the account of defendant company. It is alleged in defendant's answer that Benjamin Jaycox, at the time of the purchase of said merchandise, arranged with the representative of plaintiff to pay therefor with said stock; but, upon examination of the abstract, we find that the evidence relied upon by defendant upon this point was either excluded on objection, or stricken on motion of counsel for plaintiff. It is unnecessary to discuss other questions argued by coun-

sel. For the reasons indicated, the judgment of the lower court must be, and is,—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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MARY A. NOLAN, Appellant, v. WM. H. GLYNN et al.,  
Appellees.

**APPEAL AND ERROR: Supersedeas Bonds—Liability.** A supersedeas bond, conditioned as provided by statute, becomes a nullity upon the final entry by the appellate court of an order of reversal and for new trial, with judgment against appellee for all the costs of appeal. So held where appellee, after reversal and on new trial, obtained a *second* judgment, and sought to hold the former supersedeas bond therefor. (Sec. 4128, Code, 1897.)

*Appeal from Madison District Court.*—LORIN N. HAYS,  
Judge.

MARCH 12, 1918.

ACTION against sureties on a supersedeas bond. The opinion shows the facts. A demurrer to petition was sustained, and plaintiff's petition dismissed. Plaintiff appeals.—*Affirmed*.

*Robbins & Bonn, A. W. Wilkinson, and A. V. Proudfoot, for appellant.*

*Berry & Watson and John A. Guiher, for appellees.*

GAYNOR, J.—This appeal is from the action of the court in sustaining a demurrer to a petition filed by the plaintiff, in which she alleges the following facts as a basis for recovery:

On the 20th day of November, 1911, she obtained judgment against the defendant William H. Glynn. On the 15th day of February, 1912, the said William H. Glynn, defendant, appealed to the Supreme Court from the judgment so rendered, and for the purpose of staying further pro-

ceedings on said judgment, executed a bond, the material provisions of which are as follows:

"Now if the said appellant, W. H. Glynn, shall pay to said appellee all costs and damages that shall be adjudged against said appellant on said appeal, and shall also satisfy or perform the said judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the Supreme Court may render or order to be rendered by the said district court, then this obligation to be void, otherwise to be and to remain in full force and effect."

The bond so executed was signed by the other defendants as sureties. The case so appealed was duly submitted to the Supreme Court, and, on the 25th day of September, 1913, the judgment was reversed, and the cause remanded to the district court for further proceedings. A procedendo issued, directing the district court to proceed in the manner required by law, and in harmony with the opinion. On the 30th day of March, 1914, the district court, in obedience to the order of the Supreme Court, proceeded to a retrial of said cause to a jury, and on the 3d day of April, 1914, another verdict was rendered in favor of the plaintiff and against the defendant Glynn, and judgment entered thereon. No part of the last judgment has been paid by the defendant or anyone for him, and said judgment remains wholly unsatisfied. The plaintiff claims that the failure to pay said last named judgment constitutes a breach of the conditions of the appeal bond given by the defendant to supersede the execution of the first judgment.

Plaintiff further alleges that, in order to protect her rights, as evidenced by said judgment, she has been compelled to employ counsel, and incurred expense for counsel fees in a large sum. She also alleges that the costs in neither the first nor the second trial have been paid. She further alleges that defendant Glynn, after filing the bond, disposed of all his property, leaving insufficient to pay

either of said judgments. She prays that she may have judgment against the defendants, as sureties upon the appeal bond, for the amount of the last named judgment, together with the costs accruing on both trials, with expenses for attorneys' fees, etc.

To this petition defendants demurred, on the ground that the petition shows on its face that the Supreme Court reversed the judgment entered in the lower court, and remanded the said cause to the district court for further proceedings, and specifically shows that no judgment was rendered in the Supreme Court against these defendants or either of them; nor did the said court order any judgment entered in any other court against either of these defendants, and the only judgment entered by said Supreme Court was a judgment against the plaintiff.

This demurrer was sustained by the court, and judgment was entered, dismissing plaintiff's petition. From this, plaintiff appeals.

The only question presented here is whether the facts stated by the plaintiff entitle her to the relief prayed for.

The action originally brought was to recover damages for a breach of promise of marriage. This was tried to a jury, and a judgment rendered in plaintiff's favor. Defendant appealed from the judgment, claiming that the judgment was not binding on him as a judgment, for the reason that errors were committed in procuring the same, to the prejudice of the defendant. To stay the execution of the judgment, pending the appeal, he gave the bond in question, with the defendants herein as sureties. This is what is denominated a supersedeas bond, and is provided for in Section 4128 of the Code of 1897, and reads as follows:

"No proceedings under a judgment \* \* \* shall be stayed by an appeal, unless the appellant executes a bond with one or more sureties \* \* \* to the effect that he will pay to the appellee all costs and damages that shall be

adjudged against him on the appeal; and will satisfy and perform the judgment \* \* \* appealed from in case it shall be affirmed, and any judgment \* \* \* which the Supreme Court may render, or order to be rendered by the inferior court. \* \* \* When thus filed and approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment."

The bond given was given under this statute, and the only purpose and object of the bond, and all that it accomplished, was to stay proceedings under the judgment appealed from until final disposition in the court to which the appeal was taken.

The conditions of the statute and of the bond were:

1. That the sureties on the bond will pay to the appellee all costs and damages that shall be adjudged against him on the appeal.

2. To satisfy and perform the judgment appealed from, in case the same is affirmed.

3. To pay any judgment which the Supreme Court may render.

4. To pay any judgment which the Supreme Court may order to be rendered in the court from which the appeal was taken.

1. The liability of the sureties must be found in their obligation, and cannot be extended beyond that. Their duty and their obligation are contractual ones, and must be found within the limits of the contract made. No obligation is imposed upon the sureties by the bond, except those obligations which they assumed in their contract. Had the sureties bound themselves to pay, or had the bond been conditioned for the payment of any judgment that might subsequently be rendered against the defendant, a different question would be presented. Here, the only obligation assumed by the sureties was to pay costs and damages assessed against the defendant on appeal. No costs or damages were assessed against the defendant on appeal.

2. To satisfy and perform the judgment appealed from in case it was affirmed. It was not affirmed, and this condition on which they were required to pay did not arise.

3. To satisfy any judgment which the Supreme Court may order. The only judgment ordered by the Supreme Court was a judgment against the plaintiff for the costs of the appeal.

4. To satisfy any judgment which the Supreme Court on the appeal found the plaintiff entitled to, and ordered the district court to enter. On appeal this court did not find the plaintiff entitled to anything, reversed the case, and remanded it for retrial.

The reversal constitutes a declaration that the judgment below was not rightly entered, on account of errors found in the record which vitiated the judgment. A declaration from this court that the judgment was wrongly entered against the defendant is, in effect, a declaration that the plaintiff had no judgment which she had a right to enforce against the defendant. The giving of the supersedeas bond in question, therefore, was to stay the execution of a judgment which this court found was wrongfully entered against the defendant. The staying of such a judgment worked no prejudice to the plaintiff. Having a judgment that was erroneously entered, she had a judgment which she could not rightly enforce. The reversal was a declaration to that effect. This court, in reversing the case, found that, because of errors prejudicial to the defendant, shown in the record to have been committed on the trial, the judgment was wrongfully entered against the defendant. That judgment was, therefore, set aside, and upon reversal became of no binding effect as against the defendant. Upon a retrial, under proper proceedings, we assume, another judgment was entered. These sureties were not party to this other judgment, nor did they bind themselves in any way to pay this later judgment. Their contract bound them only to such

orders and judgments as were made or rendered by the Supreme Court, to which appeal was taken. The condition of the bond was to stay the execution of what was claimed to be an erroneous judgment. The Supreme Court, by reversing the case, said it was an erroneous judgment. The condition of the bond was to perform the judgment in the event that the defendant was mistaken in saying that it was an erroneous judgment, with the added obligation to pay all costs and damages adjudged against appellant on appeal, and to pay any judgment which the Supreme Court rendered on appeal, or any judgment which the Supreme Court ordered the district court to render. There was no condition in the bond that placed upon the sureties the duty of discharging any other judgments rendered or ordered to be rendered by the Supreme Court. The judgment, the execution of which was stayed by the bond, having been reversed and held erroneous, became nonenforceable by execution or otherwise. The bond and the undertaking of the sureties therein had fulfilled their purpose, and the judgment appealed from ceased to exist as an instrument upon which liability could be predicated.

Upon the rendition of the first judgment, this situation presented itself: The defendant said to the plaintiff:

"You are not entitled to a judgment against me upon the record you have made. I desire to take this to the Supreme Court, and have that question determined. To the end that you may be protected while this matter is being determined, I will give you a bond, with sureties, conditioned that, in the event I am wrong, and you are entitled to a judgment upon the record you have made, I will pay the judgment; or if, upon the record you have made, the Supreme Court determines and adjudges costs and damages against me, I will pay those; or if, upon the record you have made, the Supreme Court renders any judgment against me, I will pay that; or if, upon the record you have made, the



Supreme Court orders the district court to enter judgment against me, I will pay that." .

There is no condition in the bond by the terms of which the sureties undertook to pay the plaintiff anything, in the event the defendant was successful in his contention that, on the record, the judgment could not stand. The only provision or condition in the bond for the payment to the plaintiff of any sum by these sureties, other than that based on a failure of the defendants to sustain their position that the judgment below was not sustained by the record, were these other conditions, that they would pay any judgment or order which the Supreme Court should render upon that record, or any judgment which the Supreme Court, upon the record made, should order the district court to enter. These are the conditions, and the only conditions, of the bond upon which these sureties assumed any liability, and none of these conditions have been broken, and, therefore, no liability attaches. The defendant succeeded in obtaining all that he sought to obtain by the appeal, so far as this record shows.

In 2 Brandt on Suretyship and Guaranty (3d Ed.), Section 530, it is said:

"The surety in an undertaking on appeal who stipulated to pay the costs awarded against the appellant and the amount of judgment, if it is affirmed, is liable only upon the affirmance of that appeal from the then existing judgment."

In passing upon a similar question to the one involved here, the Supreme Court of Wisconsin, in *Lehman v. Amsterdam Coffee Co.*, 151 Wis. 207, used this language:

"No costs or damages were awarded against them on the appeal, nor was the judgment or any part thereof affirmed. \* \* \* No part of the original judgment was left in existence after the judgment in this court upon the former appeal. The fact that another judgment might be rendered in the future by the trial court, upon the exercise of a certain option by the plaintiff, could not, under any theory, be

construed as affirmance, even in part. The sureties are only held according to the language of their bond, and that language does not cover this case. They never agreed to pay a judgment rendered in the future in the trial court, but only the existing judgment, or some part thereof, in case of affirmance."

To the same effect see *Jackson v. Lawyers' Surety Co.*, 95 App. Div. 368; *Janeway v. Haft*, 19 N. Y. Supp. 844; *Smith v. Keyes*, 2 Aikens (Vt.) 77; *Rothgerber v. Wonderly*, 66 Ill. 390; *Chase v. Ries*, 10 Cal. 517.

Where there is a square reversal on appeal, the sureties on the bond given to stay the execution of that judgment are not liable. On appeal, the sufficiency of the record to justify the judgment is challenged. A finding by the Supreme Court that the record does not justify the judgment results in a reversal of the judgment. The judgment, as an enforceable contract, ceases to exist. Where the conditions of the bond are such that the sureties undertake to pay only in the event that the court to which the appeal is taken affirms the judgment, or does say upon the record that the plaintiff is entitled to judgment against the defendant, and so enters judgment, or orders the district court to enter judgment, there is no breach of the bond, and, therefore, no liability created on the part of the sureties.

For a discussion of the questions here under consideration, see 2 Ruling Case Law 311, Sections 267, 268, 269; 4 Corpus Juris 1276, Section 3367; and cases there cited.

After reversal, plaintiff stood in the same position with reference to her claim that she stood before the trial was had. Her claim remains, but her judgment was gone. In the second trial, she assumed the burden of showing a right to a valid judgment against the defendant, and the only judgment she has is the one secured upon this retrial, and this only against the defendant in that suit.

An examination of the authorities satisfies us that the

court was right in sustaining the demurrer, and its judgment is, therefore,—*Affirmed*.

PRESTON, C. J., LADD and STEVENS, JJ., concur.

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GEORGE C. REMBE et al., Appellees, v. J. B. FERGUSON,  
Appellant.

**APPEAL AND ERROR: Review—Finding of Fact—Equity Cause.**

1 A finding of fact on substantial supporting evidence in an equity cause is persuasive with the appellate court on appeal.

**FRAUD: Evidence—Weight and Sufficiency.** A hopeless conflict of

2 evidence on the issue of fraud, without *reason* in the record to credit the one who affirms, rather than the one who denies, leaves the charge unproven. But such *reason* may be found in the difference (a) in the mental attainments of the parties, and (b) in the considerations passing between the parties.

**FRAUD: Acts Constituting Fraud—Fraudulent Representations—**

3 **Reliance—Examination of Property—Effect.** An examination of property by the buyer before purchasing does not necessarily preclude reliance upon a distinct affirmation of *value* by the seller. So held where the parties did not stand on equal footing.

*Appeal from Plymouth District Court.*—WILLIAM HUTCHINSON, Judge.

MARCH 12, 1918.

SUIT in equity to rescind and cancel a contract for the exchange of lands, and for other relief. Decree as prayed, and defendant appeals.—*Affirmed*.

*Shull, Gill, Sammis & Stilwill*, for appellant.

*C. E. Gantt*, for appellees.

WEAVER, J.—At the inception of the transaction which is the subject of this litigation, the plaintiff was the owner of a farm of 96 acres, in Plymouth County, Iowa, of the value

of \$175 per acre, and the defendant, as a real estate agent, had upon his list of lands a farm of 345 acres in Minnesota, belonging to Gilbert Odland and Nels Anderson, which he was authorized to sell at \$95 per acre. On June 6, 1916, Rembe and wife entered into a contract with defendant, whereby defendant undertook to convey to them the Minnesota land, in consideration of which they agreed to convey to defendant the Iowa land, subject to an existing mortgage of \$4,000, and to pay him the further sum of \$30,325, as follows: \$5.00 in cash, \$20,000 in a deferred payment, secured by a first mortgage on the land, and \$10,320 in installments secured by a second mortgage thereon. On June 10th, plaintiffs made and delivered to defendant their deed for the Iowa land, and their promissory notes aggregating \$10,320, the completion of the deal being delayed, apparently, for the negotiation of a loan for the installment of \$20,000. At this time, also, the contract appears to have been rewritten, reciting the receipt of the cash payment of \$5.00 and the promissory notes of \$10,320. The writing also provides that the exchange of lands is made subject to the approval of the owner of the Minnesota property. It is further stipulated as follows:

"It is mutually understood and agreed that each party has fully informed himself and exercised his own judgment as to the kind, quality, and value of the property so to be conveyed or delivered to him, independent of any opinion expressed or representation made by any agent, middleman, or any other person in any manner whatever interested in or connected with this exchange; and neither of the parties, nor J. B. Ferguson, nor any officer, agent, or employee thereof, shall be held to be liable in damages or otherwise for any representations made as to the kind, quality, or value of said property, or any portion thereof. No alleged fraudulent representations as to the kind, quality, or value of any such property by way of inducement to the execution or

approval of this contract, or otherwise, by any person whomsoever, shall be made the basis of the rescission of this contract, or used as grounds for the failure to perform the same; but each party hereto agrees and hereby represents, each to the other, that he has personally informed and satisfied himself as to the kind, quality, and value of the property so to be conveyed or delivered to him."

Within thirty days from the date of this contract, the plaintiffs, alleging that they had been deceived and defrauded in the deal, notified defendant of their election to rescind, and demanded the return of their deeds, promissory notes, and cash payment; and, their demand being refused, this action was begun.

The petition alleges various fraudulent aqts and representations by which they were induced to enter into the contract. They aver that the plaintiff George C. Rembe is an illiterate man, unable to read or write, and wholly unfamiliar with business transactions; that associated with defendant in bringing about the exchange of lands was one Stevens, then the cashier of a local bank, with whom plaintiffs had done business, and in whom they had great confidence; that Stevens induced plaintiffs to enter into the negotiations with defendant; that defendant and Stevens together took plaintiffs to Minnesota and pretended to show them the land which they proposed to exchange; and that they represented the land to be of good quality, and having 285 acres under cultivation, and to be of the selling value of \$125 per acre. Other representations are alleged; and, in so far as they appear to be material, or to have substantial support in the testimony, will be more particularly mentioned in the further progress of this opinion. Plaintiffs state that they had no prior acquaintance with the Minnesota land, and knew nothing of its real or market value except as they were informed by defendant and Stevens, whose representations they believed and relied upon. They further say that

their visit to Minnesota was made in the car of the defendant, in the company of both Stevens and defendant, who remained closely with them, giving them no opportunity to make independent investigation; and they were thus led to rely and did rely upon the truth of the representations made to them. They aver, however, that said representations were, for the most part, false and misleading, and made with intent to deceive and mislead them into a transaction which, in effect, deprives them of their entire property without any consideration therefor. They allege that, upon their visit to the land, defendant misrepresented the location of its boundaries so as to make it appear that they included other land than the tract described in the contract; that the land described in the contract is, in fact, largely of a low and swampy character; that the actual or market value of the land is only about \$75 per acre; that, in truth, only about 170 acres of the land were under cultivation, instead of 285 acres, as stated by defendant; that a large portion of the land is waste and swamp and uncultivable; and that the crop production of the land for the prior year was materially exaggerated by the defendant. The defendant denies all the plaintiffs' charges of fraud and misrepresentation, and avers that plaintiffs entered into the contract relying solely upon their own inspection of the land, and upon their own judgment as to its character and value. Upon hearing the evidence offered on the part of both plaintiffs and defendant, the trial court found the equities to be with the plaintiffs, and entered a decree cancelling and setting aside the contract for the exchange of lands, the promissory notes, and the conveyance of the Iowa land, and requiring the defendant to surrender the possession of the said notes and deed, and that plaintiffs also recover judgment against him for the advance payment of five dollars, and for costs. It should also be added to this statement of facts that, on the day following the making of the original contract for

the exchange, defendant procured from the owners of the Minnesota land an option for the purchase of it at \$95 per acre; and, so far as the record shows, the legal title still remains in Odland and Anderson.

For the reversal of the decree below, appellant relies upon the proposition that it is without sufficient support in the record. Without extending this opinion to include a statement of the testimony, which is quite voluminous, we are of the opinion that it cannot be said that there is no evidence upon which the court could properly find the truth of at least some of the material allegations of fraud and misrepresentation. On the contrary, there is evidence which, if true, affords very substantial support for the conclusion reached by the trial court. Such finding below is, of course, not final upon appeal in an equity case, as it would be on appeal from a judgment at law; and if, upon a review of all the evidence, this court is clearly of the opinion that the trial court should have discredited such testimony, or found that an essential fact in the appellee's case is not established by sufficient evidence, it will not hesitate to order a reversal. Where, however, the finding upon a material question of fact turns wholly or principally upon the veracity of witnesses who testified in person before the trial court, we are always disposed to accord weight to its holding thereon, and interfere therewith with reluctance.

Generally speaking, in the case before us there is, upon most of the charges of fraud and misrepresentation, a radical dispute between the plaintiffs and defendant, testifying as witnesses, the former affirming and the latter denying them. Were this all, and there were no greater reason for crediting the affirmation than the denial, plaintiffs would be held to have failed in their proofs, and their action would have to be dismissed. But there are vari-

1. **APPEAL AND ERROR:** review: finding of fact: equity cause.

2. **FRAUD:** evidence: weight and sufficiency.

ous other features of the case which cannot be ignored. In the first place it is quite clear the parties did not deal on an equal footing. The plaintiff George C. Rembe, husband of his coplaintiff and principal actor in the negotiation on their behalf for the exchange, is evidently a man of very limited attainments and experience, while defendant and Stevens were much his superior in ability to drive a profitable bargain. True, there was no such mental weakness as to render him incompetent to do business or to render it improper for defendant and Stevens to do business with him; yet the disparity between them is a material circumstance to be borne in mind in determining whether he was, in fact, overreached. And while it is also true that the law will not relieve a man from his contract merely because it is improvident or foolish, so long as it does not appear to have been induced or obtained by fraud, it is also true that a transaction whereby one obtains valuable property of another for a grossly inadequate consideration will be carefully scrutinized to discover if such undue or disproportionate advantage has been fairly acquired. It is difficult to read the record and avoid the conclusion that, by this contract, if upheld, the defendant acquires the plaintiffs' property, having a net value over incumbrances of about \$13,000, for a consideration which, at best, is merely nominal. That plaintiffs' farm is worth \$175 per acre, or an aggregate of \$16,800, on which there is an incumbrance of \$4,000, is not questioned; and if we may estimate the value of the Minnesota land at the price at which its owners had listed it with defendant, or \$95 per acre, its aggregate value was \$32,775. The difference in value between the two farms, on this basis, was \$15,975, or, if the mortgage incumbrance be added, \$19,975. By the terms of the contract, however, plaintiffs are bound to pay, not this difference merely, but \$30,325, a margin of \$10,350, or an increase over the listed price of the Minnesota land of nearly the entire value of



their equity in the Iowa land which they were putting into the deal. The situation thus presented suggests at least that plaintiffs were grossly improvident, or were in some manner misled, to their material injury. But it is argued in the first place that, in fact, there was no such inadequacy of consideration, because the value of the Minnesota property was much in excess of its listed price of \$95 per acre. There was evidence by several witnesses on the part of the defendant that the land was worth \$125 to \$130 per acre; but we are not greatly impressed by this showing. Among these witnesses was Odland, one of the men who gave defendant the option on the land, who admits that he had authorized defendant to sell at \$95, and that he had given the option to defendant at the same figure. The only reason he gives for pricing the property so far below its real value is that his partner, or co-owner, desired to sell, and close up their partnership deal. Another witness was the cashier of a bank, who had formerly owned the land, and sold it, three or four years before the trial of this case, to Odland, Anderson, and another, for \$65 per acre. Two years later, Odland and Anderson had bought out the third owner, at the rate of \$80 per acre. It is doubtless true that the market value of the land had increased during the three or four years which elapsed after it was sold by the bank, but even at \$95 per acre, the increase would have been in excess of 46 per cent, and it seems hardly credible, if the increase had been so extraordinary as to make it worth, as defendant asserts, \$125 to \$130 per acre, that defendant would have carried so desirable a bargain on his list at \$95 per acre for a matter of three months without a buyer. Indeed, he testifies that his principal business is buying and selling land on his own account, and it is even more singular that he should have omitted this chance of making a profit of \$30 to \$35 an acre by purchasing it on his own account, until he had secured this contract, and should then have been so

cautious as to invest in a mere option, which he could abandon if, for any reason, that contract should not be carried out. Nor, for like reasons, is Odland's explanation that he was offering land worth \$125 to \$130 for sale at \$95 per acre merely to let his co-owner out of the deal by which it had been purchased, a very persuasive one. Indeed, this feature of the defense seems to have been somewhat overdone. Our own conclusion from the entire record is that the land was not worth materially more than the list price which Odland placed upon it. This alone, as we have already said, would not be enough to entitle the plaintiffs to a rescission; but we agree with the trial court that the evidence warrants the conclusion that the contract was induced by material misrepresentation on the part of defendant and Stevens, who introduced him to plaintiffs, and who took active part in assisting him in bringing about the exchange. It may be admitted that, in some respects, the proof is not so broad as the allegations of the petition; but in other respects, the charge made is well sustained. The allegation of the misrepresentation of the boundaries of the land is well supported by the testimony of both plaintiffs; and while defendant denies it, Stevens, who was one of the party, and was a witness for defendant, was not asked to affirm or deny such representation. The same may be said of the witness Eilers, who was also in the company, and, if we may judge from his own testimony, was apparently aiding the effort to make the sale. Upon this issue, we are disposed to accord the preponderance of the evidence to the plaintiffs.

Again, it is shown by witnesses on both sides that defendant and Stevens assured the plaintiffs that the land had a market or selling value of \$125 per acre, a price which, we think, was exaggerated by at least 25 per cent. It is argued, however, that plaintiffs, having visited the land before making the contract, cannot

3. FRAUD: acts constituting fraud: fraudulent representations: reliance: examination of property: effect.

be heard to say that they relied upon defendant's representations in this respect. The rule of the authorities cited by appellant, *Michaelson v. Schulke*, 180 Iowa 201, *Bossingham v. Syck*, 118 Iowa 192, and others of like import, is well established; but it is less broad than the interpretation which counsel here place upon it. When representations of value are not made as a matter of opinion, but as of an existing fact, to influence the party to whom they are addressed to enter into a contract, and such party, not having knowledge or information to the contrary, believing and relying thereon does enter into such contract, subsequent discovery that the representation is false affords good ground for rescission. *Hetland v. Bilstad*, 140 Iowa 411; *Ross v. Bolte*, 165 Iowa 499; *Mattauch v. Walsh Bros.*, 136 Iowa 225; *Brown v. Holden*, 120 Iowa 191. Where the parties are, or have opportunity to be, equally well informed on the subject of values, or where the party charging misrepresentation is given full opportunity to inform himself on such subject, then an affirmation of value by the other party may well be treated as a matter of opinion or argument only. But the rule thus stated does not afford refuge for the defense in this case. Admittedly, plaintiffs were entire strangers to the Minnesota land, and had no opportunity to acquaint themselves therewith, except as it was afforded by their trip to the land the day before the contract was made. They were taken and accompanied on this trip by both defendant and Stevens, and while there, the party were the guests of the defendant's brother, another real estate agent. On the trip of inspection to the land, they were accompanied by the defendant and his brother, and by Stevens and Eilers. Defendant says he offered to take the plaintiffs to other farmers in the vicinity, if they desired, but they did not wish it; and on the following day, the party returned to Iowa. While this brief inspection of the land, or some part of it, may have given

the plaintiffs, as farmers, some idea of its qualities for agricultural use, it was of but little assistance to them in acquiring any information as to its market value. Stevens testifies that defendant told Rembe, on this trip, that the land was worth \$125 per acre. Eilers told him he would do well if he got it at \$125 per acre. Defendant himself says, "I am not sure I told them the land was worth \$125 per acre, and don't think they asked me." Plaintiff George C. Rembe says that defendant said to him, "You can sell it for \$125 per acre, and maybe higher." Mrs. Rembe testifies that he said the land was worth \$125 per acre. So far as appears, these statements constitute all the information plaintiffs received from anyone of the market value of this land. It may have been improvident in them that they did not seek other information from more disinterested sources; but, if they believed the representations so made to them, and relied thereon, it does not lie in the mouth of the other party to say that they should have been less gullible, or that they confided in his representations at their peril. *Hetland v. Bilstad*, 140 Iowa 411. It may be conceded, as argued, that there were no confidential relations between the plaintiffs and appellant or Stevens, but it is none the less true that their acquaintance and friendship with the latter, and their general confidence in him as one in whose word they could safely trust, is not without probative value in explanation of their reliance (if such there was) upon the representations made by him and by the man to whom he introduced them. In this connection, we may also say that, while defendant testifies that he read and explained to plaintiffs the clause heretofore quoted from the contract, by which plaintiffs are made to waive or surrender their right to allege or prove fraud or misrepresentation in the procurement of said contract as a ground for its rescission or for the recovery of damages, counsel do not rely on it in argument, as affording any defense to this action. Indeed, if it is to be

considered at all, the natural, if not inevitable, effect is to arouse a suspicion of the good faith of a party who thinks it necessary, in advance of any complaint, to provide a shield against legal liability for his own misrepresentation or fraud.

Although much is said on either side with reference to other fact issues which we have not attempted to discuss, we think it unnecessary to further consider them; for, however decided, they cannot obviate the reasons we have already assigned for approving the decree appealed from.

The decree of the district court is, therefore,—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS JJ., concur.

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M. L. URDANGEN, Appellee, v. CHARLES FRYER, Appellant.

**COMPROMISE AND SETTLEMENT: Consideration—Unfounded**

- 1 **Claims.** The good-faith assertion of a judicially unfounded claim furnishes ample consideration for a compromise and settlement.

**PLEADING: Motion to Strike—Compromise and Settlement—Non-**

- 2 **Defensive Matter.** An allegation that plaintiff and defendant had, at a time prior to the settlement sued on, fully settled and adjusted all their respective claims, constitutes no defense, and is properly stricken unless accompanied by an allegation that, *since* said former settlement, no bona-fide difference has existed between the parties.

**APPEAL AND ERROR: Assignment of Error—Failure to Make—**

- 3 **Effect.** Rulings on the admissibility of evidence will not be reviewed, in the absence of an assignment of error or brief point thereon.

*Appeal from Muscatine District Court.*—F. D. LETTS, Judge.

MARCH 12, 1918.

ACTION on the alleged settlement and for services resulted in a judgment for plaintiff. The defendant appeals.—*Affirmed*.

*Thompson & Thompson*, for appellant.

*J. F. Devitt*, for appellee.

1. COMPROMISE  
AND SETTLE-  
MENT: consid-  
eration: un-  
founded  
claims.

LADD J.—I. The petition alleged that the parties hereto entered into an agreement of settlement, March 4, 1914, whereby defendant undertook to pay plaintiff the sum of \$1,000 by executing a note for that amount and mortgage to secure the same; and that, though plaintiff complied with the terms thereof, the defendant failed and refused to carry out his agreement. In a second count of the petition, plaintiff demanded compensation for expenses and services subsequently rendered.

The answer was a general denial. Subsequently, an amendment in two divisions was filed. In the first division:

"The defendant specifically denies that, from and after the 5th day of June, 1912, he was ever indebted to said plaintiff, M. L. Urdangen, and denies that, in the month of March, 1914, a settlement and accounting was had between himself and the plaintiff. He further denies that, at Mason, City, Iowa, or at any other time or place, he ever agreed that he was indebted to said plaintiff in the sum of \$1,000 or any other sum, but avers the facts to be that, in a settlement and accounting had by and between himself, A. N. Fryer, M. L. Urdangen, and Ida Urdangen at Rock Island, Ill., on or about the 5th day of June, 1912, it was there and then orally agreed by and between all of said parties that all claims and indebtedness owing from one to the other should be adjusted and settled, and that, in pursuance of said oral agreement to account and adjust their various claims, the said indebtedness then owing by this defendant unto said plaintiff was agreed to as fully paid."

That part from "but avers" to the end was stricken on motion, as constituting no defense and as incompetent and immaterial to any issue in the case. Segregated from the

remainder of the division, the portion stricken had little or no bearing; but, considered in connection therewith, the pleading (1) alleged that there was a complete settlement of all matters between the parties on the day stated, and (2) denied that defendant had ever become indebted to the parties.

2. PLEADING :  
motion to  
strike : com-  
promise and  
settlement :  
nondefensive  
matter.

If defendant had, instead of this last, pleaded that, subsequent to the alleged settlement of 1912, there had been no dealings or bona-fide differences between the parties, then the amendment would have raised a valid defense; i. e. (1) that there was no settlement on March 4, 1914, and (2) that all differences had been previously adjusted, and whatever agreement there may have been was without consideration. As a basis of the alleged settlement of 1914, it was not essential that any actual indebtedness should have existed: all necessary was that plaintiff, in good faith, should have asserted claims against defendant, even though these may have been excessive or unfounded in fact. If disputed claims are asserted in good faith, even though judicial investigation might have demonstrated them to have been unfounded in fact, the settlement thereof furnishes a sufficient consideration for the settlement agreement. *Keck v. Hotel Owners' Mut. Fire Ins. Co.*, 89 Iowa 200; *Greenlee v. Mosnat*, 116 Iowa 535. On the other hand:

"A mere false claim, a sham, one set up without any colorable pretense or plausible foundation, might not come within the terms or definition of a compromise, and might not sustain it. Characterized by bad faith, the preferring of such a claim would itself be a fraud, and concessions made or rights yielded on the strength of it would not be lost, nor the settlement be a bar." *Kercheral v. Doty*, 31 Wis. 476, 485.

Even though there may have been no indebtedness of defendant subsequent to the 1912 settlement, as alleged, this

would not constitute a defense to an action on the alleged settlement agreement of 1914; for that may have been based on claims which, though on judicial inquiry they would have been found to be without just foundation, were honestly asserted by plaintiff, and in good faith adjusted by the agreement of settlement. As a complete defense other than the denial was not pleaded, there was no error in sustaining the motion to strike.

- II. Some complaint is made in argument of the rulings on the admissibility of evidence, but none are pointed out in assignment of error, nor is there any brief point or proposition presented with reference thereto.
3. APPEAL AND ERROR: assignment of error: failure to make effect.

The argument is general, and not on specific rulings, and for these reasons may not be reviewed.—*Affirmed.*

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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STATE OF IOWA, Appellee, v. L. H. SHERMAN, Appellant.

**FALSE PRETENSES: Evidence—Failure of Proof.** In a prosecution for false pretenses, wherein the State relies on the testimony of *one* witness, a total failure of proof results from testimony which shows that the accused, in what he did say at the time and place alleged, either made a statement of *fact* or a statement of *opinion*, with no corroborating evidence in favor of either theory.

1

**FALSE PRETENSES: Evidence—Falsity of Representations—Suf-**

2 ficiency. Evidence reviewed, and held insufficient to show the falsity of representations concerning the value of corporate stock, especially as part of the evidence related to values long *subsequent* to the time when the alleged false representations were made.

**FALSE PRETENSES: Elements of Offense—Scienter.** Knowledge

3 on the part of an accused of the falsity of alleged false representations is an essential element of obtaining property by false pretenses.



*Appeal from Jasper District Court.*—K. E. WILLCOCKSON,  
Judge.

MARCH 12, 1918.

THE defendant was indicted on the charge of obtaining property by false pretenses. Trial to a jury, resulting in a verdict of guilty. Judgment being entered on the verdict, defendant appeals. The opinion states the facts.—*Reversed.*

*Morgan & Korf* and *Burrell & Devitt*, for appellant.

*H. M. Havner*, Attorney General, *F. C. Davidson*, Assistant Attorney General, and *M. R. Hammer, Jr.*, County Attorney, for appellee.

GAYNOR, J.—The defendant is charged with the crime of cheating by false pretenses. It is alleged in the indictment that, on or about the 24th day of April, 1913, the defendant was indebted to the Bank of Sully in the aggregate sum of \$56,000, evidenced by certain promissory notes; that, on said day, he feloniously, unlawfully, and designedly, and with intent to cheat and defraud said bank, represented and pretended to the cashier of the bank, F. G. Sherman, that two certificates of stock of 500 shares each, of the par value of \$100 per share, purporting to have been issued by the National Mausoleum Company, a corporation organized and incorporated under the laws of California, were valuable, and at said time had a market value of \$32.50 per share, and were of the aggregate value of \$32,500; that he made these representations and pretenses for the purpose of inducing the said Sherman, as cashier of said bank, to believe the representations to be true, and to induce the said Sherman to accept said certificates and deliver to him the notes aforesaid, or some of them; that said Sherman believed said representations to be true, received said certificates, and delivered to the defendant the notes aforesaid, or some of

1. FALSE PRE-  
tenses: evi-  
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of proof.

them; that said representations were, in fact, untrue; that the defendant knew them to be untrue; that F. G. Sherman, acting for the bank, believed them to be true, and, so believing, accepted the certificates, and turned the notes aforesaid over to the defendant; that, as a matter of fact, said shares of stock did not have a market value of \$32.50 a share at that time, or any other value, but were wholly worthless, all of which was well known to the defendant at said time.

To the charge thus made, the defendant entered a plea of not guilty, was tried to a jury, and convicted, and from this conviction appeals.

The first contention of the defendant is that the evidence does not justify the conviction.

To justify a conviction, the State must establish the following propositions beyond a reasonable doubt, and the court so told the jury in its instructions:

1. That the defendant made the representations to the cashier of the bank substantially as charged in the indictment, to wit, that the two certificates of stock of 500 shares each, described in the indictment, were valuable, and then, at that time, had a market value of \$32.50 per share, and said shares were of the aggregate value of \$32,500.

2. That said representation, if made, was false.

3. That the defendant knew it to be false at the time he made it.

4. That said representations were falsely and feloniously made, with intent and design to defraud the Bank of Sully of the ten promissory notes, or some of them, by inducing the said Sherman to deliver to him, the defendant, the said promissory notes, or some of them, in exchange for the two certificates of stock.

5. That the said F. G. Sherman, acting for the bank, believed and relied upon said representations at the time, and was induced to part with said promissory notes, or some of them, and to deliver them to the defendant, and to accept in

exchange therefor the two certificates of stock referred to in the indictment.

6. That, relying upon said representations, the said Sherman, acting for the bank, did deliver to the defendant the said promissory notes, or some of them, in exchange for said stock.

The court said to the jury that, if the State failed to establish any one of these allegations beyond a reasonable doubt, they should acquit the defendant.

F. G. Sherman, the cashier of the bank, was the only witness called by the State to prove the making of the representations charged to have been made by the defendant. His examination shows that he is defendant's brother; that he was cashier of the bank at the time, had been cashier for a number of years; that the defendant was formerly connected with the bank; that he severed his connection in 1898. Upon this point, he testified, in substance:

"I had a conversation with the defendant regarding the delivery of these notes to him and transfer to the bank of the shares of Mausoleum stock mentioned in the indictment."

He was asked this question:

"Tell the jury what was said on that occasion between you and the defendant. A. I don't remember what was said, at this time. I don't remember the conversation. Q. The question now is, Mr. Sherman,—you understand what I am asking you,—I am asking you for the conversation that took place between you and your brother in relation to his having transferred to you certain shares of Mausoleum stock, and you delivering to him certain notes of his, which were held by the Bank of Sully. A. I presume we had a conversation that day, but I don't remember the conversation. Q. Can you remember anything that was said between you in regard to that subject? A. There was a transfer made on that day, but I don't remember my conversation at that time with my brother. Q. Do you remember anything he

said to you in regard to the value of the stock? A. I think he said it had a value."

He was again asked for the conversation, and was asked to refresh his memory by examining the minutes of his testimony, attached to the indictment. He answered:

"Since I read the testimony that I gave before the grand jury, that refreshes my testimony. By the court: The question is, Mr. Sherman, you state the conversation had at that time between you and your brother relating to the matter, the delivery of the notes and the delivery of the stock. A. I took stocks and bonds of the Mausoleum Company and certain Canadian lands in exchange for the indebtedness he owed the bank."

The court then said to the witness:

"I understand this conversation is called for. State the conversation,—state all the conversation. What was said by you and what was said by your brother at and during your transaction, if there was any conversation. A. I do not know as I remember all the conversation between us. Q. Tell us what you can remember of it, if you cannot remember it all. Go ahead and tell us what was said about the corporation stock. A. I do not just remember exactly what that was figured at. There seems to be some difference in the testimony I gave before the grand jury and the books of the bank, and I must have been mistaken some way in the way that was figured. Q. Can you tell us what was said there that day, Mr. Sherman? A. It was my understanding that he told me what the value of the Mausoleum stock was. Q. What did he say about that? A. I understood him to say it was worth in the neighborhood of \$32.50 a share. Q. What credit did you give him in exchange for the stock? A. Somewhere in the neighborhood of \$26,000 or \$27,000. Q. In what form was that? A. Credit on his note. Q. What is that? A. Credit on his indebtedness to the bank. Q. Did you deliver to him the notes that represented the in-

debtedness at that time? A. All his notes were turned over to him at that time, at the time of the settlement, so far as I know."

He further testified:

"I do not recall any further conversation now. I do not remember that he told me the date of the organization of the corporation, or anything being said about the organization of the company. I think he said they expected to build mausoleums. He was president of the company, I understood, and Mr. Selby was secretary. Q. Did he tell you any of the assets that the corporation had? A. Possibly he did, but I do not remember what the assets were, at this time. Q. Mr. Sherman, I ask you also, in addition to refreshing your recollection by reading the minutes of the matters taken before the grand jury, to refresh your recollection further by reading the testimony which you gave before the referee, or a portion of it. Now, Mr. Sherman, after refreshing your memory as indicated, the question is, Can you tell us anything further that was said by Mr. Sherman in regard to the value of the Mausoleum stock? A. It was my understanding it was worth \$32.50 a share. Q. I am asking you what he said about them. It is not your understanding we are asking for, it is what he said. A. Since I have read my testimony there, I think he said it was worth \$32.50 a share. Q. Is it not true he said to you at that time that this stock had a market value of \$32.50 a share? A. I do not remember him saying it had a market value of \$32.50 a share, but I understood he said it was worth that. Q. I will ask you if he did not say at that time that this stock had a value of \$32.50 a share. A. I do not remember that he said it had a market value of \$32.50 a share, but it was my understanding that it was worth \$32.50, but I don't know as he said it had a market value. Q. I will ask you the question if, in your conversation that day, he didn't say to you, in words or substance, that this stock had a

value of \$32.50 a share. A. Yes, sir, I think he did."

He further testified that the notes in question and the interest amounted to \$56,661.92; that the defendant's total indebtedness at the bank, including overdraft, was \$59,308.41. He said:

"I took the Canada land. Two items, the Sturgan contract at \$26,960, and other Canada land, \$7,400, was credited to these notes and indebtedness of the defendant, making \$34,360.00; that the defendant's total indebtedness on the notes and interest was \$56,691.02. On this I have applied \$34,360, proceeds of the land and Sturgan contract. I credited him on the notes from Sturgan contract, \$26,960, and I credited him on the notes for the other Canada land, not included in the Sturgan contract, \$7,400."

On cross-examination, he answered:

"It is my understanding at the time that he said he thought the Mausoleum stock was worth \$32.50."

He testified further, on cross-examination:

"Q. Did you not testify before the referee, in substance, that defendant told you he thought the stock was worth \$32.50, or if it was not, it soon would be? A. I don't remember. I could tell by referring to the testimony before the Federal— Q. If you have refreshed your recollection by this record, tell the jury whether or not you did not tell the referee, in substance, that he told you he thought the stock was worth \$32.50 a share, or soon would be? A. That was what I testified before the Federal jury. Q. That is true? A. Yes, sir. Q. Didn't you also testify before the referee that your brother told you he would take up this Mausoleum stock at what you took it in at? A. I do not remember."

He was asked to refresh his memory by examining the report of the proceedings before the referee.

"Q. After having refreshed your recollection, didn't you say, in substance, that your brother told you, or that you

had an understanding with your brother, that he would take up the stock in the future at what you took it at, if you wanted to, and that is the reason you took the stock? A. Yes, sir, I testified to that. Q. And that was true? A. I think it was. Q. Didn't you say, in answer to this question, you took it on the condition that he would dispose of it and hold you harmless,—is not that true? A. Yes, sir, that is my testimony before the referee. I testified that with this understanding I accepted the stock, and that is as true now as when I testified before the referee. My brother came to Sully in April, 1913, in response to a letter from me. I had a deal to sell the bank, and after my brother came, we drew up a proposed draft of an agreement of partnership between myself and Charlie Boat and Verrancamp, for the purpose of increasing the capital stock of the bank. I wanted defendant to put his indebtedness in another form. I told him he should reduce his indebtedness to the bank. I was quite heavily indebted to the bank at that time. Q. Was it for the purpose of reducing your indebtedness to the bank that the Mausoleum stock was put into the bank by you at a considerable increased price at what you received it from your brother for? A. Yes, sir. Q. That increase in price that you received from the bank for the stock was used in reducing your indebtedness to the bank? A. Yes, sir. Q. That indebtedness consisted largely of an overdraft and notes? A. Yes, sir."

On redirect examination, he was asked this question, in substance:

"You were asked, on cross-examination, that the conversation that occurred between you and your brother at the time of the transfer of the certificates, and at the time of the delivery of the notes to him, if he didn't say that he thought the stock had a value of \$32.50 per share. I want you to tell us again just what you said on that subject. A. It was taken in at \$32.50 a share. By the court: The ques-

tion is, What was said by your brother? A. I do not know what was said there. Q. Can you recall what was said there in regard to the value of that stock? A. I understand he said he thought it was worth \$32.50 a share. Q. What did he say,—not what you understand,—but what did your brother say? By the court: If you don't remember, say so; if you do, say what he said. A. I don't remember the exact conversation. It was my understanding it was worth \$32.50 a share. Q. Didn't he say to you at that time that the stock had a market value of \$32.50 a share, and that it would be worth more than that in the future,—didn't he say that to you? A. Don't remember of his saying that in those words. Q. Did he say that in substance? A. Yes, sir."

On re-cross-examination, he was asked this question:

"You believed he would take it off your hands? A. Yes, sir. Q. You relied on it? A. Yes, sir. Q. That is the real reason,—that and the reason you wanted to get his paper out of the bank, is the reason you wanted to make this deal, isn't it? A. I suppose it is."

The defendant testified on this point:

"I didn't tell F. G. Sherman, my brother, that the Mausoleum stock mentioned in this case was worth \$32.50 a share, or had a market value of \$32.50 a share. I didn't tell him what it was worth. The only value that I gave him was the value that the stock had been sold at."

This is all the evidence offered by the State,—in fact all the evidence in the record tending to show that the defendant made the representations charged in the indictment to have been made by him.

The court said to the jury, and it is the law of the case, that, in order to convict the defendant, the State must establish beyond a reasonable doubt that, on or about the time alleged in the indictment, the defendant designedly and feloniously made to the cashier of the Bank of Sully the following representations:



"That two certificates of stock of 500 shares each, of the par value of \$100 per share, purporting to have been issued by the National Mausoleum Company, \* \* \* were valuable, and then and at that time had a market value of \$32.50 per share, and said shares were of the aggregate value of \$32,500; and no other alleged representations will be considered by you \* \* \* except as above mentioned and set out in this instruction."

Before coming to the analysis of this testimony, it is well to have before the mind the circumstances and conditions that led to the meeting on this day when it is claimed this Mausoleum stock was exchanged for the notes.

On the 19th day of March, 1913, F. G. Sherman, cashier of this bank, wrote to the plaintiff a letter addressed to him in California, as follows:

"Dear Brother: For the life of me, I don't see where we are going to be able to swing things here for April 1st: wish you were here now to assist me in a few ways just how to swing things. I hate to lay down or give up, but I do declare I don't know what to do; possibly I can get the boys to help me some more if I can make them safe in what Canada lands and Canada contracts I have, but I don't see how we will swing the deal for that time unless we have eleven or twelve thousand, and I don't see where it's coming from. I suppose it will be impossible for you to get here and help me out, but I do wish you could come, and in some way I think you ought to be able to help me in some way, I think if you were here we could figure it out some way to swing the deal here until possibly we could fix or tide things over, wish you would wire me on receipt of this, I cannot see any light at present where anything is coming to speak of, but as I said I think if you were here you and I together could make things secure enough so the boys would help us out. Answer at once, and I will try my best to do something, or do something, do what you think

best. I don't know what to do, but I wish you would help me, and I do think Lofland and Blackburn would help us over if we would talk to them and make them secure."

On March 24th, the defendant replied:

"I will transfer \$20,000 worth Canada lands to secure any deal you make. Lay the matter frankly before Fred Andreas, also before Fred and Welle. I will stand back of you for any deal you make. Two letters on way."

Defendant arrived from California some time in April, in response to this letter.

The cashier, Sherman, testified further that, when the defendant arrived, he (the cashier) had a deal on to sell the bank; that, after his brother, the defendant, arrived, they drew up a proposed draft of an agreement of partnership between the witness and others, for the purpose of increasing the capital stock of the bank. The witness said:

"I wanted to put the defendant's indebtedness in another form. I told him he should reduce his indebtedness to the bank."

He further stated that the real reason he wanted to get his brother's paper out of the bank was that he might make this deal; or he said, "At least, I suppose that was the reason." The notes delivered to the defendant were dated in 1908, 1909, and 1910, and one as late as 1912. It appears that, at the time the transfer of these notes was made for the land contracts, the stock and the notes, with interest, aggregated \$56,661.92; that there was about \$3,000 interest due and unpaid upon the notes; that, at that time, the defendant was indebted to the bank for an overdraft about \$2,646. It does not appear in this record that the defendant had any property other than that which was turned over to the bank at the time of this transaction, called by the cashier, Sherman, a settlement. It does not appear that the notes turned over had any value except that which rests in presumption. This may account for the desire of the cash-

ier to get the notes out of the bank before "pulling off" the deal which he said he had on hand at the time his brother arrived.

There is nothing in the record to show that the defendant, at the time of the transaction called in question, made any statement to the witness Sherman touching any substantive fact affecting the value of the stock, or supporting an opinion that the stock had a value claimed by the State. The witness says, "I don't remember that he told me even the date of the organization of the corporation." He does not attempt to say that, in this conversation, the defendant made any statement as to what the stock was selling for upon the market, what it had sold for upon the market, whether the stock was paid for or not, what the capital stock of the company was, what its assets were, or any statement tending to support the assumption that the stock had a value. He does say, however, that the defendant was president of the company. The nearest he comes to making any statement touching the assets is in answer to the question:

"Did he tell you any of the assets that the corporation had? A. Possibly he did, but I don't remember what the assets were at the time."

This is not an affirmative statement that the defendant did make any statement touching the assets. What is the witness' testimony on this? That he does not remember the conversation had with his brother touching the transfer of the notes to him for the Mausoleum stock.

"I presume we had a conversation that day, but I don't remember the conversation. I think he said it had a value, but I don't know as I remember the conversation,—that is, all the conversation. It was my understanding that he told me what the value of the Mausoleum stock was. I understood him to say it was worth in the neighborhood of \$32.50. It was my understanding it was worth \$32.50 a share. I don't remember him saying it had a market value

of \$32.50 a share, but I understood it was worth that, but I don't know as he said it had a market value. I think he said, in substance, that the stock had a value of \$32.50 a share."

But he does not say whether defendant said that was the face value, the actual value, or the market value.

On cross-examination, he was asked this question:

"You said, on direct examination, that it was your understanding that the defendant said the stock was worth \$32.50 a share. That is what he said, wasn't it? A. Yes, sir, that was what I understood it to be. That was my understanding, that he thought it was worth \$32.50 a share. That is exactly what he said. My understanding was that he thought the stock was worth that money."

On redirect examination, he was again approached on this subject, and asked to state what his brother said touching the value of this stock. His answer was:

"I don't remember what was said there. I understand he said he thought it was worth \$32.50 a share. I don't remember the exact conversation: it was my understanding it was worth \$32.50 a share."

The question was then finally propounded to him:

"Didn't he say to you at that time that the stock had a market value of \$32.50 a share; that it would be worth more than that in the future,—didn't he say that to you? A. I don't remember his saying that in those words. He said that in substance. I think he said he would take it off my hands. I don't think we agreed on a price. I supposed he would take it off my hands at what I gave for it, anyway. I believed he would take it off my hands, and I relied upon his doing so. That and that I wanted to get his paper out of the bank is the reason I wanted to make the deal, I suppose."

Assuming, for the purpose of this discussion, that the representation set out in the indictment, if proven, would

constitute such false pretense as brings the case within the provisions of the statute (Code Section 5041), which reads, "If any person, designedly and by false pretenses, \* \* \* and with intent to defraud, obtain from another any money, goods or other property, \* \* \* he shall be imprisoned in the penitentiary not more than seven years," etc.,—the mind naturally inquires which of the several statements testified to by this witness is the statement made by the defendant, at the time of the transaction, and relied upon by the cashier in consummating the transaction. Clearly, if the statement made by the defendant was that he thought the stock was worth \$32.50 a share, such statement would be simply an opinion, and would not be the basis for a criminal prosecution. What the mental attitude of this witness was towards the whole transaction, and towards the prosecution, we are not in a position to know. We must take his evidence as we find it in the record. In this record, he has assured us that all the defendant said was that he thought the stock was worth \$32.50 a share. If the defendant stated as this witness testifies in some portions of his evidence, we may assume that it sustained a charge of false pretense, under the statute. If, however, he stated only that he thought it was worth \$32.50 per share, then clearly, under all the authorities, such statement would not bring defendant within the provisions of the statute as to false pretense. See *State v. Webb*, 26 Iowa 262. Whether he made a statement which constitutes an actionable pretense or a statement which does not make an actionable pretense, was a mere matter of conjecture. When we consider that the burden of proof is upon the State to show, beyond a reasonable doubt, that he was guilty of making actionable pretense, and the evidence offered as clearly shows a nonactionable pretense, how can a jury say that the actionable pretense is proven? When the evidence relied upon establishes a nonactionable pretense, just as clearly as it establishes an actionable pretense, and

from the mouth of the same witness, with no circumstances in the record tending to support the one statement rather than the other, with the record tending rather to support the making of the nonactionable pretense, we cannot see that the State has carried the burden placed upon it to a successful issue. No verdict can be sustained on such uncertain proof of a fact essential to the consummated crime. We think the evidence insufficient to justify a jury in finding that the defendant made the representations alleged to have been made by him. We say that the record is wholly insufficient to justify a jury in saying that the defendant made the actionable pretense charged in the indictment, assuming such pretense to be actionable.

The next question that presents itself in the record upon this point is, Assuming that the actionable pretense was proven, has the State established its falsity? Or has it introduced any evidence upon which a jury could find that the pretense was in fact false, if made?

The only evidence upon this point is found in the following facts disclosed in the record: One Ralph Graham was called as a witness, and stated that he lived in California; that he was an attorney at law; that he knows the secretary of the Mausoleum Company, and one Hiatt. This Hiatt was one of the original incorporators. He acted as attorney for the company. He said he was not acquainted with the value of corporation stock in California, or in the city of Los Angeles in general; that he had made some investigation to ascertain what the value of the capital stock of the Mausoleum Company was in 1913; that he never heard of the Mausoleum Company, did not know there was such a company, until the fall of 1914; that he examined the books of the company to some extent in the fall of 1914 with this Mr. Hiatt, and examined the records in the county clerk's office; that he found a certificate to the effect that the

2. FALSE PRE-  
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charter of the company had been forfeited for nonpayment of license; that this forfeiture occurred on the 28th day of February, 1914, as it appears in the records of the clerk's office. He was then asked this question:

"Upon this investigation, state what, in your judgment, was the value of the capital stock of the corporation on the 24th of April, 1913. A. Had no market value."

On cross-examination, he said:

"I first learned that there was a National Mausoleum Company of California in the fall of 1914, and first examined its books then. I did not examine its bank book. I did not examine the assessment roll of the county for that year. I know that there was some stock of this corporation sold, but do not know at what price. My opinion is based partly on an examination of the record of the transactions that occurred a year and six months after the date inquired about, or approximately so. I do not know at this time how much stock was sold. I did know at the time. At least, I knew what the books showed, or rather, what was issued. I only examined a part of the records of the company, which was some time in the summer or fall of 1914. The county attorney of Jasper County sent me a telegram, and told me to render whatever assistance I could to the sheriff; and to that extent I was in the employ<sup>1</sup> of the county. I recently got a draft from the county as attorney out here. That came from the bank down at Sully. I do not know of any Mausoleum stock selling out in California, or what they are selling for. I do not know personally what the stock in this corporation sold for. I don't know how much was sold, but I know that some of it was sold."

One Macy was called as a witness, who said he lived in Lynnvile, Iowa. He testified that he was partially acquainted with the books of the bank and the transactions that occurred in the Sully Bank.

"I made an investigation of the shares of stock. That

investigation consisted in writing to one Hiatt, Los Angeles, California; and I employed E. J. Salmon to come to Los Angeles to make an investigation, and he made a report as to the value of this stock. A report was also made to me by Hiatt. The report from Hiatt came in the form of a letter. The letter was as follows: 'Regarding the shares of stock in the National Mausoleum Company, can only say that they are of no value. This company was organized for the purpose, as its name indicates, of building mausoleums in California, under patents known as the International Patents. It became the owner of an option to purchase the patent rights from the Iowa Mausoleum Company of Waterloo, Iowa, for the state of California; but it failed to make its payments, and lost its option. Its charter has been forfeited for failure to pay the state license taxes, and the corporation no longer exists.' I showed this letter to Mr. Sherman, the defendant."

He was asked this question:

"What did you state to Mr. Sherman, and what did Mr. Sherman say to you in regard to the value of this stock at that time and during the conversation? A. I made no statement, except read the letter to Mr. Sherman relative to the stock. Q. Was that letter read by you to Mr. Sherman as a part of the conversation? A. That portion relating to the Mausoleum stock was read. Q. Then what did Mr. Sherman say? A. As I remember it, he says, 'That is true, but Mr. Hiatt should have explained further relative to the re-organization of the company, and gone on to explain more about the company,—the situation of the company.'"

This letter of Hiatt's was dated May 26, 1914, but when it was shown to the defendant does not affirmatively appear. The letter evidently speaks of the condition of the company at the date of the writing of the letter. There was no reference in the letter as to the condition the year previous, and it is assumed now that the defendant's assent to the state-



ment in the letter (the letter, of course, not being competent as evidence) has probative force as to the value of the stock in April, 1913. The evidence shows simply an assent, if it has any probative force at all upon the matter, to the statement in Hiatt's letter that, at that time, the stock had no value. The facts upon which Hiatt seems to predicate his statement that it had no value, are facts happening long after the transaction in question; and the statement of the defendant might well be construed into an assent to the statement of Hiatt as to the then value of the stock, but could not be construed into an assent on the part of the defendant, or an admission that the stock had no value in April, 1913, more than a year previous. The general rule is that a condition shown to exist is presumed to continue. But the rule ordinarily is that such presumptions do not relate backward. It is a fact of common observation that enterprises of this kind do start with every promise of success, and later, the honest dreams of the promoters are broken by a sad awakening.

The question before the jury was, What was the value of the stock in April, 1913? Proof of the condition of the corporation or of the value of the stock a year and six months, or even a year later, is no proof of its value on the day charged.

We think the evidence wholly fails to establish this essential element in the charge made.

3. FALSE PRE-  
TENSES: ele-  
ments of of-  
fense: *scienter*. The next point is, Did the defendant know, at the time the representations were made, if made, that they were false?

There is absolutely no evidence to establish this fact, except that the defendant was president of the company at the time, and that, a year later than the time the representations were made, some evidence was introduced tending to show that the stock was then worthless. The burden is on the State, not only to show that the representations

were made, and that they were false, but that the defendant knew they were false, at the time he made them.

It is true that, in civil actions for fraud, it has been held that a statement that a fact exists, as of the knowledge of the one asserting the fact, when he has no knowledge of the fact, and when it is made recklessly, and for the purpose of inducing another to believe it to be true, followed by proof that it was, in fact, not true, makes the *scienter* required in civil actions. There is no proof in this case that the defendant knew the fact to be untrue, if untrue. In *State v. Rivers*, 58 Iowa 102, the defendant was indicted for obtaining money and property by false pretenses. This court said:

"If he made such representation, knowing that it was not a valid lien, and the cashier was thereby induced to give up the mortgage, he is guilty; but if he believed it to be true, or did not know it to be false, \* \* \* he is not guilty."

We have examined this record with care, and are satisfied that, on the points above indicated, there was such failure of proof on the part of the State that the verdict ought not to be permitted to stand. The cause is, therefore,—*Reversed and remanded.*

LADD, SALINGER, and STEVENS, JJ., concur.

SALINGER, J.—I am not in accord with the argument on what "makes the *scienter* required in civil actions." With that exception, I concur.

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JOHN H. WREDE, Appellee, v. AUGUST GROTHE et al., Appellants.

**HIGHWAYS:** Establishment—Private Ways of Necessity—Rights  
1 Acquired—Fences. He who condemns a private way through the lands of another in order to secure access to a public high-

way, acquires no *fee* to the land so condemned, and therefore takes no title to a fence then existing along one side of said condemned way. The condemnor must build and maintain the fences on both sides of such way. It follows that the landowner from whose lands the said way is carved may remove existing fences. (Sec. 2028, Code Supp., 1913.)

**HIGHWAYS:** Construction—Preparing for Travel—Destruction of  
 2 Growing Things. While things existing upon and in land condemned for a highway belong to the landowner from whom the way is taken, in so far as they are not necessary for road purposes, yet he who condemns a private way of necessity may, equally with the road supervisor, put the condemned way in condition for travel, and for such purpose, if necessary, may burn or wholly remove from the said way the grass, brush, or wood existing thereon.

*Appeal from Johnson District Court.*—R. P. HOWELL, Judge.

MARCH 12, 1918.

ACTION at law by which plaintiff sought to recover for the wrongful removal of a line fence by the defendants. Defendants counterclaimed for alleged wrongful acts committed by the plaintiff in the removal and conversion of cross-fences, cutting and removal of hay and grain growing on the established public way, digging and removal of dirt on said way, and the burning of defendant's wood thereon. Each asked for exemplary damages, in addition to actual damages. There was a verdict and judgment for plaintiff for \$140, and defendants appeal.—*Reversed*.

*Hart & Hart*, for appellants.

*Edwin B. Wilson*, for appellee.

PRESTON, C. J.—1. Plaintiff sought to  
 1. HIGHWAYS: recover damages for the alleged wrongful  
   establishment: taking by appellants of 40 rods of fence.  
   private ways  
   of necessity: Plaintiff owns the west half of the south-  
   rights ac- west quarter of the southeast quarter of the  
   quired: fences. section, and defendants own the north half of the south-

east quarter. Defendants' tract is between plaintiff's land and the public highway on the north of defendants' land. Plaintiff had no way to that or any other public highway from his land. He petitioned for a public way one rod in width across the land of defendants at the west end of the 80. Defendants in this action, who were plaintiffs in an injunction suit, sought to restrain the establishment of such a road, on the ground that the road as petitioned for, 16½ feet wide, was too narrow to accomplish the purposes desired. The plaintiff here and the sheriff, who were defendants in the injunction suit, moved to dissolve the injunction, and a hearing was had thereon, May 14, 1915, at which time a stipulation was entered into and signed by the parties, as follows:

"In the above cause, it is agreed between plaintiffs and defendant, John H. Wrede, in full settlement of all questions relative to said cause, that the application for appraisal be amended to read '33 feet off of the west end of plaintiffs' premises,' and the said plaintiffs hereby waive appraisal by sheriff's jury; and by agreement, the price affixed for said premises, as by law provided, is \$200, which amount the defendant, John H. Wrede, agrees to pay, and in addition, to furnish a gate, the same as at the entrance from the road to plaintiff's premises, and set same on the east side of said road at the middle point of the 80 rods, unless otherwise designated by plaintiffs, for the use of plaintiffs and the public; but thereafter, plaintiffs to maintain and keep said gate in repair. Defendant Wrede agrees to deposit said \$200 with the county auditor, to be paid to plaintiffs upon the completed record for said road being filed by the sheriff in the county auditor's office. Plaintiffs to pay the costs of this action, and defendant, Wrede, to pay the costs in the application for the establishment of said road. All other matters relative to the establishment of said road to be as by law provided."

The plaintiff in this case deposited the money, as agreed, and the road was established. Defendants received the \$200 agreed upon as compensation for the road. Prior to such establishment, there was a partition fence along the west end of defendants' land, between defendants' land and the land of one Krall, to the west. The north half of this fence was the portion belonging to Krall, and the south half had been built and kept in repair by the defendants. This was the fence on the west line of the new road. After the establishment of the new road, plaintiff, with the consent of defendants, laid off the road and began building the 80 rods of fence along the east line thereof, when defendants, over plaintiff's protest, tore down and removed the south 40 rods of what had formerly been the partition fence between defendants and the Krall land, to the west. Defendants attempted to remove this fence, and claimed the right to do so. The plaintiff opened the new road, after it had been established, and defendants allege in their counterclaim that, at that time, plaintiff burned wood situated upon the new road, of the value of \$1.00; that plaintiff cut grass on said new road and converted it to his own use, which was of the value of \$12; that plaintiff tore down cross-fences that crossed the new way and converted it to his own use, to the value of \$8.00; that the plaintiff removed soil from said new way to his own premises, and converted said soil to his own use, to defendants' damage in the sum of \$20; to defendants' damage in the sum of \$41 for all these items. Defendants asked exemplary damages in the sum of \$500, in addition to such actual damages.

It is conceded that there is practically no dispute as to the facts in the line fence matter. It is admitted that defendants took that part of the fence between their land and that of Krall, which had been built by them. Appellant says in argument that one of the main questions in the case, the decision of which will tend to settle a great part

of the controversy, is as to who had the right to the possession and use of the south half of the line fence between the land of defendants and Krall, after the establishment of the highway,—whether defendants or plaintiff. And plaintiff states the proposition that, though a number of errors are assigned, the really decisive question as to plaintiff's claim is whether defendants had the right to remove this fence; and that, if they had such right, plaintiff has no cause of action against them therefor.

Defendants offered a number of instructions, to the effect that, by the law under which the public way in question was established, plaintiff has the duty of erecting and maintaining fences on both sides of said public way; that the establishment of such way does not divest the title to the land from the original owner; and that all grain, hay, wood, and timber thereon remained in the original owner of the land comprised within the said way, subject only to the right of the public to the use of the way; that, subject to the privilege in the public at large to use said way, and subject to the right of the public officers to use such of the soil, wood, trees, etc., as may be necessary for the purpose of repairing, keeping up, and working the said public way, all right to the property thereon remains in the original owner, and that the items set up by the defendants in their counterclaim are the property of defendants; that, by the payment of the \$200 by plaintiff for said right of way, he obtained no interest in the items set up in the counterclaim; that the only right acquired by the plaintiff was the use of the way as the general public; that defendants, as the original owners of the land comprised within the established way, are the owners of and are entitled to take away all fences erected by them previous to the establishment of the road, and along and across the land now comprised within said public way; and that they were not trespassers in removing the same.

The court instructed the jury that plaintiff claimed \$40 as the reasonable value of the fence removed by defendants, and claimed exemplary damages in addition, and said further:

"In this case there is no controversy but what there was a public way established across one end of an 80-acre tract belonging to the defendants in this case, upon the petition of the plaintiff herein, and that plaintiff paid for said public way the sum of \$200, which was received by the defendants. So then, so far as the plaintiff is concerned in this action, his claim for damages is based solely upon the claim that the defendants wilfully and maliciously, and without the consent of the plaintiff, tore down and removed entirely the south half of the fence along the west side of said roadway, being a part of the division fence between the property of the defendants and one Krall. The defendants do not deny that they removed the said fence. Now, you are instructed that the defendants in this action had no right under the law to remove this fence, and that plaintiff is therefore entitled to recover the reasonable value of that portion of said partition fence removed by the defendants, such value to be determined from the testimony in this case. And if you further find that the action of the defendants in removing said fence was malicious, then you are authorized, if you so desire, to allow exemplary, or punitive, damages."

By this instruction the court held, as a matter of law, that the fence went with the land taken.

Section 2028, Code Supplement, 1913, provides:

"Any person, corporation or copartnership owning or leasing any land not having a public or private way there-to, may have a public way to any railway station, street or highway established over the land of another, not exceeding forty feet in width, to be located on a division, subdivision or 'forty' line or immediately adjacent thereto;

but if a railway is to be constructed thereon, as provided in section two thousand and thirty-one, the same may be located wherever necessary and practicable, but not exceeding one hundred feet in width, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through inclosed land, be fenced on both sides by the person or corporation causing it to be established."

Appellee contends that the provisions of Title X, Chapter 4, are made applicable to such a way or road, by Code Section 2030. But appellants' contention is, at this point, that the section last referred to has no reference to the fence matter now in dispute. It is appellants' contention that plaintiff did not take the fee to the new road, but that only a public way was established, and that plaintiff must pay the damages for the taking of the right of way, and is required to fence the new public way on both sides; and therefore the fence in question did not pass with the land, but belonged to the defendants, and that plaintiff had no right to use it. It is true, of course, as contended by appellants, that plaintiff was required to fence the new road, and plaintiff concedes that he would be compelled to maintain the fences. If there were no fences on either side, then, clearly, he would be required to build the two fences. But the fence in question was already there, on one side of the road as established, and the question is whether plaintiff, having established and paid for the road, is entitled to use the fence that was already there.

It is contended further by appellants that a right of way means a mere easement, and that, when land is taken for such purpose, the right to the things growing or being thereon remains in the owner of the fee, subject only to the right of the public to pass over the land, and also to the right of public officials to make use of anything growing or being on the land, to make the way fit for travel (citing



cases). Plaintiff was not a road supervisor or an officer; but the record shows, and the jury could have so found, that plaintiff, with the consent of the defendants, laid out the road and did the work, so that, under such circumstances, in that respect he would doubtless stand in the same position as a road supervisor. Counsel for appellants concede that, if the public officials had found it necessary to use this fence to make the way suitable for travel, they might have taken it and used it for that purpose; but not otherwise. They concede, too, that the method of taking this strip of land for the road was by condemnation proceedings, and that it was taken under the provisions of Section 2029 of the Code, and that the way taken was a public way.

It is thought by appellants that the court, in its instructions, told the jury, in effect, that it was defendants' duty to fence one side of the road; but this is not quite accurate. The question is, rather, whether plaintiff had the right to the fence or to use it. On the other hand, it is contended by appellee, as already stated, that, by Code Section 2030, the provisions of Title X, Chapter 4, are made applicable to such a way or road as is provided for in Section 2028 of the Supplement to the Code, 1913. They say, too, that a railway company acquiring land by condemnation is required, under Section 2057 of the Code, to fence land on both sides, the same as under Section 2028 of the Supplement. And they contend, also, that, where land is thus condemned, the amount of damages should be the full value of the land, as the bare fee remaining is of no determinable value (citing *Clayton v. Chicago, I. & D. R. Co.*, 67 Iowa 238). They rely on Section 1995 of the Code, which is in Title 10, Chapter 4, which provides, substantially, that the railway may, in addition to the real estate for its right of way, "also take, remove and use for the construction and repair of said railway and its appurtenances, any earth,

gravel, stone, timber or other materials on or from the land so taken." Their contention is that the words "other materials" in this statute would include fences already built and in use when the land is taken; that appurtenances are things belonging to another thing as principal, and which pass as incident to the principal thing (citing cases); that the word "appurtenances," as used in Section 1995, does not refer to the land taken for the right of way, but relates to the railway itself; that the word "its" shows that the legislature intended it to mean appurtenances of the railway acquiring the right of way: that is, that the fence in question would not be claimed by the railway as being an appurtenance of the land itself, but an appurtenance of the railway. And they say that, if the land was conveyed by ordinary deed, the fence thereon would pass with the conveyance and the fee, and that, under Title X, Chapter 4, the interest or title provided by the statute would pass to the condemnor. The trial court so held, and I am inclined to that view, to the extent, at least, that plaintiffs would be entitled to use the fence already there. It is doubtless true that the fee to the land did not pass to plaintiffs. But that is the practical effect of the proceedings: nothing remained in defendants but the naked fee, subject to the use by the public.

Appellee contends that, under Section 2030, the applicant acquiring a way to lands under Section 2028 of the Supplement is in the same position as a railway procuring its right of way, except that the section confers no title upon the applicant; that the fence in question was upon the land taken, and belonged to the defendants, with its material thereon, and could be used for the construction of appurtenances to the road; that defendants had been paid their damages in full for all that had been taken away from them, and this, by the stipulation, was by their consent.

There is no provision in Section 2028 that the person

establishing the road shall pay for an existing fence along the line of the proposed road, in addition to the assessed damages. It seems to me that the intent of the legislature was that the party procuring the road should construct a fence where there was none, and should maintain fences on both sides. Under the stipulation by which the damages were fixed, defendants did not expressly reserve the fence. Had there been no fence on either side of the road, and plaintiff had erected a new fence on both sides, defendants would have no right to destroy or remove it.

The majority are of opinion, however, that, because the fee did not pass by the condemnation proceedings, the fence in question did not pass to plaintiff; and therefore plaintiff had no interest therein, and could not recover for its removal by defendants. For the error of the court in instructing to the contrary, the cause is reversed. This disposes of the principal controversy in the case.

2. As to the counterclaim, complaint is made that the trial court refused instructions requested by the defendants. The propositions covered thereby are that plaintiff had no right to remove the soil, burn the wood, etc., because the things represented by these items in the counterclaim were the property of defendants; and that plaintiff would have no right to remove them and convert them to his own use. They concede, however, that a road supervisor might be permitted to take down the cross-fences, dig the soil, etc., to open the road, and further, that only a road supervisor could open the road and make it fit for travel. We have already referred to this matter, that the plaintiff was opening the road with the consent of defendants.

On the disputed question of fact as to whether plaintiff did convert some of this property, as alleged, to his own use, or whether he simply removed it to open the road, the

court submitted the question to the jury. On this branch of the case, the trial court instructed the jury that the burden of proof was on the defendant as to the counterclaim, and said further, substantially:

"You are instructed that the plaintiff herein had no right to convert to his own use any of the cross-fences, and if he did so, he is liable to the defendants for the reasonable value of the same, as shown by the testimony. You are instructed, however, that he would have the right to remove the same from said highway, in order that he might use such highway or put it in condition for use. You are further instructed that plaintiff would have no right to convert to his own use or burn any wood which might be on said highway belonging to the defendants, and if he did so, he would be liable to the defendants for the reasonable value thereof; but you are instructed that he would have the right to clean up said highway, in order that he might use the same, and if, in doing so, it became necessary to burn brush that was on the highway, he might do so. You are instructed that the plaintiff could have no right to remove any of the soil from said highway and convert the same to his own use, and that, if he did so, he would be liable to the defendants for the reasonable value thereof; but you are instructed that he would have the right to put said highway in condition for travel, and if, in doing so, it became necessary to haul away some of the dirt therefrom, that he would have the right to do so, and might haul it to his own ground, if there was no suitable place upon said highway to use the same, and in that event he would not be liable for so doing. You are instructed that the plaintiff would have no right to cut and haul from said road any grass or hay that might be thereon, and if he did so, he would be liable to the defendants for the reasonable value thereof; but you are instructed that he would have the right to clean up said roadway for use, and that, if what he

did was done only for that purpose, then he would not be liable."

Without approving the instruction as to some of its features, we think it is as favorable to the defendants as they could ask.

Appellants complain that the court used the word "brush" at one point in the instruction, and that this discredited defendants' claim as to the item claimed for wood. Only one dollar was claimed for burning wood; and there is evidence that there was some brush attached to the body of a tree, and that plaintiff burned this with weeds, grass, and brush which was mixed up with the tree, and that he mowed the road and cleaned it up and hauled the grass to his home and threw it on his manure pile.

3. The record shows that, during the cross-examination of a witness in regard to the amount of dirt claimed to have been hauled away by plaintiff, this question was asked: "Q. Do you know how much he hauled away?" An objection was sustained. Thereupon, counsel for defendants said: "I will try again; maybe my luck will turn." Thereupon, the court said:

"I do not care to have any remarks of that kind addressed to the court. If I am wrong, I am perfectly willing to admit it. Nothing was asked this man about the amount of dirt that was hauled away by Mr. Wrede. It shows you weren't paying any attention to the direct examination, or you wouldn't attempt to conduct such a cross-examination, and take the time of the court and jury in doing it. The objections were sustained, and they are perfectly good."

Complaint is made of this language by the court, and defendants think the remark was prejudicial, because the statement was made in the presence of the jury that counsel was taking the time of the court and jury. There was some provocation. Counsel, during the stress of the trial,

were perhaps not as courteous to the court as they should have been.

Other questions are argued, but those we have noticed are the more important. We have examined the record, and conclude that, for the error stated, the judgment ought to be, and it is,—*Reversed*.

LADD, GAYNOR, and STEVENS, JJ., concur.

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A. F. BARBER, Trustee, Appellee, v. IDA L. WIEMER, Trustee,  
et al.; Appellants.

**WITNESSES: Competency—Transaction with Deceased—Assignees**

- 1 by Operation of Law. The statutory declaration (Sec. 4604, Code, 1897,) that a party to an action is not a competent witness to detail personal transactions and communications against an assignee of a deceased person, does not apply when the assignee is such *by operation of law only*. So held where the assignee was a trustee in bankruptcy.

**BANKRUPTCY: Trustees—Appointment and Qualification—Effect.**

- 2 Principle recognized that a trustee in bankruptcy is the representative of the *creditors*, and not of the bankrupt, even though the trustee does take over the title to the property of the bankrupt.

**BANKRUPTCY: Trustees—Remedies—Transactions with Deceased.**

- 3 A trustee in bankruptcy, in an action to enforce an alleged trust in favor of the bankrupt, may not have the same right to exclude evidence of personal transactions with a deceased grantor as the bankrupt would have, were he prosecuting the action. (See Sec. 4604, Code, 1897.)

**WITNESSES: Competency—Transactions with Deceased—Trustee**

- 4 in Bankruptcy as "Assignee." A trustee in bankruptcy, in an action to enforce a trust in favor of the bankrupt, which trust, it is alleged, was granted to defendant by one now deceased, is not an "assignee" of the deceased grantor, either in *fact* or by *operation of law*; and therefore the defendant, who denies the trust, is a competent witness to testify against said trustee as to personal transactions with said deceased.

**DEEDS: Requisites and Validity—Parol.** A parol gift of real estate, where the donee takes possession thereunder and improves the land as his own, will be sustained.

**ADVERSE POSSESSION: Nature and Requisites—Character and Elements.** One who enters into possession of real estate under a parol gift, and for ten years retains open, notorious, continued, and undisputed possession, under an asserted claim of absolute ownership, acquires an absolute title.

**DEEDS: Conditions and Restrictions—Validity.** One who is, in fact, the absolute owner of real estate under an executed parol gift, is none the less so because of the subsequent execution by the donor of a deed to donee, containing trust provisions to which donee did not consent.

*Appeal from Crawford District Court.*—E. G. ALBERT,  
Judge.

DECEMBER 11, 1917.

REHEARING DENIED MARCH 15, 1918.

PLAINTIFF, as trustee in bankruptcy of the estate of Frank and Henry Wiemer, bankrupts, instituted this action in equity, June 23, 1914, to terminate a trust and to recover said bankrupts' alleged equitable interest in 160 acres of land, asking for an accounting against Ida L. Wiemer, trustee, for said bankrupts' share of the rents and profits of the lands. Defendants Frank and Henry were adjudged bankrupts in May, 1914, and were discharged in October, 1915. The trial court found for plaintiff; denied reformation of the deed; and found that, under the deed and the evidence, there was a trust, as alleged by plaintiff, and that the two bankrupts were beneficiaries; terminated the trust; and found that the two bankrupts had an interest in the land which should go to the plaintiff, because of the bankruptcy proceedings; also required the defendant Ida L. Wiemer, as trustee, to account. A judgment and decree were entered accordingly. Defendants appeal.—*Reversed and remanded.*

*Shull, Gill, Sammis & Stilwill*, for appellants.

*Conners & Powers*, and *Harding & Kahler*, for appellee.

STEVENS, J.—I. Plaintiff alleges substantially that, on November 7, 1895, one Sophia Lambach, being then the owner in fee simple, conveyed by trust deed to defendant Ida L. Wiemer, as trustee, for the use and benefit of herself and children, including said bankrupt defendants, 160 acres of land in Crawford County, Iowa, a particular description of which is given in the pleadings; that said two bankrupts, under and by virtue of said deed, were the equitable owners of an undivided 26/60 interest in said land; that, by operation of law, plaintiff, as trustee in bankruptcy, succeeded to and became vested with the interest of said bankrupts in said property; that the legal title is still in the name of said defendant Ida L. Wiemer, trustee, and, in violation of the terms of her said trust and said conveyance, she has repudiated said trust by claiming to be the absolute owner of said property; and further, that said defendant Ida L. Wiemer, trustee, one of the beneficiaries in the trust deed, is now in possession of said real property, claiming to be the absolute owner thereof, and denying that any of her codefendant beneficiaries, including said bankrupt defendants, or plaintiff, as their representative, have any right therein by virtue of said trust deed or otherwise; that said claims and repudiation of said trust have been called to the knowledge of plaintiff and all other defendants; and that said defendants have united with their codefendant, Ida, and have acquiesced in said claims so made by her and disclaimed any interest in said trust property and have also repudiated said trust; that said trust is no longer active, and no purpose could be subserved by its continuance; that plaintiff's interest in said trust property will no longer be preserved by such continuance, but would be defeated thereby; that the trust should be terminated by decree of



court and the trust enforced: and accounting is asked, and general equitable relief. The trust deed is as follows:

"Know all men by these presents: That Sophia Lambach, widow, of Crawford County, state of Iowa, in consideration of the sum of love and affection and one dollar, in hand paid by Ida L. Wiemer, trustee, of Crawford County, and state of Iowa, do hereby quitclaim unto the said Ida L. Wiemer, trustee, and to her heirs and assigns, the following described premises, situated in the county of Crawford, state of Iowa, to wit: The west one hundred and sixty (160) acres of east half of Section twenty-three (23) in Township eighty-three (83) North, Range forty-one (41), West of the 5th P. M. The said premises are not to be incumbered in any manner and are to be held in trust for the benefit of trustee's children and herself. The profits derived from said premises to be used for benefit of grantee and her children. In case the said grantee considers it best she may sell said land and reinvest the proceeds for the purpose above described. After her death the said premises become the property of the said grantee's children, and the grantor aforesaid hereby relinquishes all contingent rights, including right of dower and homestead which she has in and to the aforesaid described premises.

"Dated this 7th day of November, 1895.

"Sophia Lambach.

"Duly acknowledged and recorded November 8, 1895."

The defendants answer by general denial, and all except Ida L. Wiemer disclaim any interest in the property. In addition to this, the defendant Ida L. Wiemer, and Ida L. Wiemer designated trustee, for separate answer admits that she is the mother of Fred, Mary, Henry, and Frank Wiemer, and Lula Wiemer Calhoun, and that Sophia Lambach executed and delivered the deed before set out; denies that plaintiff has any right, title, or interest to the premises described, or to any part of the income or profits she

may have received therefrom; that, in executing said deed, said Sophia intended that said property should belong to her, the said Ida, in fee, and that the word "trustee" was inserted by said grantor through mistake, and through a misapprehension of its legal effect; that the grantor inserted these words in said deed, to wit, "The said premises are not to be encumbered in any manner, and are to be held in trust for the benefit of trustee's children and herself," in order that the husband of said Ida should not receive or acquire any interest in said property; and that grantor did not intend to create a trust estate; that the grantor, by placing these words in the deed, to wit: "The profits derived from said premises to be used for benefit of grantee and her children. In case the said grantee considers it best she may sell said land and reinvest proceeds for the purpose above described. After her death the said premises becomes the property of the said grantee's children"—did not intend to limit or restrict the estate which she had before granted to said Ida; and that said deed should be reformed by the court to carry out the intentions of the grantor. Said defendant Ida further alleged that she is the absolute and unqualified owner in fee of the property described and the income and profits thereof; that she has been in actual possession of said property for more than ten years prior to the bankruptcy proceedings, and has held the same as the absolute owner thereof in fee; that her said possession has been open, notorious, and adverse to all the other defendants; and that she had always claimed that she was the absolute owner in fee thereof; and that she was in possession of the same as such owner, holding the property free and clear from any and all claims which each and every one of the defendants might claim to have therein. She prays that plaintiff's petition be dismissed, and that the deed before referred to may be reformed, and for general equitable relief. These affirmative allegations are de-

nied in plaintiff's reply, and plaintiff alleged further that said Ida was present at the execution of the trust deed, had personal knowledge that it was executed to her in trust; that she accepted the trust, and, having consented thereto and acquiesced therein, she is estopped from denying the validity of said trust or the validity of said trust estate against any beneficiary, and is estopped from denying the title and estate of plaintiff; that said transaction was voluntary, and intended as a gift from Sophia Lambach for the benefit of defendant Ida and her children; and that because thereof a court of equity will not reform the instrument.

All the defendants mentioned in the petition are still living. The bankrupts, Henry and Frank, did not list the real estate as assets in the bankruptcy proceedings. Defendant Lula Wiemer Calhoun, wife of D. J. Calhoun, the youngest of the children, was born to defendant Ida after the execution of the deed before referred to. A son was born to her, prior to the execution of the deed, who died in 1897. Prior to the commencement of this suit, notice was served on defendant Ida for an accounting, and a demand for the rents and profits since the execution of the deed. The husband of Ida died before this suit was brought. It was admitted that there are not sufficient funds of the bankrupts in the hands of the trustee to pay claims filed and allowed, unless the trustee is allowed to hold their interest, if any, in the land. There was evidence as to the value of the land itself, and its rental value. There were no buildings on the land in controversy. The defendant Ida lived on an adjoining 160 acres, which had been given her before by her mother, or she had taken as a part of her father's estate. It is claimed by defendant Ida that her mother, by a parol gift, gave her the land in controversy in 1881, and that she occupied it thereafter, and that her mother, at different times, promised to give her a deed,

which she finally did in 1895, as before stated; and her claim is that she so occupied under claim of right, and that, therefore, she had a fee title independently of the deed. Plaintiff's answer to this is that any talk of that kind was but a part of the transaction of the execution of the deed, which followed later; that, as trustee, she could not claim title as against the beneficiaries; that she is incompetent to testify to such a parol gift, under Section 4604 of the Code; and that, even though her testimony is competent, and to be considered, she has not established such claim by that clear and satisfactory and convincing evidence required in such cases. Proper objection was made to her competency as a witness, and to her evidence. The testimony introduced on behalf of the defendants, stated as briefly as may be, and substantially as they claim it to be in argument, is that Ida L. Wiemer was married, and lived near Davenport, prior to coming to Crawford County, in 1881; that her mother gave her this property, and that she, Ida, was to come from Davenport, and go out on the farm in Crawford County, and that she and her husband did so in 1881; that, since that time, she has paid all taxes on the land; that her mother did not give her a deed until 1895, although she promised it to her; and that she, Ida, used the property as her own; that she, Ida, broke and farmed the land from 1881 on; that her mother never made any claim to the real estate in question since 1881; that her father died prior to 1881; that she, Ida, was in possession of this real estate, claiming to be the owner of it; that she spent money in improving the farm, putting up fences, and seeding it down; that the farm was in poor condition when she first went on it; that she used the money and income from the place in taking care of herself and family and improving the property; that she came out here at the request of her mother, on the promise of her mother to give her this land; that her mother gave her the land; that all the business in reference to the farm was

transacted by her in her own name. In regard to the execution of the deed in 1895, Ida testified:

"She [her mother] went and made out the deed and sent the deed and put it on record. I was present at the time the deed was made out. At the time of the transaction, she said that it was my property, and that she made it that way because Mr. Wiemer [Ida's husband] was speculating and didn't wish him to get hold of the property. I handled the property just the same after the deed was made out; never kept any account concerning the credits or income; didn't examine the deed after it was prepared. No one, from the time I took possession in 1881 until this controversy, ever made claim to the real estate against me. Never knew the word 'trustee' was in the deed until this controversy came up. The deed was not delivered to me at the time it was made out. Mother caused the deed to be executed and placed on record. Neither Frank nor Henry at any time ever made any claim to this land or any interest in it."

She further testified that her mother wanted her to have this property so that Mr. Wiemer could not use it in speculation. It seems that the deed was left in a box in the bank, with Ida's papers.

Witness Frank Wiemer testified that his mother always claimed this property as her own, and that he never made any claim to any interest in it; never heard anyone else claim any interest; at the time of the trial, he was twenty-nine years of age.

Henry Wiemer testified to a conversation that he heard when he was ten years of age, between his mother and grandmother, in which the grandmother said that the reason she gave this property to Ida, her daughter, was because she gave a brother his college education, and property from the estate; and that this was to be his mother's,—he thinks he heard them more than once. He also puts it this way:

"She said that my mother's brothers always got so much

property from the estate, and that was to be hers, my mother's."

On cross-examination, he says a boy cannot tell or remember all that he heard, only can tell a little of it,—some things are pretty plain; that he gave the conversation the best he could remember; that it was not an impression.

Sophia Lambach was deceased at the time of the trial of this case. Appellant, however, testified, as a witness in her own behalf, to the transactions and conversations which she claimed to have had with her mother relative to the alleged gift to her of the land in controversy. Counsel for appellee contend that she was incompetent, under Section 4604 of the Code, to testify thereto. Counsel also assume that the plaintiff, trustee, in all respects stands in the place of the bankrupts, and that any objection to the competency of appellant as a witness that could have been urged by said bankrupts in a suit between her and the bankrupts, growing out of said transactions or communications, was available to plaintiff. It may be conceded that appellant would be incompetent to testify to personal transactions or communications with her deceased mother in a suit between herself and her sons, involving a controversy over the subject-matter of the quitclaim deed, and that the said bankrupts, within the meaning of the statute, were assignees of Sophia Lambach.

Under Section 70-a of the Bankruptcy Act, title to the property of a bankrupt vests in the trustee, by operation of law, after he has been appointed and qualified, as of the date of the adjudication thereof.

*Simpson v. Miller*, 7 Cal. App. 248 (94 Pac. 252); *Fourth St. Nat. Bank v. Millbourne Mills Co.'s Trustee*, 172 Fed. 177; *Johnson v. Collier*, 222 U. S. 538.

1. WITNESSES:  
competency:  
transaction  
with deceased:  
assignees by  
operation  
of law.

2. BANKRUPTCY:  
trustees: ap-  
pointment  
and qualifica-  
tion: effect.

3. BANKRUPTCY:  
trustees: remedies:  
transactions with  
deceased.

The trustee is the agent of the court to liquidate the assets of the bankrupt, to protect the same and bring them before the court for final distribution. He is not the representative of the bankrupt, but of the creditors, and holds the legal title to the property as the representative of the creditors, and not of the bankrupt. *In re Ducker*, 134 Fed. 43; *Devries v. Orem*, 104 Md. 648 (65 Atl. 430); *Carney v. Averill*, 110 Me. 172 (85 Atl. 494); *In re Kreuger*, 196 Fed. 705; *In re V. & M. Lbr. Co.*, 182 Fed. 231; *Merchants Nat. Bk. v. Sexton*, 228 U. S. 634; *Mueller v. Nugent*, 184 U. S. 1; *In re Baum*, 169 Fed. 410; *In re Wilka*, 131 Fed. 1004; *Edwards v. Schillinger*, 245 Ill. 231 (91 N. E. 1048); *Starr v. Whitcomb*, 150 Mich. 491 (114 N. W. 345).

Plaintiff, however, as trustee in bankruptcy, is not the assignee of deceased assignor of said bankrupts, but, at most, is the assignee by operation of law of an assignee of said deceased assignor's or grantor's. The word "assignee," as employed in Section 4604 of the Code, must be given its usual and ordinary meaning.

The Supreme Court of Kansas, in *Burlington Nat. Bank v. Beard*, 55 Kan. 773 (42 Pac. 320), construing the following statute: "No party shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee, of such deceased person"—in a case in which the question was whether a sheriff, who had levied a writ of attachment upon chattels, and the attachment creditors were assignees, within the meaning of the above statute, said:

"We think that the common acceptance of the word 'assignee' is limited to an assignee in fact, and does not comprehend an assignee by mere operation of law. If it had been intended by the legislature to include the latter sense,

it would scarcely have been necessary to use the words 'executor, administrator, heir at law, next of kin,' or 'surviving partner;' for the word 'assignee' would be broad enough to embrace them all, and therefore the word 'assignee' was used in its more limited sense, of an assignee in fact. It would be regarded as a strained construction of the word to extend it to a sheriff, or the creditors whom he represents, by reason of the levy of an attachment upon the property of a defendant."

The Supreme Court of Arkansas, in *Tucker v. West*, 31 Ark. 643, held that a statute of that state which required every plaintiff suing as an assignee to give security for costs, did not apply to executors or administrators. As throwing some light upon the question in this case, see *Page v. Johnston*, 23 Wis. 295; *Tremper v. Conklin*, 44 N. Y. 58.

In all controversies between a bankrupt and his creditor, his relation with the trustee is one of hostility. In this case, the bankrupts are joined with their mother as defendants, and testified as witnesses in her behalf. The prohibition of the statute does not extend to an assignee by operation of law of a deceased person; but refers to an action where a party thereto, or some person interested in the event thereof, or some person through or under whom such party to the action or interested person derives some interest, is called as a witness against the "assignee" of such deceased person,—that is, an assignee as the word is usually and commonly used and understood, and not otherwise.

It follows that, even though plaintiff be the assignee of the bankrupt by operation of law, he is not an assignee as that term is used in Section 4604; and appellant was not incompetent thereunder to testify to the conversations and transactions referred to in her testimony.



Under the Bankruptcy Law, title to all property of the bankrupt, together with the right to maintain any necessary action in relation thereto for the benefit of the creditors of said bankrupts that could have otherwise been prosecuted in the name and on behalf of the bankrupt, may be maintained by the trustee in bankruptcy. Chapter 27, Remington on Bankruptcy, and cases therein cited. Suits brought by a trustee in bankruptcy in a state court will be tried the same as other actions, and according to the rules of evidence prevailing in the state court where same is tried. Whether appellant was a competent witness to testify to personal transactions or communications with her deceased donor or grantor depends entirely upon whether plaintiff is an assignee in fact of such deceased person, within the terms of Section 4604.

Plaintiff was not the assignee of deceased either by operation of law or in fact, and appellant was a competent witness under the statute to testify in her own behalf.

II. Appellant claims title to the real estate in controversy (a) under a parol gift from her mother in 1881, and (b) by adverse possession for more than ten years under a claim of right. It has been repeatedly held by this court that a parol gift of real estate, where the donee enters into possession thereunder and improves the land as his own, will be sustained. *Bevington v. Bevington*, 133 Iowa 351; *Sires v. Melvin*, 135 Iowa 460; *Farlow v. Farlow*, 154 Iowa 647. Also, that adverse possession of real estate under claim of right for ten years will ripen into an absolute title. *Hamilton v. Wright*, 30 Iowa 480; *Sires v. Melvin*, supra; *Wilbur v. Cedar Rapids & M. R. R. Co.*, 116 Iowa 65; *Walsh v. Doran*, 145 Iowa 110; *Wilson v. Beck*, 160 Iowa 276; *Boynton v. Salinger*, 147 Iowa 537; *Goulding v. Shonquist*, 159 Iowa 647.

4. WITNESSES : competency : transactions with deceased : trustee in bankruptcy as "assignee."

5. DEEDS : requisites and validity : parol.

6. ADVERSE POSSESSION : nature and requisites : character and elements.

Appellant testified that her mother gave her the land in controversy in 1881; that she immediately moved thereon, and has continuously been in possession thereof, by herself or tenants, claiming to be the absolute owner thereof under said gift and claim of right since that time; that she broke the sod, fenced the land, placed some other improvements thereon, paid the taxes, and has occupied, used, and controlled said real estate as her own, during all of said time; that her mother repeatedly promised to execute a deed conveying said premises to her, and in 1895, the quitclaim deed before referred to was executed and forwarded by her for record, and thereafter placed in the bank at Charter Oak with other papers of appellant. It is not claimed that appellant paid a consideration for said conveyance, but it is argued by counsel for appellee that appellant accepted and claims title under said instrument, and is bound by all the terms and limitations therein contained.

Appellant testified that she did not know that the word "trustee" was in the instrument, until after the present controversy arose; that she continued in possession and control of said real estate, receiving and using the income for herself, the same after the execution of said deed as before.

Appellee testified that defendant applied to him for a loan upon her real estate, and that, upon examination of the title, he found that she held the same in trust for herself and children; that the instrument contained a provision prohibiting her from encumbering same; that he called her attention to the instrument; and that she replied that she had forgotten that she held it in trust. Appellant denied the latter statement, and testified that she told appellee she had forgotten she was not to encumber the land; that there was no conversation between them to the effect that she held the land in trust only, or that she had forgotten that fact. Ap-

pellee is personally interested in the result of this suit, as a large creditor of the bankrupt defendants'.

Appellee admitted that, when appellant applied to him for a loan, she may have said that she would secure payment thereof upon the land in controversy or another tract, whichever he desired. It is also claimed that appellant, upon a previous occasion, testified that she claimed title under the quitclaim deed. The final conveyance by appellant's mother, fourteen years after she took possession of the land, claiming to be the absolute owner thereof, and occupied, managed, and controlled the same as her own, to some extent, at least, corroborates appellant's claim that she took possession of the land under a gift from her mother. One of the defendants, Fred Wiemer, was born in 1881, but whether before or after the alleged parol gift of the land to appellant does not appear.

It is also contended by counsel for appellee that, at most, the record discloses the promise of Sophia Lambach to give said land to appellant, and that said promise was never executed or carried out until the quitclaim deed was executed, in 1895, and that appellant did not hold possession of said premises as owner, but, at most, under an arrangement by which the deed in question would some time be executed and delivered to her; but in our opinion, the evidence does not sustain this claim. The testimony of appellant relative to the alleged gift, her occupancy and control of the land, payment of taxes, receipt and use of the income as her own during all the years since 1881, together with her claim of ownership, is not disputed by the testimony of any witness. On the other hand, she is corroborated, to some extent at least, by the testimony of her sons.

The case made out by appellant is fully as strong as, if not stronger than, the facts in *Bevington v. Bevington* and *Sires v. Melvin*, supra. The defendant bankrupts testified that they did not know of the contents of the quitclaim

deed until this controversy arose, and that they have never made any claim to said real estate, or any interest therein whatsoever. The evidence is undisputed that appellant claimed, during all the time she was in possession of said real estate, to be the owner thereof, and that same had been given to her by her mother. Such claim constituted a claim of right, set the statute of limitations in operation, and title to said premises became complete in her in ten years thereafter. *Sires v. Melvin*, supra; *Bevington v. Bevington*, supra.

But it is also contended by counsel for  
7. DEEDS: con-      appellee that appellant accepted said quit-  
    ditions and      claim deed and, upon a previous occasion,  
    restrictions:      testified that she claimed title to said prem-  
    validity.          ises thereunder. It is elementary, of course, that, if she be-  
came vested with the title to said real estate under a parol  
gift from her mother, or by adverse possession, before the  
execution of said quitclaim deed naming her as trustee and  
her children beneficiaries thereof, the grantor was wholly  
without authority to bind her by any conditions or limita-  
tions upon the title. She accepted the deed, evidently, with-  
out knowledge that she was named as trustee, and may have  
been willing that the provision prohibiting her from encum-  
bering said premises be inserted therein, as protection  
against the importunities of her husband to mortgage same  
to aid him in live stock speculation. She testified that same  
was inserted in the deed for that reason. The evidence is  
wholly insufficient, however, to show that appellant intended  
to, or, in fact did, waive any right, claim, or interest in and  
to said real estate with which she had previously become  
vested by virtue of the gift and adverse possession thereof  
for more than fourteen years before said deed was executed.  
The trust provision of said deed was evidently not thought  
of at the time appellant took possession of said premises  
under said alleged gift, and, so far as the record discloses,

not until the date on which the instrument was executed. It seems to us that the evidence satisfactorily, if not conclusively, shows that appellant went into possession under a parol gift of said premises to her by her mother, and that she has at all times claimed to be the absolute owner thereof under said gift, which amounted also to a claim of right, and that title in fee to said premises was complete in her before the said quitclaim deed was executed, and that she is the absolute owner thereof; and plaintiff's petition should have been dismissed, and the prayer of appellant's cross-petition asking that title to said premises be quieted in her, should have been sustained, and decree entered in accordance therewith. Other questions discussed by counsel, in view of what is said above, need not be referred to herein.

For the reason above stated, the judgment of the district court is reversed and cause remanded, with directions that a decree be entered in the court below in harmony with this opinion.—*Reversed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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IOWA NATIONAL BANK, Appellant, v. HENRY PYLE et al., Appellees.

**BILLS AND NOTES:** Payment and Discharge—Evidence. Evidence reviewed, and held to show affirmatively that the payment alleged had not been made.

**BANKS AND BANKING:** Deposits—Payment of Check on Improper Indorsement—Estoppel. It is suggested, inferentially, that the drawer of a check who, at the end of the month, receives said check from his banker, with the usual bank statement showing payment of the check, and retains the same without objection for some two years, is estopped to plead that payment was made on an unauthorized, or even forged, indorsement.

**BILLS AND NOTES:** Payment and Discharge—Cancelling Indorse-

- 3 **ment of Payment.** One who holds a promissory note as collateral may peremptorily cancel an indorsement of payment when such indorsement was made without the knowledge or consent of the holder, and without the receipt by said holder of any consideration.

*Appeal from Polk District Court.*—WM. S. AYRES, Judge.

DECEMBER 11, 1917.

REHEARING DENIED MARCH 15, 1918.

ACTION in equity to recover judgment upon a note made to plaintiff by the defendants Henry and Delilah Pyle for money loaned, and to foreclose the pledge made to the bank as collateral security by said Henry and Delilah, of a note executed by defendant National Life Association to Delilah Pyle, and guaranteed by all the defendants except the association. The trial court found that there was due plaintiff from defendants Henry and Delilah Pyle the sum of \$2,259.69, with interest, and that there was due from defendant association to Delilah Pyle, upon the collateral, \$2,334.30, with interest, which amount is subject to the lien of plaintiff to secure the payment of \$2,259.69 and interest found due from Henry and Delilah to plaintiff under the pledge of the collateral note; that a payment by check of \$2,000, January 23, 1914, by defendant association, was drawn payable to Delilah Pyle, and was intended to be applied upon the collateral note of \$5,000 made by the association; and that said check was paid by plaintiff out of funds belonging to the defendant association, but that it was not paid to Delilah, nor indorsed by her, nor through any authorized agent, but that the check was paid by plaintiff either without indorsement, or on a forged indorsement; and that, by reason thereof, there is due and owing from the plaintiff bank to the defendant association \$2,262, with interest; that, all parties being before the court, the amounts due from one to the other should be offset; that the bank

should recover from all defendants, except the association, \$70.28 with interest; that Delilah Pyle should recover judgment against defendant association for \$75.23, with interest; that the collateral note made by defendant for \$5,000, and held by the bank as collateral, should be cancelled and surrendered to the association; that the loan note was paid, and that it should be surrendered to defendants Henry and Delilah. The costs were apportioned. The plaintiff appeals.—*Reversed.*

*Nourse & Nourse*, for appellant.

*Clark & Byers, Sampson & Dillon, A. D. Pugh, and R. L. Parrish*, for appellees.

1. **BILLS AND  
NOTES: pay-  
ment and dis-  
charge: evi-  
dence.**

PRESTON, J.—The controversy seems to be between the plaintiff and defendant association. The only argument for appellees is by said association. The principal controversy arises over a \$2,000 check. Plaintiff contends that such check was for back salary to Henry Pyle, an officer of defendant association, and that the check was drawn payable to him; that Henry Pyle drew the money on said check, and that it was not to be indorsed on the collateral note. The defendant association contends that the check in question was drawn payable to the order of Delilah Pyle; that it was to be applied on the note; that it was not indorsed by her personally, or by anyone authorized; that, after the giving of said check, a payment of \$3,005.83 was made by the association to plaintiff on the collateral note; and that this was all of that note, except the \$2,000 in controversy, and some interest on the \$2,000. The matter in regard to the \$2,000 check is the principal controversy in the case, although the defendant association makes a claim that plaintiff did not notify it of the erasure of the indorsement of the \$2,000, and that, if it had, the association could have recouped itself. Plaintiff also contends that, soon after the

payment of the \$2,000 check, it, with other checks, was returned to the association, with a statement of checks paid by the association the preceding month; and that this statement had printed at its head the following:

"Please examine at once. Failure to report errors in this statement within twelve days of its receipt will release the Iowa National Bank from all liability."

Plaintiff asserts that the association made no objection, and made no claim that the check was improperly paid, for about two years, and until after the evidence was closed on the trial of this case, when its amendment to answer was filed. Plaintiff pleads an estoppel against the association to now claim that the check was not properly indorsed and paid. After the check was returned to the association, it was lost. The \$5,000 note has, at all times since it was deposited with plaintiff as collateral, been held by the plaintiff bank as such collateral security.

The execution of the two notes is admitted by all the defendants. The answer of Delilah Pyle avers the payment of interest on the collateral note, and \$3,000 principal, and avers that there was due thereon, September 15, 1915, \$2,583.34, with interest. She admits that there is due from herself and the defendant Henry Pyle to the bank on the loan note the sum of \$2,000, with interest. In a cross-petition, she alleges that there is more due upon the note of the association which the bank holds as collateral than there is upon the note she and her husband, Henry Pyle, executed to the bank, and she asks judgment against the association for the amount of the collateral note, subject only to the lien of the plaintiff bank for the debt due it. The answer of the association, filed before the trial, admits the execution of its \$5,000 note to Delilah Pyle, but says it has neither knowledge nor information sufficient to form a belief as to whether it was pledged to the plaintiff as collateral, and, by way of cross-petition, pleads payment on Jan-



uary 23, 1914, of \$2,000 by the check before referred to. Issue was joined by plaintiff and the association upon the material allegations of Delilah Pyle's cross-petition; also by the plaintiff upon the allegations of the cross-petition of the defendant association. Such were the issues at the commencement of the trial.

When the evidence was all in, and the parties had rested, the association amended its answer and cross-petition, withdrawing Division 2 of its prior answer, and alleged, among other things, the issuance of the \$2,000 check on January 23, 1914, and that, on January 24, 1914, the bank delivered the collateral note to Henry Pyle, who made the following indorsement thereon:

"January 24th, Received \$2,000 on the within note.

"Henry Pyle."

It was further alleged that Henry Pyle then returned the collateral note to the bank, which, at the time, erased said indorsement and refused to recognize it; that plaintiff did not advise it of said transaction until after Henry Pyle had severed his connection with the association, and that, had it done so, the association could have recouped itself, wholly or in part, from defendants Pyle; that, if the check was indorsed at the time it was paid by the bank, it was indorsed by someone who had no right or authority to indorse the same, and that it was, therefore, wrongfully paid out of the funds of the association on deposit with plaintiff. Said answer further alleged that, if the said \$2,000 indorsement was made on said note by Henry Pyle, he was at that time the president and executive managing officer of the association, and if the \$2,000 check payable to Delilah Pyle was, in truth, actually indorsed by her, or by someone authorized by her, or the proceeds were received by her to apply upon the collateral note, and the defendant Henry Pyle was authorized to act as her agent in the matter, then the indorsement of \$2,000 on the collateral note

by Henry Pyle when it was in his possession, as the agent of Delilah, which possession was consented to or made possible by plaintiff, could not be cancelled by the plaintiff bank without the consent of the association; that plaintiff, having carelessly allowed Henry Pyle to obtain possession of the note and indorse said payment thereon, and having failed to notify defendant of the cancellation of the indorsement, has waived the right to, and is now estopped from claiming that said indorsement was not properly made and that it should not be allowed as a payment as against the plaintiff.

After the filing of this amendment to answer, the case was reopened, and further testimony taken. During all the time covered by the transactions herein, the defendant association kept two checking accounts at plaintiff bank, one denominated "Benefit Fund," and the other, "General Fund." There are some other facts which should be referred to as briefly as may be, before taking up the discussion of the questions involved.

It appears that, at the time the loan note was executed by defendants and the collateral note turned over to plaintiff, defendant Stevenson was then, and for some years thereafter, a director of defendant association, and defendant H. Percival Pyle was the vice-president. Henry Pyle, the husband of Delilah Pyle, was at that time, and at the time of the indorsement on the collateral note of the \$2,000 by him, and for some months thereafter, or until March 14, 1914, the president and the general manager of the association, and was, or had been, a director therein. There is evidence that the association was referred to as a one-man company, and that Henry Pyle had charge of and directed the entire thing. He gave general directions to all the employes of the company. It is admitted by defendant Delilah Pyle that her husband, Henry, was her agent, and had entire charge of her business in connection with the matter

under consideration; and her husband testifies that he generally did her business, under her general supervision and direction, and that he never did any business without her knowledge, and that, with her knowledge, he was acting for her in the matters in controversy. The business in question was all transacted by Henry Pyle, so far as her end of the business was concerned. She says she never authorized him to sign her name. She says, further, that she did not herself personally ever ask the association to pay the interest on the collateral note, nor ask them to pay the principal. In December, 1912, the association paid the interest on the collateral note by a check drawn on plaintiff bank, payable to Henry Pyle, signed with the name of the defendant association, by H. Percival Pyle, Vice-President, and Guy Baker, Secretary, which check was indorsed by Henry Pyle and paid in due course by the bank. In the same month, the association made another payment of interest on said note in like manner, except that the check was signed by the association, by Henry Pyle, President. In June, 1913, the association drew a third check, drawn in the same way, the check being signed by the association, by Henry Pyle, President. Both the last named were duly indorsed by Henry Pyle, and proper indorsements made on the collateral note of all three payments of interest. As said, on January 23, 1914, the \$2,000 check in question was drawn, by the auditor of the defendant association. We shall refer in a moment to the disputed fact question whether the check was payable to Delilah Pyle or Henry Pyle. It is shown that Henry Pyle either drew the money on this \$2,000 check himself, or deposited it to his own credit. The plaintiff bank did not receive it. Henry Pyle made an indorsement of the \$2,000 on the collateral note, which then belonged to the plaintiff bank, under the following circumstances:

Mr. Blackburn, plaintiff's cashier, testified that, at the time of the indorsement of the \$2,000 on the collateral note,

January 14th, nothing was paid to the bank, and that no part of it was ever paid to the bank, and that he did not know that the indorsement was made there by Henry Pyle, at the time it was made. He says:

"Mr. Pyle came in the bank one afternoon, I believe, and asked to look at the collateral note that was attached to the original note. I gave it to him, and he stepped over to the desk, and in a few minutes he handed it back to me, and I noticed the indorsement, and I told him at the time that we had not received any money, so we could not allow the payment. I erased it, and told him we could not allow it without the payment to us. By erasing, I mean the pencil marks that made a line over or through the indorsement. The erasure that I refer to is the pencil and ink marks that is made over the indorsement on the back of the note. At the time the indorsement was made, Mr. Pyle was at the desk, and I did not know of it until after it was put on there. The defendant association knew we held this note as collateral, and they had known it for a couple of years at least before the indorsement by Henry Pyle. I presume Mr. Pyle had this note three or four minutes. He did not take it out of the bank; he just stepped over to the little desk in the banking room of plaintiff's bank, ten or fifteen feet from my desk. The indorsement dated January 24th was made in March, 1914."

Henry Pyle testified in regard to this matter as follows:

"The indorsement of the \$2,000 is in my handwriting. I made that indorsement in the plaintiff bank. I just asked for the note there, and stepped to the desk there, and I wrote the indorsement on it. After I made the indorsement, I gave it to Mr. Blackburn, and he said they would not allow any indorsement to be made. He crossed it off. He said they had not received the money, and they would not allow the entry to stand. Previous to this indorsement,

I did not receive \$2,000 from the defendant association to be paid on this note. Before the indorsement, I received \$2,000 from the defendant association, and it was paid to me on account of my salary as director. It was back salary that had accrued up to the time it was drawn. At that time, I was a member of the board of directors, and president of the defendant association. I know, of my own personal knowledge, that there was and is resolutions of the board of directors voting salaries to the directors. Mr. Biggs was crowding me to the point that he thought it ought to be done, and it was under his pressure that I went down there; and when the bank would not allow it, that was just as satisfactory to me, because I did not want to do it anyhow. I thought I had this money, and it was mine."

It is admitted that plaintiff did not notify the association of this transaction, but Henry Pyle was, at that time, the president and managing officer of the defendant association, and it is contended by appellant that Henry Pyle's knowledge was notice to the association. This might be so, under some circumstances. Appellant also contends that, if there was any wrong in the matter, it was the wrong of Henry Pyle, the general agent of the association, and of his wife, Delilah Pyle, and that he obtained and holds the full benefit of the \$2,000 paid by the plaintiff bank upon the check. Appellant contends further that, under such circumstances, the association should not complain of its general agent's wrongful act, and especially that Henry Pyle personally should not obtain a benefit by offset because of this act, if it was wrongful.

It should have been said that defendants Delilah and Henry Pyle admit in their answer that there is \$2,000 due plaintiff on the loan note. None of the defendants except the association complain of the payment of the check. As before stated, plaintiff returned to the association a statement of checks paid during the month of January, 1914,

and the evidence shows that, when the statement was returned, the association's clerks, under the direction of its auditor, examined it with the returned checks; and the auditor testifies of this examination that it was made under his direction, and that the \$2,000 check in controversy was returned by the bank with this statement; that it was necessary for it to do that, to balance the account; and Mr. Spencer, a witness for the defendant association, testifies that he saw this check in the files of the association during an examination made by him some time between February 24 and 28, 1914. The officers and employes of plaintiff bank testify that the bank never paid any checks of the association that were not properly indorsed, and that they never received any complaint of such payment, or that any of the association's checks were cashed without proper indorsement. It is contended by appellant that there is no evidence showing that the \$2,000 check was not properly indorsed, when paid by the bank. As we understand it, the only claim in reference to this on the part of the association is that the check was payable to Mrs. Pyle, and that she says she had never authorized her husband specifically to sign her name. It is claimed by the plaintiff that Henry Pyle was the agent for his wife, and that, even though the check was made payable to her, he had the right to indorse it, and the bank to pay.

We think there is force in plaintiff's claim at this point; but, after a careful reading of the record, we think it is satisfactorily shown, by the clear weight of the evidence, that the check was, in fact, drawn payable to Henry Pyle. This being so, the bank had the right to pay, and Henry Pyle had the right to receive, the money on the check. If this is so, then it cannot justly be claimed that the \$2,000 should be credited on the collateral. As stated, Henry Pyle was claiming that this was his own money, and drawn for back salary as director. He so testifies, and the

minutes of the defendant association were introduced in evidence, showing that the directors were to receive a salary. It is true, there is parol evidence on behalf of defendant association that the directors agreed not to draw a salary, and some of them did not do so. However this may be, if the check was drawn payable to Henry Pyle, he had the right to cash it, and the plaintiff should not be held guilty of negligence in paying it.

I. Taking up, now, the evidence as briefly as may be, in regard to the question as to who was the payee of the \$2,000 check. This, as are most of the other questions in the case, is a question of fact; but, as we regard this the turning point in the case, we shall set out the evidence in regard to it a little more fully than the evidence on other points; but we shall not take the time or space to set out the evidence in full, or all the circumstances, pro and con, bearing on the question. We have read the record carefully, and we are satisfied and find that the check was payable to Henry Pyle.

Mr. Spencer, examiner of the insurance department of the state, testified that he saw this check in February, in the office of the defendant association, and that it was payable to Delilah Pyle: he did not notice the indorsement on the back of the check. He further testified that, on March 16th, the day after Henry Pyle ceased to be president of the association, he again examined the defendant association, for the auditor of state, and attempted to run down this \$2,000 check and get the details and the indorsement; but the check was not found, and it was never afterwards found or produced on the trial, although called for; and there is evidence that search was made for it, and it could not be found. The last known of it, it was in possession of the defendant association.

The auditor of the defendant association testifies that, on January 23, 1914, the date of the check, at the instance

of Henry Pyle, he drew a check upon the account of the association in the plaintiff bank for \$2,000; that he does not remember to whom the check was payable, but, knowing of the note of the association to Delilah Pyle, he entered the check upon the Check Register of the association as payable to Delilah Pyle; and that, from the entry thus made in the Check Register, the item was carried into other books of the defendant association. He testifies that, after he drew the check, he delivered it to Henry Pyle. He says that no one instructed him to make the entry in the Check Register as it was made; that it was simply his understanding, because of his knowledge of the Delilah Pyle note, and he thought it must be on that. He says he made the notation without question as to some other matters, being involved; that the entry was based on his understanding of the transaction; and that, if the entry in the Check Register was not in accordance with the facts, that would go to all the subsequent entries in the books.

There may be some collateral circumstances bearing upon this point, but this is the substance of the testimony offered by the defendant association in regard to its claim that the check was payable to Delilah Pyle.

On the other hand, Henry Pyle testified that this check was made payable to himself, Henry Pyle, and that he had drawn it and received it on account of back salary, under resolutions of the board of directors; that the check was not drawn or received as a payment on the collateral note. The secretary of the association testified that he signed this check for \$2,000 at the request of Henry Pyle, and that it was payable to Henry Pyle. Mr. Pyle testified further that, before having this check drawn to himself, he talked with Mr. Stevenson, Mr. Doty, and Mr. Hager, of the association, about drawing it.

Mr. Hager testified that Henry Pyle talked with him about indorsing the \$2,000 check on the collateral note held



by the bank, and that Pyle told him that the check was drawn payable to him, Henry Pyle, and that he had cashed it at the plaintiff bank; and that the question was whether Pyle had the right to take the check and cash it, instead of applying it on the note; and that Mr. Hager told him that, if the check was drawn to him (Pyle), and the association was owing him a salary to the amount of the check, under proper resolution, it was his money, and he had a right to cash it.

As stated, all the three checks drawn for the payment of interest on the collateral note were payable to Henry Pyle, and indorsed by him and paid by the plaintiff bank. These checks were for interest on the collateral note, accrued before the loan was made by the bank to the Pyles, or before any interest other than the original discount fell due on the loan note. Henry Pyle was transacting the business in regard to these notes. There may be other circumstances bearing upon this question.

2. BANKS AND  
BANKING: de-  
posits: pay-  
ment of check  
on improper in-  
dorsement:  
estoppel.

II. We think there is force in plaintiff's claim that, even though the check was drawn to Delilah Pyle, and not properly indorsed, or if the indorsement was forged, the association, by its conduct and neglect for about two years after the bank returned the check paid, and until after the association had lost the check and led the plaintiff to believe the check was properly indorsed when paid by the bank, is now estopped and precluded from asserting any defense of that character. Appellant cites, as having some bearing, Section 1889-a, Code Supplement, 1913. But in view of the fact that we find the check to have been payable to Henry Pyle, we shall not further discuss this point.

III. Appellant contends, and cites us to the evidence and figures to show, that the defendant association paid to Henry Pyle more than \$2,000 after it had notice and an

opportunity to recoup itself. But we do not feel justified in going into this matter further.

3. **BILLS AND NOTES:** payment and discharge: canceling indorsement of payment.

IV. A further suggestion in regard to the indorsement of \$2,000 on the collateral note by Henry Pyle, and the association's claim that it was not notified of the erasure.

It seems to us, under the circumstances shown in regard to the making of this indorsement, that it was not a good indorsement in the first place. He received the note for the purpose of looking at it, according to the testimony, and the plaintiff did not consent to any such indorsement's being made. The note belonged to the plaintiff, and it had not received the money. Henry Pyle had no right to indorse a payment of \$2,000 on plaintiff's note without the consent of plaintiff, under the circumstances shown. At the time the indorsement was made by Henry Pyle, he was claiming that the \$2,000 belonged to him, and that the check was not drawn for the purpose of making a payment on the collateral note. So far as this transaction is concerned, he was a mere interloper, and his act was not binding upon the bank.

Under the record, it is very clear to us that the equities are with the plaintiff. The trial court should have rendered its decree against the defendants on the loan note, and refused to allow the credit of \$2,000 on the collateral note, and decreed a sale of the collateral note.

The judgment and decree of the trial court is reversed and remanded for a decree in harmony with this opinion, or plaintiff may, at its election, have a decree in this court.—*Reversed.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

E. H. JOHNSON, Administrator, Appellant, v. MINNEAPOLIS  
& ST. LOUIS RAILROAD COMPANY, Appellee.

**MASTER AND SERVANT: Method and Plan of Work—Negligent**

- 1 **Construction of Bridge.** A master may be guilty of actionable negligence by adopting an unsafe plan and method of doing his work. So held in the construction of a railway bridge.

**PRINCIPLE APPLIED:** In building a railway bridge, it was necessary to bore certain holes in the timbers which were beneath the ties. This was ordinarily done from a scaffold, consisting of a hanger, or stirrup, and a plank. The hanger was made by bending an iron bar into the shape of a long "U," the ends of the bar *ordinarily* being threaded to receive a nut, after a *flat* iron, with holes in the ends, was slipped on. This *flat* iron was then looped over the end of the overhanging tie, and extended below the ties for a distance of several feet. A plank was then slipped into the closed end of the "U," and the scaffold was complete. The superstructure also required a railing resting on the top of the ends of the ties, and about 4 inches from the ends thereof. The approved and proper method to do the work was to do the boring first, and later to build the railing, for the reason that, when the railing was in place, the *flat* iron of the hanger had only 4 inches on which to rest, or hang, instead of 18 inches, before the railing was built. The probability of the hanger's slipping from this 4 inches was a source of danger. In the instant case, *the railing was built first*, owing to the non-arrival of other material. Later, the foreman *twice* directed the workmen to use the U-shaped hangers, in boring the holes below the ties. The jury could have found that the master had but two hangers at the bridge. Deceased and his fellow workman in some manner secured these two hangers. Whether one man carried both of them to the place where they were to be used, or whether each man carried one, does not appear. The scaffold was rigged up. The men worked on opposite ends of the scaffold. The hanger at the end of the scaffold *where deceased worked* was made in the *ordinary* way. The hanger at the end where the other workman was engaged *was not threaded*, but had the ends so bent as to form a round hole, through which a *round* rod was inserted, and this was looped over the end of the tie, instead of the *ordinary flat* piece of iron. This rod did not fit tightly into the round hole, but was loose. The jury could have found that the deceased had no

knowledge of this defective hanger, and had never seen it. The boring caused the scaffold to sway, and the round, loose rod to roll. No appliance was furnished the workmen to prevent the hangers from slipping from the ends of the ties. There was evidence that the deceased had been told to drive nails outside the crossbar of the hangers, and also that, preceding the accident, and while working at *another* place on the bridge, the attention of deceased was called to the exceptional shortness of the tie then used, and to the fact that the hanger at the opposite end from where deceased was working ought to be nailed. While deceased was working, his fellow workman left the scaffold, the hanger at the end where the fellow workman had been working slipped off the tie, the scaffold fell, and deceased was killed. *The hanger at the end where deceased was working remained in place.*

*Held*, a jury question was presented on the issue whether the master was negligent:

1. In adopting an unsafe method or plan of doing its work: to wit, in building the railing prior to boring the holes.

2. In furnishing the deceased and his fellow workman an unsafe tool: to wit, the defective hanger.

3. In ordering the deceased to work in a place which he (the master) knew was unusually dangerous by reason of the defective appliance, and not so known to deceased.

4. *Held*, further, the deceased did not, as a matter of law, assume the danger attending the use of the defective hanger.

5. *Held*, further, that deceased had the right to assume that the hanger was reasonably safe.

**MASTER AND SERVANT: Safe Tools—Defective Hanger for**  
2 **Scaffold.** A master is guilty of negligence in furnishing a servant with an unsafe tool, not known by the servant to be unsafe.

PRINCIPLE APPLIED: See No. 1.

**MASTER AND SERVANT: Assumption of Risk—Master's Neglect.**  
3 A servant does not assume dangers unknown to him, and arising from the neglect of the master.

PRINCIPLE APPLIED: See No. 1.

**MASTER AND SERVANT: Assumption of Risk—Assumption as**  
4 **Matter of Law.** It requires a very clear case of knowledge and appreciation of danger on the part of a servant before it may be said, as a matter of law, that he assumed the danger attending the doing of a thing, when he did it with the one instrumentality *specifically directed by the master.*

PRINCIPLE APPLIED: See No. 1.

**MASTER AND SERVANT: Safe Tools—Servant's Right to Assume Tools to be Safe.** A servant, no knowledge on his part to the contrary appearing, has the right to assume that a tool furnished to him by the master is reasonably safe for the purposes for which intended.

PRINCIPLE APPLIED: See No. 1.

*Appeal from Webster District Court.*—R. M. WRIGHT,  
Judge.

NOVEMBER 17, 1917.

REHEARING DENIED MARCH 15, 1918.

ACTION at law to recover damages on account of the alleged wrongful injury and death of plaintiff's intestate. There was a directed verdict and judgment for defendant, and plaintiff appeals.—*Reversed and remanded.*

*E. H. Johnson, and Kenyon, Kelleher & Price, for appellant.*

*Burnquist & Joyce, for appellee.*

WEAVER, J.—The deceased was a bridge carpenter, working at his trade in the defendant's employment, in the construction of a bridge upon its line of railway. At the time in question, he, with a fellow workman, was engaged in boring auger holes through braces at the cap timbers resting upon the piles which supported the structure. To do this work, it was necessary for the workmen to occupy a position beneath the ties which support the track. To meet this need, a plank somewhat longer than the width of the bridge was suspended under the upper structure, and held in place by two iron hangers made for that purpose, and looped over or suspended from opposite ends of one of the crossties. The device was moveable, and was changed from place to place as needed in the prog-

1. MASTER AND SERVANT: method and plan of work: negligent construction of bridge.

ress of the work. On February 24, 1913, the deceased was in his place, upon the scaffold thus constituted, boring a hole in a brace on the east side of the bridge, and his companion, Johnson, was similarly engaged on the west side. Johnson was evidently first to complete the hole which he was boring, and climbed from the plank to the top. As he did so, the iron hanger on that side slipped from the end of the tie on which it was hung, causing the plank to fall and draw out of the hanger on the other side, precipitating Karlson to the ground below, and causing his death.

This action is brought by the administrator of Karlson's estate, to recover damages on account of his death, for the benefit of his parents. The facts, so far as we have already recited them, are undisputed. Plaintiff charges, however, that the injury and death of his intestate was caused by the negligence of the defendant, and specifies the alleged negligence as follows: (1) That defendant negligently adopted an unsafe plan and method of work; (2) that it negligently supplied deceased's fellow workman, Johnson, with a defective hanger, by reason of which it fell from the tie, causing the accident; (3) that defendant's foreman saw and knew the defective condition of the hanger, and failed to do anything or to take any measures to prevent accident therefrom; also, that defendant was negligent in permitting Johnson to use the hanger; (4) That defendant failed to furnish deceased a reasonably safe place to work; and (5) that Johnson, the fellow workman of the deceased, was negligent in his manner of leaving the scaffold, causing it to sway, vibrate, and fall, and that such negligence is imputable to the defendant.

The defendant denies all allegations of negligence on its part, and in various forms pleads that the risk of injury and death in the manner described was assumed by the deceased. It further pleads that its railway was, at the

2. MASTER AND  
SERVANT: safe  
tools: defec-  
tive hanger  
for scaffold.

time, engaged in the business of interstate commerce, and that the work on which deceased was employed was of that character.

The hanger, which, the evidence tends to show, was ordinarily used in work of the kind described, is made by taking a strap or bar of iron, and bending it into a shape having some resemblance to an elongated letter U, the bottom part of which is made broad enough to let in the plank which is to serve as a scaffold. On the upper end of each of the parallel uprights of the hanger, a thread is cut to receive a nut. These ends pass through holes in another flat bar of sufficient length to fit over them, and when this crossbar is secured by the nuts on the ends of the uprights, the device is complete. When hung in place to receive the plank, the crossbar rests on the upper face of the tie, which, in the present case, was sawed smooth. The hanger on Karlson's side of the bridge was of the usual kind, which we have here attempted to describe. The one on the opposite side of the bridge, where Johnson worked, was different in the following respect: the upright bars, instead of being finished at the top with threads and nuts and crossbar, were each bent or turned over to make an eye, and through these eyes, a round bolt of sufficient length was inserted, and made to serve the purposes of a crossbar. The evidence further tends to show that this bolt did not fit tightly in the eyes, but was loose, and when in place, was liable to roll on the face of the tie; and this is one of the facts upon which the charge of negligence on the part of defendant is founded. Another condition complained of in this connection is the following: The plan of the bridge contemplated the fastening of wooden guard rails outside of and parallel with the track across the top of the ties, and within about four inches of their ends on either side. In the regular and usual course of construction, these guard rails are not laid until after the work of boring and fas-

tening the braces has been done. In this instance, however, owing to some delay or confusion in supplying the materials, the guard rails were put in place first, with the result that, when Karlson and Johnson were ordered to bore the braces, there were only about four inches of either end of the ties on which to suspend the hangers. When deceased and Johnson began boring the holes, they did not use the hangers, but in place thereof, extended a plank across the caps resting on the piles, and from the plank reached the braces with their augers. They had worked in this manner for a time, when the assistant foreman, who was in immediate charge and oversight of their labor, directed them to use the hangers. This order was twice given. The tools and implements for the use of the workmen were kept on a platform made for that purpose at the end of the bridge, and there Karlson and Johnson obtained these hangers, which, according to the apparent preponderance of the evidence, were the only ones furnished at that place; though there is evidence tending to show that there were others in one of the cars left at the station of Arnold, some distance away. Up to that time, no use had been made of hangers in the construction of the bridge, and they had been in use on this occasion not more than an hour or two when the scaffold fell. Whether the hangers were both carried from the platform to the place of work by one man, or whether each carried the one he was to use, does not appear. When in their respective places on the plank, Karlson and Johnson were separated by the width of the bridge, a distance of eight feet or more, and they continued in this relative position as the work moved forward from bent to bent along the length of the structure, neither having any special reason to examine the work of the other or the condition of the hanger used by him, unless it be as they moved the scaffold from one bent to another, of which there is testimony. There was also testimony indicating that two



other persons assisted in the moving. No evidence appears that Karlson's attention was called to the fact that the crossbar or bolt on the hanger used by Johnson was loose in the eyes through which it was placed, but it is the contention of defendant that, as a matter of law, he must have known it, or, in the exercise of reasonable care, he ought to have known it. The testimony of the defendant's foreman, who directed the use of the hangers, is to the effect that the natural swaying and vibration of the suspended plank tended to make the top of the hanger work outward toward the end of the tie, a tendency which would naturally be more marked where the crossbar is in the form of a roller than where it is in the form of a flat and rigid bar. That it was the roller-top hanger which fell is shown without controversy, for the one on Karlson's side was found after the accident to be still in place. No appliance was furnished the workmen to tie or hold the hangers in place, though the chief foreman testifies that, on different occasions, he had told Karlson to drive nails in the ties outside of the crossbar of the hangers to hold them in place; but, so far as relates to the hanger used by Karlson on this occasion, his omission so to do appears to have had no connection with his fall, because, as we have seen, that hanger did not leave the tie. One other witness says that, at some point in the work before reaching the place of the accident, he noticed that the end of the tie on which Johnson's hanger was suspended was unusually short, leaving only about two and one-half to three inches outside of the guard rail, and, thinking it a source of danger, he said to Karlson, "There ought to be a nail outside of this hanger;" but as this advice, if given, seems to have had reference to the danger occasioned by the exceptional shortness of the tie, rather than to any defect of the hanger, it has little relevance to the matters now in issue, for he concedes that this

incident occurred at a place other than the place of the accident.

The foregoing exposition of the facts alleged or proved is sufficient for an introduction to the discussion of the legal propositions urged by counsel on either side.

I. Stated in brief, the contention for plaintiff is that defendant was negligent: First, in its method and plan of organizing and prosecuting the work; second, in the orders pursuant to which the deceased was at work at the time of the accident; and third, in furnishing the men with a defective hanger. Each specification is denied by the defendant, who also pleads assumption of risk by the deceased.

Taking up first the question whether, under all the evidence, the jury could properly find the defendant negligent in any of the matters complained of, we think our answer must be in the affirmative. In the first place, but for the laying of the guard rails before boring the braces and cap timbers, the projecting ends of the ties would have afforded a space of eighteen inches in length, on which to suspend the hangers in apparent safety; and the usual and proper order of construction was to do this last mentioned work first. The assistant foreman testifies:

"We do not usually put on the guard rails before boring the holes. We never did before. To my knowledge, it was done first this time because we did not have the materials for the braces there,— the material did not come in its order. The workmen then put on guard rails because they did not have anything else to do. Mr. Renshaw directed it to be done. If these guard rails had not been put on the bridge, the ties would have stuck out beyond the rails where the scaffold hangers would be hung about eighteen inches. The fact that the guard rail was on the ties prevented there being eighteen inches of this bridge on which to hang the hangers."

It was certainly within the province of the jury to find

that this departure from the usual and approved method or plan of construction added to the peril to workmen employed on a scaffold so suspended, and correspondingly increased the duty of reasonable diligence and care on the part of defendant to see that harm therefrom did not result to those exposed to such peril in carrying out its orders or performing the service which it required. It was this place of increased and unusual danger in which defendant ordered the deceased to work, and specifically directed the use of the hangers; and the jury could find from the evidence that the two hangers we have described were the only ones furnished for use at that place. That the one taken by Johnson was defective is hardly open to question. Had the round bolt used for a crossbar fitted tightly in the eyes of the uprights, in a manner to prevent it from revolving or rolling, though it might have been less desirable or less safe than if a flat bar had been used, it would, perhaps, not be a defect, in the ordinary sense of the word; but when it is shown that the bolt was loose in the eyes, so that it would operate as a roller over the smooth, hard surface of the tie, its defective condition is quite clearly established, and a finding that defendant was negligent in furnishing it and ordering its use has sufficient support in the testimony.

11. Did the deceased, as a matter of law, assume the risk of the injury occasioned by the defective hanger? Risk of this character is not one of those hazards which are merely incidental to the service in which he engages. The risks which he assumes in entering a given employment are those only which naturally and usually remain incident to such business, when conducted by the employer with reasonable regard on his part for the safety of those who serve him, and they do not include any risk or hazard created by or arising from the neglect of the employer to observe the magisterial duties which the law imposes upon
3. MASTER AND SERVANT: assumption of risk: master's neglect.

him. It is true that, under some circumstances, a servant who remains in his employer's service after he knows, or may be presumed to know, of his employer's neglect of his magisterial duties, or a servant who makes use of a tool or appliance which he knows, or ought to know, is so defective or dangerous as to expose him to injury, will be held to have assumed such risk. It must be borne in mind, however, that this plea of assumed risk is an affirmative defense, to be established by a preponderance of the evidence;

4. MASTER AND  
SERVANT: as-  
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of law.

and it is only in very exceptional cases that this defense is made out with such clearness and certainty that the court may peremptorily sustain it as a matter of law. Had the

hanger in this case been the one which the deceased had in his own immediate possession and use, it may be that the court could say that he could not well have avoided discovering its defective condition and appreciating the danger to which it exposed him, and in such case, we should have more hesitation in holding that the court erred in directing a ver-

5. MASTER AND  
SERVANT:  
safe tools:  
servant's right  
to assume  
tools to be  
safe.

dict against plaintiff. But even then, the question would not be free from doubt; for, so far as appears, Karlson had never before seen this hanger, or had any knowledge of its peculiar character or defects, and, being or-

dered to do the work with it, he had the right, within reasonable limits, to assume that it was a safe and suitable appliance for the use to which he and Johnson were directed to put it. He had been using it only a very short time,—a fraction of a half day,—and, considering the reliance which he could place upon the performance of defendant's duty to furnish him a hanger reasonably safe and sufficient for the purpose, it would be open to serious question whether he should be held to have assumed the risk, as a matter of law. As it was, he was chargeable with no special duty to inspect the hanger which Johnson took; though, of course, if he

knew, or if the circumstances were such that, as a reasonable man, he ought to have known, that the hanger on that side was defective, thus exposing him to danger, his continuing work on the scaffold could well be held to operate as an assumption of the risk.

Nor does the case, as a matter of law, come within the class where the servant is directed or expected to select the appliance or implement for his use from a supply furnished by the master for that purpose; for, as we have said, the evidence would justify a finding that the two hangers in question were the only ones furnished, and that the order of the foreman to get and use the hangers had reference to these alone; and in such case, the workman, as we have already noted, could rightfully place some reliance upon the assumption that they were reasonably adapted to the work to be performed, and were not dangerously defective. *Hammer v. Janowitz*, 131 Iowa 20, 23; *McGuire v. Waterloo & C. F. Union Mill Co.*, 137 Iowa 447. In *Wilder v. Great Western Cereal Co.*, 130 Iowa 263, the master urged as a defense that the servant was injured because of his own negligence in using a stick to remove material with which a part of the machinery had become clogged, and that, having chosen that manner of doing the work, he assumed the risk; but, as there was testimony tending to show that the foreman had directed him to do the work in that manner, this court, speaking by Ladd, J., said:

"But it is said that, in selecting the stick, the plaintiff acted for himself, independent of defendant, and for this reason, the latter is not chargeable with negligence in not supplying proper tools. This might be so, had the superintendent given no directions. According to plaintiff's testimony, he was instructed merely to use a stick, and he selected one like that the superintendent had. If this was so, he was not acting independently, but under instructions as to what tool to use in unclogging the feeder. \* \* \* He selected

such instrument, then, as he was instructed to use, and not one of his own choosing. \* \* \* True, he did not investigate the machinery; but he had the right to assume, from the order to do the work, that there was no danger not apparent, and that he could perform it in safety."

Quite in point in principle is our holding in *Luisi v. Chicago G. W. R. Co.*, 155 Iowa 458. There, the foreman of a section gang directed three of his men to move a wet railroad crosstie, two of the men in front lifting it on the round, iron handle of a track wrench, and the third carrying the rear end of the tie. In attempting to load it on a car, the tie slipped from the iron, and injured the man at the rear. The plaintiff charged negligence, both in defendant's failure to furnish a sufficient number of men to handle the tie, and in its failure to furnish a proper appliance for such use. Replying to the defendant's contention that plaintiff assumed the risk, and was himself negligent, we said:

"The track wrench used for the purpose of carrying the front end of the tie was of small, round iron, about two feet long, which the jury might easily find from the evidence would slip under the weight of a heavy, wet tie. And furthermore, there was evidence tending to show that the proper and usual tool for loading ties of this character and size was a tie, or grab hook, which could not slip when fastened in the tie. Where an improper tool is furnished, and a servant directed to use it, the master is, or may be, liable for not providing a proper tool."

In *Rawley v. Colliau*, 90 Mich. 31 (51 N. W. 350), the Michigan court, while holding that a plaintiff injured by the use of a defective hammer, when others of a safer kind were at hand, cannot recover, proceeds to say:

"If this hammer had been the only one in the shop, \* \* \* or defendants had directed it to be used, knowing its condition, another case would be presented."

Speaking to the same question, the Massachusetts court has said:

"If the master personally interferes in the performance of work, and, in consequence of this negligence, a servant is injured, the master is liable, unless the carelessness of the servant is a defense; and when the master undertakes to direct specifically the performance of work in a particular manner, we cannot say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the vigilance which otherwise would be incumbent upon him." *Haley v. Case*, 142 Mass. 316, 322 (7 N. E. 877, 879).

Having furnished the materials of which the scaffold was constructed, and provided the method and plan of construction, it was the positive duty of the defendant to furnish materials of a kind reasonably fit for the purpose for which they were to be used. If it failed to so do, it was negligent; and unless it be established beyond dispute that the deceased knew of such neglect, or ought to have known it, and appreciated the danger to which he was thus exposed, then the question whether he assumed the risk was for the jury. *Risku v. Iron Cliffs Co.*, 163 Mich. 523; *Rihmann v. George J. Grant Const. Co.*, 114 Minn. 484; *Lee v. H. N. Leighton Co.*, 113 Minn. 373; *Lang v. Bailes*, 19 N. D. 582; *Swanson v. Schmidt-Gulack Elevator Co.*, 22 N. D. 563 (135 N. W. 207). Bearing more or less directly upon the law of this case, see also *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa 14, 47; *Rogers v. Overton*, 87 Ind. 410; *Bane v. Irwin*, 172 Mo. 306; *Illinois Steel Co. v. Wierzbicky*, 206 Ill. 201; *Norfolk & W. R. Co. v. Ward*, 90 Va. 687.

Considering the record as a whole, in the light of our own decisions above cited, and the trend of the authorities from other jurisdictions, we are of the opinion that it cannot be said, as a matter of law, that the deceased assumed

the risk to which he was exposed in obeying the order to use the scaffold, and that the motion to direct a verdict should have been overruled. The judgment below is reversed, and the cause remanded for a new trial.—*Reversed and remanded.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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W. W. LYONS et al., Appellants, v. J. J. VAN OEL et al., Appellees.

**INJUNCTION: Subjects of Protection and Relief—Contracts—**

- 1 **Breaches.** Injunction will lie to restrain one party to a contract from so proceeding under the contract as to involve all the parties in obligations not authorized or contemplated by the contract. So held where the parties agreed to first organize a corporation, and thereunder to carry on a sand and gravel business; but one of the parties proceeded to carry on the business without the organization of the corporation.

**PARTNERSHIP: The Relation—Necessity for Contract Relation.**

- 2 Principle recognized that, where the rights of third parties are not involved, a partnership cannot exist, in the absence of a contract so providing.

*Appeal from Polk District Court.*—HUBERT UTTERBACK,  
Judge.

DECEMBER 10, 1917.

REHEARING DENIED MARCH 15, 1918.

ACTION for an injunction. Opinion states the facts. Decree for the defendants in the court below. Plaintiffs appeal.—*Reversed and remanded.*

*Read & Read* and *W. E. Miller*, for appellants.

*Clark, Byers & Hutchinson*, for appellees.

GAYNOR, C. J.—On the 4th day of December, 1913, the



following memorandum of agreement was signed by both plaintiffs and defendants herein:

“Memorandum of agreement by and be-

1. INJUNCTION: subjects of protection and relief: con- tracts: breaches.	tween W. W. Lyons and L. W. Lyons, parties of the first part, and J. J. Van Oel and Will Van Oel, parties of the second part:
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“It is hereby understood and agreed

that the above-named parties are to enter into and operate a sand and gravel business under the name of The Beaver Valley Sand and Gravel Co., to be incorporated and run for a term of twenty years if certain plans and conditions are carried out to the satisfaction of both parties. These plans being as follows:

“First: That the above-named J. J. Van Oel and Will Van Oel (parties of the second part, now engaged in business such as to meet and know contractors and builders throughout this state), are to secure contracts for sand and gravel to the amount that would warrant the building of a switch and track extending from The Perry Interurban to certain beds of sand and gravel located on a certain farm belonging to W. W. Lyons (consisting of 180 acres and lying between The Des Moines River and Beaver Ave.), furthermore, these contracts shall be sufficient to warrant the buying of machinery, sand pumps, and such other apparatus that is needed to operate such a business not to exceed \$6,000 to \$8,000.

“Second: It is understood that J. J. Van Oel and Will Van Oel, parties of the second part, do not receive any consideration for securing above contracts only in the way of getting said sand business in running condition. After such time, they may both be reimbursed to the amounts agreed upon by both first and second parties. Sand, shovels and machinery to be located at any point the said J. J. Van Oel may choose to locate so that it is above the south end of the river pasture and above a point directly east of

the barn. The said W. W. Lyons agrees in permitting the said company to operate and remove and sell the sand and gravel from said location that he will secure right of way and also assist in securing a switch track from Inter-urban Ry. Co., the said J. J. Van Oel to furnish all machinery, tools and equipment necessary to carry on the business, not to exceed from \$6,000 to \$8,000. There being uncertainty as to the terms on which The Railway Co., will construct a switch, it is agreed that the expense shall be paid from the undivided profits of the business and that the salaries of the parties who are entitled to salaries under this contract, shall not exceed two thirds as named or agreed upon as salaries until the amount assumed be paid for switch track.

"When all machinery is installed, track in and business in running condition, it is agreed that J. J. Van Oel shall receive a salary of \$3,000 per year and L. W. Lyons a salary of \$1,500 per year and Will Van Oel a salary of \$1,500 per year. At the end of the year or every six months, if so agreed, the profits are to be divided; W. W. Lyons and L. W. Lyons to receive one half of the net profits and J. J. Van Oel and Will Van Oel a like amount.

"It is also agreed that the said J. J. Van Oel and his associates shall have the exclusive right, unless otherwise mutually agreed, to all the sand and gravel described to be on premises stated in this contract for the term of years above named."

On the margin of said agreement was written the following:

"Said W. W. Lyons authorizes the Sand & Gravel Company to get gravel and sand from the river bed at any place along the east line of said farm."

It appears that the parties have never incorporated. It is the claim of the plaintiffs that this was a tentative agreement to incorporate; that the agreement itself is too vague

and indefinite as a basis for incorporation; that it does not fix definitely, and provides no means by which the amount of capital stock may be definitely determined; that it does not fix the highest amount of indebtedness to which the corporation may subject itself at any time; that it does not fix a time for the commencement or the termination of the corporation, by what officers or persons its affairs are to be conducted, or the times when or the manner in which they shall be elected; that, in fact, no compliance with the provisions of Chapter 1, Title IX, of the Code of 1897, is provided for to effect incorporation; that there is nothing authorizing the parties to said tentative agreement to bind each other by contract; that this agreement, in so far as it undertook to bind the corporation, is void, and cannot be enforced. In fact, it is claimed that the tentative agreement is too vague and indefinite to be an enforceable instrument.

It is claimed that the defendants, however, have assumed to act under said agreement without incorporation, and to make contracts by which these plaintiffs are sought to be bound; that they are assuming the right to take possession of the land mentioned in the contract, and to take sand therefrom, over the objection of the plaintiffs. Plaintiffs pray that the contract be cancelled and held for naught; that the defendants be enjoined from claiming or asserting any rights under it; that they be enjoined and restrained from contracting any obligations of any kind, under said writing, which will be binding on these plaintiffs; and that the defendants and each of them be restrained from selling or attempting to sell sand or gravel underlying the premises described in the contract belonging to the plaintiffs; and that they be enjoined from claiming any interest in the premises described in the contract, or the gravel underlying the same.

The contract is inartificially drawn. As we interpret

it, and as we take it the parties understood at the time, the thought was to incorporate, and as a corporation to operate a sand and gravel business under the name of the Beaver Valley Sand & Gravel Company, and we think the contract should be so read, in the light of the record. It is clear that the parties understood and agreed to incorporate, and as such, operate a sand and gravel business, under the name of the Beaver Valley Sand & Gravel Company, for a term of twenty years, but only in the event that certain plans and conditions were carried out, to the satisfaction of both parties. These plans and conditions which must be satisfactory to both parties are: That the Van Oels should secure contracts for sand and gravel, to an amount that would warrant the building of a switch and track extending from the interurban line to certain beds of sand and gravel located on the farm of W. W. Lyons, and such as would warrant the buying of machinery and sand pumps, and such other apparatus as is needed to operate the business, not exceeding a definite amount; but that the Van Oels should receive no consideration for securing the contracts, except as they might profit thereby in the operation of the business; that, after the business was incorporated and in operation, the parties should be reimbursed for expenditures to an amount agreed upon by both parties; that, after the incorporation was effected, the Lyons would permit the company to remove and sell sand and gravel from the premises mentioned in the contract, and also would secure the right of way to the sand, and assist in securing switch tracts, the Van Oels to furnish all machinery and tools and equipment necessary to carry on the business, not to exceed the amount stated, the expense of constructing the switch to be paid from the undivided profits of the business; and that the parties entitled to salaries under the contract should not get over two thirds the amount named or agreed upon as salaries until the amount

assumed to be paid for the switch was paid out of the business.

No corporation has ever been formed. No legal entity, to be known as the Beaver Valley Sand & Gravel Company, has ever come into existence. The contract itself clearly did not establish or create such corporation, nor is it the contention of the defendants that a corporation was created by this contract. The bringing of this entity into existence, to be known as the Beaver Valley Sand & Gravel Company, was left by the tentative contract to the future. Whether it should be brought into existence at all depended upon whether certain plans and conditions specified in the contract were carried out to the satisfaction of both parties. The contract itself, supplemented by the disclosures made in this record, makes it apparent that the organization of the corporation was the first thing; that the taking of sand and gravel was to follow, and the selling and taking were to be the business of the corporation when organized. That it was the intention of the parties to incorporate is manifest by the testimony of all. That, when the writing was drawn, it was the thought of all that a corporation would be effected, cannot be doubted. These defendants, however, assumed, as this record shows, to act for this nonexistent legal entity, and to make contracts and do business in its name, and involve these plaintiffs in obligations against which they have no protection, except it comes to them through the courts. They assumed to remove the sand from the plaintiffs' premises in the name of this nonexistent entity, and to carry on a sand and gravel business in the name of the Beaver Valley Sand & Gravel Company, and this on the assumption that the plaintiffs are legally bound to the performance of the agreement so made. It is so apparent that in this they have no right, that it would hardly seem to be open to discussion. They claim, however, that the contract itself gives to these de-

defendants certain rights. This can only be on the assumption that there exists between the plaintiffs and defendants the relationship of copartners; that a copartnership exists; that these defendants and these plaintiffs are members of a copartnership; that a failure to agree upon a corporation, or upon the terms under which they would incorporate, has the effect, under this tentative contract, of creating that which neither of the parties contemplated, and neither of the parties has in fact consented to, to wit, a copartnership.

2. **PARTNERSHIP:**  
the relation:  
necessity for  
contract rela-  
tion.

It is true that, where there is an attempt to organize a corporation, and the parties fail to effect a legal organization, but continue doing business under the corporation name, they may be held as copartners. But this would be only on the basis of estoppel, and against third persons, but not as between themselves. Partnership is a contractual relationship, and has its basis and foundation on contract between the parties. It takes two parties to make a contract. What parties contract to do, that is what they are bound to do, in law. What they agree among themselves to be, that is what they are, in contemplation of law, as between themselves. It was never contemplated here that these parties should assume any partnership relationship, nor is there anything in the contract to suggest that it was the thought of any of the parties to it that a partnership relationship was created or would exist, or that rights and duties were created between them as such. Whether what has been done might estop either of these parties to deny a partnership relation as to third parties, is a question we do not determine; but certainly there is no estoppel between the parties themselves, who have acted with full knowledge of all matters, and in the full light of the understanding of each, from which an estoppel against one or the other can be invoked. Contracts entered into by the Van Oels, in the name of the Beaver

Valley Sand & Gravel Company, and contracts made by them in that name, by which the defendants sought to bind the plaintiffs, are not supported by any right conferred upon these defendants in the contract. An injunction looks to the future. It is to restrain what is threatened; and the evidence shows that these defendants contemplated proceeding further in the matter of making contracts in the name of the nonexistent entity, and are seeking to bind the plaintiffs and their property by those contracts. They are so clearly without authority in this matter that the court should have restrained them from so doing. To allow them to make contracts for the delivery of sand and gravel from plaintiffs' property, in the name of the Beaver Valley Sand & Gravel Company, is to permit them wrongfully to make contracts which might bind the plaintiffs to the performance of these contracts, and to subject them to liability for damages for a breach thereof, or at least to the annoyance of litigation. To allow them to purchase machinery and to install the same on plaintiff's land, in the name of the company, on the assumption that the plaintiffs were members of said company, and that the Beaver Valley Sand & Gravel Company was a copartnership, of which plaintiffs were members, would be to allow them to pledge the plaintiffs' credit to the discharge of obligations so assumed, and this without authority of the plaintiffs, and without the existence of a copartnership entity, in fact or in law, legally authorized to bind the plaintiffs.

We do not determine whether the court should have cancelled this contract or not, but of this we are certain: that the court should have enjoined the defendants from entering upon plaintiffs' land or removing any sand therefrom, or contracting to do so, and from making any contracts in the name of the Beaver Valley Sand & Gravel Company, and from purchasing any material in the name of the Beaver Valley Sand & Gravel Company, and from attempt-

ing to create any liability, or obtain any credit on account of these plaintiffs, or the Beaver Valley Sand & Gravel Company; and for this reason, the cause is reversed and remanded for decree in accordance with this opinion.—*Reversed and remanded.*

WEAVER, PRESTON, and STEVENS, JJ., concur.

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PACKERS NATIONAL BANK, Appellee, v. JOSEPH MICHENER, Appellant.

**BILLS AND NOTES: Transfer by Delivery—Surrender by Collateral Holder—Warranty.** One who purchases a note at a time when it is held by another as collateral security, and, at the request of the seller, pays the purchase price by check to the collateral holder, may not deny liability on the check on the ground that the purchased note was a forgery, it appearing that the collateral holder, on receipt of the purchaser's check, cancelled the seller's debt, and delivered the collateral to the purchaser thereof. Under such circumstances, there is no warranty by the collateral holder of the *title* or *validity* of the note. (See Sec. 3060-a65, Code Supp., 1913.)

**TRIAL: Instructions—Applicability to Evidence—Refusal to Submit Issue.** Issues wholly without support in the evidence must necessarily be withheld from the jury.

**SALES: Rescission—Restoration of Status Quo.** One who would rescind a contract of sale must first restore, or offer to restore, that which he has received under the contract.

*Appeal from Pottawattamie District Court.—O. D. WHEELER, Judge.*

SEPTEMBER 22, 1917.

REHEARING DENIED MARCH 15, 1918.

ACTION at law to recover amount of check drawn by defendant in plaintiff's favor upon the First National Bank of Council Bluffs. Trial to jury. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*



*Fremont Benjamin and Verne Benjamin*, for appellant.

*John M. Galvin and William J. Coad*, for appellee.

WEAVER J.—Prior to the transaction between the plaintiff bank and the defendant, one Axel E. Grandjean became indebted to the bank, and secured payment of such debt by the deposit of a promissory note and mortgage for \$2,500, purporting to have been made by one Hanson to one Johnson, and assigned by the latter to Katherine Grandjean. Thereafter, Axel E. Grandjean negotiated a sale of the collateral note and mortgage to the defendant, Michener, who undertook to pay therefor by the conveyance of a tract of land, and in addition thereto, to pay Grandjean the sum of \$960.20. Instead of paying this difference direct to Grandjean, Michener, with Grandjean's consent, gave his check for that amount to the bank. Of the amount of this check, the bank applied \$820 to the payment of Grandjean's debt, and deposited the remainder to his credit, and surrendered the notes which evidenced such debt. Before the check was presented to the bank on which it was drawn, Michener stopped payment thereon, because of information obtained by him that the note and mortgage were forgeries and worthless.

Suit being brought upon the check, defendant answered, admitting the making of the instrument, but alleging that it had been obtained from him by fraud and misrepresentation on the part of Grandjean, participated in by the bank, by which he was induced to believe the said note and mortgage to be valid instruments. He further alleges that the mortgage was upon land in Nebraska, and was not subscribed by witnesses, as is required by the laws of that state, and that, having discovered such defect, pending the negotiations, he refused to complete the deal until such defect was corrected; and it was then and there agreed between the parties that the check should not be payable until this was done; and

1. **BILLS AND  
NOTES:** transfer by delivery: surrender by collateral holder: warranty.

that such correction has never been made. He further alleges that this agreement was made at the bank, and in the presence and hearing of its officers.

In submitting the cause to the jury, the court charged that there was no evidence in the record to support the finding of fraud or false representation on the part of the bank or its officers, but did submit the issue as to whether there was any agreement or understanding that payment of the check should be conditioned upon Grandjean's procuring the mortgage to be properly witnessed. In so submitting the case, the court told the jury that, if this claim was found to be true, and defendant had offered to return the papers which he had received at the time of delivering the check, then the plaintiff was not entitled to recover anything, and the verdict should be for the defendant.

2. TRIAL: instructions: applicability to evidence: refusal to submit issue.

I. Did the trial court err in refusing to submit to the jury the question whether the bank was guilty of any fraud or misrepresentation?

We find no error in this respect. While it is charged that "the plaintiff and Axel E. Grandjean represented to defendant that the said mortgage was a valid and a good mortgage," and that they "did conspire together to sell such worthless mortgage and note to defendant, representing the same to be good," when it was, in fact, a forgery, we find no evidence on which the truth of such allegation could properly be found. There was an utter absence of evidence tending to show any combination or collusion between the bank and Grandjean to swindle the defendant. It appears that the bank did believe the mortgage to be a valid instrument; for it had lent Grandjean \$800 on the strength of the security it furnished, and if it was, in fact, a forgery, there is not the slightest showing that its fraudulent character had come to the bank's notice until defendant himself discovered it, after his purchase of the paper. The defendant

does not swear that he asked the bank officer whether the mortgage was valid, nor does he say that the officer told him it was valid, nor that the officer claimed to know anything concerning the mortgaged property or its value, or the title thereto. The most he says is that he asked the assistant cashier if it was a good note and mortgage, and received an answer in the affirmative. This is denied by the witnesses for the bank; but, even assuming the statement to be true, it is not enough of itself to sustain the charge of fraud or false representation. The bank is not in any manner shown to have been a party to the fraud, if any, by which these papers were brought into existence or put into circulation. Grandjean himself was not a party to the making of these instruments, and there is no evidence that, at the time he deposited them as collateral, or when he disposed of them to defendant, he knew of their forged character. It is probable that, as against him, even though he acted in good faith, the defendant could sustain a plea of want or failure of consideration; but that is not a matter for our present consideration. Proof of the alleged forgery alone has no probative value in support of the plea of fraud and false representation on the part of the bank, and the issue upon this plea was properly withdrawn from the jury.

II. But counsel argue that the legal title to the collateral was in the bank, and that the transaction should be treated as a sale of such collateral by the bank. Were this correct, and such plea had been made, it may be admitted that, the consideration for such purchase by the defendant having wholly failed, plaintiff could not enforce collection of the check, notwithstanding its entire good faith in the transaction. But no such state of facts is shown. While the bank, when holding the collateral, was, in a qualified sense, its owner, such title was held as security only, and Grandjean, as equitable owner, had the right to sell the same, subject to the bank's claim, and to direct the bank

to deliver the paper to the purchaser, upon payment of the debt for which such collateral had been deposited. In recognizing such right, and delivering the collateral to the purchaser, the bank cannot be held to warrant the title, or be compelled to reimburse the purchaser for any loss sustained if the paper prove worthless.

III. The one issue presented which has any support in the record is that which is raised by the plea that the check was delivered to be paid only on condition that witnesses to the execution of the mortgage should be supplied. The testimony of the defendant as a witness tended to support this answer, but the jury appears to have found against him upon this question, and this, we think, forecloses further discussion concerning it.

3. SALES: rescission: restoration of status quo.

We find no just ground for counsel's criticism of the court's instruction which made the return or tender of the collateral paper which the bank surrendered on receiving the check essential to his right to refuse payment. The answer expressly pleads an offer to return both the collateral note and mortgage, and the rule which required such showing applied equally to the notes which the bank held against Grandjean. The court, therefore, in Paragraph 15 of its charge, properly told the jury that, if these notes were delivered to the defendant by the bank upon receiving his check, he could not rescind the transaction and repudiate his check, if he did not return or offer to return the notes so surrendered to him. This seems to be a self-evident proposition. It is one of the most familiar principles of the law governing such cases that a party will not be permitted to rescind or deny his contract, even for good cause, except upon condition that, so far as possible, he restore to the other party all that he has received by virtue of the agreement which he repudiates.

IV. Some other exceptions are argued, but the questions

raised are ruled adversely to the appellant by the conclusions we have already announced, and we will not extend this opinion for their discussion.

We find no reversible error in the record, and the judgment below is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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J. E. WILLIAMS, Appellee, v. C. L. HERRING et al., Appellants.

**PARTNERSHIP: The Relation—Sharing Profits but not Losses.** A

- 1 sharing in both profits and losses is essential to the existence of a partnership. So held where one of the alleged partners received a stated wage, plus a percentage of *profits*, but in no wise bore any of the *losses*.

**TRIAL: Method of Trial—Numerous Involved but Non-Mutual Ac-**

- 2 counts. The mere fact that issues will require an examination and consideration of an *exceptionally* large number of credit and debit items of non-mutual accounts presents no ground for transfer from law to equity. *Convenience* in trying the cause is not ground for transfer to equity.

PRINCIPLE APPLIED: Defendant established a wholesale and retail oil business *for which he furnished the entire capital*. Plaintiff was to *manage* the business for five years at a certain wage per month, and in addition, was to have (a) 30% of the yearly profits, and (b) the right at any time to buy 30% of the business at the cash value thereof. All accounts attending the business were kept under plaintiff's direction and supervision as manager. After some four years, plaintiff brought action to recover (a) the said 30% profits, and (b) damages, because of defendant's failure to allow plaintiff to buy 30% of the business. To determine these issues involved an examination and consideration (1) of many leases and contracts running for different terms, (2) of the expense attending the erection of buildings, tanks, and equipment, (3) of the items of depreciation on the equipment, and (4) of the condition of the accounts for the purchase and sale of the oils handled, and for help, advertising, etc. Manifestly, these different and varied items were *very* large. *There were no mutual accounts between the parties*. Held, no grounds for equitable jurisdiction were made to appear.

*Appeal from Polk District Court.—T. H. GUTHRIE, Judge.*

DECEMBER 11, 1917.

REHEARING DENIED MARCH 15, 1918.

ACTION at law to recover compensation upon a contract, and damages for an alleged violation thereof. Defendant moved to transfer the trial to equity, and this appeal is from the judgment of the district court overruling said motion.—*Affirmed.*

*Clark & Byers*, for appellants.

*George A. Wilson*, and *Ayres, Strauss & Shaw*, for appellee.

1. PARTNERSHIP:  
the relation:  
sharing profits  
but not losses.

STEVENS, J.—I. Plaintiff's petition, which is in two counts, is based upon the alleged violation by defendant of certain terms of a written contract, entered into on the 21st day of March, 1913, between the parties hereto, by the terms of which the defendant agreed to establish a wholesale and retail oil and gasoline business, as a department of the business at that time conducted by him in the city of Des Moines, for the purpose of handling oils and gasoline of all kinds and description at wholesale and retail, same to be conducted as a branch to the principal business of defendant. All necessary capital up to \$50,000 was to be furnished by the defendant, the business to be located, so far as possible, in the buildings then occupied by defendant, the office facilities, credit rating, and other branches thereof to be employed and used in the conduct thereof without charge, except a pro rata charge for overhead expenses, based upon the actual cost to defendant of the items of rent, light, heat, office expenses, and materials furnished. Plaintiff agreed to devote his entire time and attention to the management of the department of the business referred to in said contract, for which it was agreed that he should receive as full com-

)  
pensation \$125 per month, payable monthly, and in addition thereto, 30% of the net profits of said business, to be determined annually as of the 31st day of December of each year, and to be divided and distributed as soon thereafter as convenient. It was further agreed that said contract should be in full force and effect for a term of five years, and plaintiff was therein given the option personally to, at any time during the life of said contract, purchase any part of the said business covered by said contract, up to 30% of the actual amount invested therein, without any addition for good will, the purchase price thereof to be the cash value of the amount purchased, to be determined by the net charge upon the books of defendant to the department covered by said contract, showing the actual amount invested therein.

Plaintiff, in Count 1 of his petition, alleges that he entered into said business and continued therein until on or about April 1, 1917; that he has received as compensation \$125 per month only; and that the net income of said business, during the time he conducted same, was \$40,000: and he prays judgment against the defendants for 30% thereof, or \$12,000. For a second cause of action, he alleges that, on or about the 15th of March, 1917, and during the life of said contract, and while he was yet in the employ of defendant, he sought to exercise his option, under the terms thereof, to purchase 30% of the value of the department of defendant's business covered thereby, but that defendant refused to convey same to him, or carry out the terms thereof in relation thereto; that the value of said business exceeded the actual amount invested therein in the sum of \$45,000: and he prays judgment upon this count of his petition for \$13,500, and in the full sum of \$25,500.

The defendant, for answer to plaintiff's petition, admitted the execution of the contract, and the payment of \$125 per month, and denied the remaining allegations thereof. Defendant, for further answer, alleges that defendant

entered into contracts and leases for the right to use and occupy the real estate necessary for the conduct of said business; that same extends over a long period of years; that defendant contracted for and erected large buildings, oil tanks, and other equipment for the handling and conduct of business covered by said contract; that defendant purchased a large stock of oil and other products, which was continuously replenished, from time to time, in the conduct of said business; that defendant employed a large force of salesmen, stockmen, bookkeepers, and other employes, and expended large sums in advertising and placing the products of said business on the market; that the business was conducted by plaintiff as manager; that the books showing the transactions of said business were kept under the direction of plaintiff; and that same are in the possession of the department of defendant's business covered by said contract; that the same contain a vast number of items of debit and credit; that said business should be charged with the expense of buildings, leases, tanks, and equipment of every kind, together with the numerous items of expenses incident to the carrying on of said business; and that, in determining whether said business yielded a net income, it will be necessary to examine and go over all of the items upon said books, and the transactions of said business, and also the question of depreciation of the value of buildings and equipment; and that same can only be properly and efficiently done by an accounting: and he moved that this cause be transferred to equity for trial, which motion was by the court overruled.

The foregoing is a sufficient statement of the issues to indicate the grounds upon which appellant seeks to have the trial of this cause transferred to equity. The contention of appellant is that the relation between the parties is in the nature of a partnership, and that this action cannot be maintained until there has been a determination by a



court of equity whether the business conducted by the plaintiff in fact yielded a profit. There is no controversy between the parties but that, if the contract created a partnership relation, this cause should be transferred to equity and the accounts there adjusted; but it is quite clear that no such relation was created by the contract or is shown by the pleadings to exist between the parties. Plaintiff was under no provision of the contract to share in the losses of said business, and same was to be conducted as a department or branch of the business in which defendant was at that time engaged, under the name of the Herring Motor Company.

It has been repeatedly held by this court that participation in the profits of a business alone does not constitute a partnership. There must be a sharing of losses. *Porter v. Curtis*, 96 Iowa 539; *Winter v. Pipher & Co.*, 96 Iowa 17; *Haswell v. Standring*, 152 Iowa 291. The contract considered in *Porter v. Curtis*, supra, was, in its provision for a share of the profits, quite like the contract involved in this controversy. In that case, the court said:

"It is very plain that the contract, as expressed in the writing, is not a contract of partnership. It is a hiring at a stated salary of \$1,200 a year, and a share of the profits. Porter undertook to devote his time to the business of the defendants as an engineer and draftsman, and attend the letting when it became necessary. It is well settled in this state that a mere participation in the profits of a business does not constitute a partnership as between the parties. There must be a sharing of the losses."

All of the capital of said business was to be furnished by appellant up to \$50,000, and appellee was to have no interest in the capital or equipment of said business, unless he purchased and paid therefor on the basis set forth in said contract, but was to receive, as additional compensation, 30% of the net income of said business, to be ascer-

tained and paid as provided in said contract. The pleadings do not show that the relation of partners existed between the parties.

II. The principal contention of counsel for appellant, however, is that the ascertainment of the net income, if any, of said business necessarily involves the examination and consideration of all of the items of income received and expense incurred in the conduct of said business; that numerous other questions, such as depreciation in the value of buildings and equipment, taxes, losses, etc., must be considered; and that the number of items involved is so great that same can be properly tried and determined only by a court of chancery.

Plaintiff alleged in his reply that there is no dispute between the parties as to the "amount of commodities purchased and sold by the plaintiff and defendant under said contract; that there is a dispute as to certain charges for expense and depreciation, and of not exceeding twenty-five items; that the defendant has now and has had in his possession all the books and records in relation to said business." Of course, the allegations of plaintiff's reply are not controlling; but, as plaintiff was in charge of and managed the business covered by the contract, the statements thereof afford some insight into the probable extent of the actual controversy between the parties. Attached to plaintiff's petition is a series of interrogatories, intended to elicit from defendant a full and complete statement of the items of debit and credit shown upon the books of said business. It does not appear from the pleadings that there are mutual accounts to be considered, but rather that all of the accounts are on one side, and that the trial of the first count of plaintiff's petition involves only the determination of the question whether said business yielded a net income. Undoubtedly, the number of items on the books and the transactions cov-

2. TRIAL: method of trial, numerous involved but non-mutual accounts.

ered by the period of said business will be cumbersome and difficult to present to a jury; and yet, so far as the pleadings disclose, the accounts are not complicated or intricate, but vast in point of numbers. It is a matter of common experience that, in the trial of cases of this character, items of account not in dispute are practically eliminated by agreement of counsel, and that accounts involving great numbers of items and vast sums of money are presented in such a way as to reasonably be within the understanding and comprehension of a jury.

Plaintiff, in the first count of his petition, seeks to recover 30% of the net income of the business in question. Appellant alleges that the books were kept under plaintiff's directions, and are in the office where same were kept. Apparently, the principal reason for seeking a transfer of this cause to equity is that same can there be much more conveniently, and probably more efficiently, tried than at law. Conceding that this is true, yet the pleadings do not disclose a controversy arising out of a matter cognizable in a court of equity, and the relief sought upon the first count is for a sum alleged to be due as compensation, and upon the second count, for damages based upon an alleged violation of one of the provisions of said contract. The question of mutual accounts is not, under the pleadings, involved. The fact that the controversy involves a large number of items of debit and credit arising out of many business transactions, and that same could be more conveniently tried to the court, is not a ground of equitable jurisdiction. The test is not whether the cause can be more conveniently or satisfactorily tried and determined by the court than by a jury, but the accounts must be mutual, requiring an accounting, or there must be some other ground of equitable cognizance not shown to exist in this case. *McMartin v. Bingham*, 27 Iowa 234; *Faville v. Lloyd*, 140 Iowa 501; *Galusha v. Wendt*, 114 Iowa 597; *Marks Hat Co. v. Slatnik*, 178 Iowa

370; *Bradford E. & C. R. Co. v. New York, L. E. & W. R. Co.*, 123 N. Y. 316 (25 N. E. 499).

In our opinion, plaintiff's cause of action upon both counts was properly brought at law, and he is entitled to a trial thereof by jury. The ruling and judgment of the district court are—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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WILLIAM YOUNG, Appellee, v. JAMES A. HAYES, Appellant.

**BILLS AND NOTES:** *Transfer by Indorsement—Non-Presumption as to Ownership.* The law does not presume that a note payable *to order* belongs to a party, from the naked fact that his name appears on the back thereof as indorsee. Evidence sufficient to show *delivery* to such indorsee is imperatively necessary. (Sec. 3060-a30, Code Supp., 1913.)

*Appeal from Dubuque District Court.*—J. W. KINTZINGER, Judge.

DECEMBER 11, 1917.

REHEARING DENIED MARCH 15, 1918.

ACTION at law on a promissory note for \$1,000, dated July 21, 1903, payable to Peter Kiene, and endorsed "without recourse" to the plaintiff. At the close of the testimony, the court directed a verdict for plaintiff for the full amount of said note. Defendant appeals. The facts are fully stated in the opinion.—*Reversed and remanded*.

E. E. Bowen, for appellant.

T. J. Paisley and William Graham, for appellee.

STEVENS, J.—The note sued upon is in the usual form of a negotiable promissory note, made payable to the order of Peter Kiene, and signed by Jas. A. Hayes. Numerous endorsements appear upon the back thereof, from which it ap-

pears that interest was paid thereon at the rate of 6% to July 21, 1909, and thereafter at 5½% to July 20, 1912. It is alleged in plaintiff's petition that he delivered \$1,000 to Peter Kiene & Son, Dubuque County, Iowa, to be loaned by the latter for him. Plaintiff testified that, at the time of delivering the \$1,000 to Kiene, the latter gave plaintiff a receipt therefor; that interest was regularly paid to him, as above stated, on said \$1,000; and that Kiene entered the note in question in plaintiff's book, kept by him; but that he did not receive possession of the note until after the death of Kiene.

The defendant, in answer, admitted the execution to the said Kiene of a note similar in terms and amount to that sued upon, but averred payment thereof, denied that same was ever delivered to plaintiff or that he was the owner thereof; and stated that, if the note in question at any time became the property of plaintiff, it was obtained by or through said Kiene, who was, at the time, acting as the agent of plaintiff, and without knowledge of the defendant; and that payment thereof was made to the said Kiene as agent of the defendant. The original note is claimed by plaintiff to have been attached to a claim filed in the bankruptcy court against the estate of Peter Kiene, and he claimed that he was unable to find or produce the same, but introduced what appears to have been a true copy thereof.

Plaintiff at no time had any conversation with defendant concerning said note until after the death of Kiene, and defendant claims that he had no knowledge whatever that plaintiff was the owner of, or claimed any interest in, said note, until he demanded payment thereof.

Defendant, called as a witness in his own behalf, testified, over the objection of plaintiff, that the note executed by him to Kiene was in payment for railroad stock, of the par value of \$1,000; and that, at the time said note was executed, Kiene told him that if, at any time, he became

dissatisfied with the stock, he should return it to him, and he would cancel the note; that some time in 1909, defendant offered to return the stock to Kiene, who agreed to receive same, and in March, 1910, the same was returned to him, but the note was not, at the time, taken up by the defendant; that, at the time the stock was returned, it was understood between defendant and Kiene that same was in full satisfaction and payment of the note. The endorsement upon the note,—which is as follows: "Pay to William Young or order without recourse on me. (Signed) Peter Kiene,"—is not dated, and no evidence was offered by either party to show when the endorsement was placed thereon.

The court admitted the testimony of the transaction between defendant and Kiene over the objections of plaintiff, but reserved ruling thereon until the evidence was closed. Upon motion of plaintiff for that purpose, all of defendant's testimony was stricken from the record, and a motion for a directed verdict in favor of plaintiff sustained, and verdict returned by the jury in accordance with the court's direction.

The ground of plaintiff's objection to the above testimony, upon which same was stricken, was that defendant was incompetent, under Section 4604 of the Code, to testify thereto; and that the claimed payment, if made to an agent of plaintiff's, was not in cash, and the agent is not shown to have had authority to receive payment in anything but cash. It is important in this connection that defendant claims that he purchased the railroad stock of Kiene and gave his note therefor, so that Kiene did not loan to defendant the \$1,000 deposited by plaintiff with him to be loaned. The arrangement to return the stock if not satisfactory, upon doing which Kiene agreed to cancel the note, was strictly an arrangement between appellant and Kiene, as a part of the transaction for the purchase of the railroad stock, and had nothing whatever to do, directly or indirectly, with any

transaction of Kiene's as the agent of appellee to loan the \$1,000. As to this transaction, there is no evidence that Kiene was the agent of appellee, or that he was not acting wholly for himself.

If Peter Kiene acted as the agent of plaintiff only for the purpose of loaning \$1,000, then Kiene was not his agent for the sale of railroad stock, and the note in question, which defendant claims was given therefor, did not, upon the execution and delivery thereof to Kiene, become the property of plaintiff. If plaintiff was, at the time of the trial, the owner of said note, he must have become such by purchase, or some other arrangement between himself and payee. Section 3060-a30 of the Supplement to the Code, 1913, provides:

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery."

As before stated, the note in question bears the endorsement of the payee to plaintiff; but that is not sufficient, in itself, to transfer title thereto to plaintiff. The negotiation must have been completed by delivery of the note. It is earnestly contended by counsel for appellant that the evidence wholly fails to establish such delivery. Plaintiff testified that he never saw the note and did not know of the endorsement on the back thereof until after Kiene's death, nor do we find any evidence in the record of a transaction between plaintiff and Kiene by which the former purchased or became the owner thereof.

The only transaction shown in evidence between plaintiff and Kiene is the deposit of \$1,000 by the former with the latter, to be loaned upon good security, and the payment to plaintiff of interest on said \$1,000, for part of the time at 6% and the rest of the time at 5½%. If plaintiff left

\$1,000 with Kiene to loan for him upon good security, Kiene's authority was limited to doing that for which plaintiff employed him. There is no evidence tending to show that plaintiff authorized Kiene to sell railroad stock for himself, take a note therefor, and transfer the same to plaintiff, without his knowledge or consent, and compel him to accept the same in satisfaction of said deposit. The \$1,000 note was executed to Kiene in payment for railroad stock, and title to the note passed to Kiene, and not to the plaintiff. Plaintiff does not claim to have purchased the note from Kiene; that it was ever the subject of conversation or negotiation between them; that he ever accepted same in payment of said deposit; that he paid \$1,000 therefor; that he knew, prior to the death of Kiene, that he owned said note, except as hereinafter stated.

We are unable to determine, from the record before us, whether the note was in the possession of Kiene at the time of his death, or whether same had been transferred to and placed with the private papers of plaintiff, which he testified were in Kiene's safe for safe-keeping. Plaintiff, however, does claim that Kiene entered said note on his book with other loans of plaintiff, and that he paid plaintiff the interest, as above stated. No other evidence of delivery or of the purchase of said note by plaintiff from Kiene appears in the record.

In *Irwin v. Deming*, 142 Iowa 299, the evidence showed that plaintiff purchased the notes there in controversy from one Crocker, who was cashier of a national bank in which plaintiff kept his private papers; that he examined the notes, saw the signatures and the endorsement, paid therefor by check on the bank, and left them with his other papers in his private box, with the authority to Crocker to collect for him. The court said:

"True, the witness does not say, in so many words, that he took the notes in his own hands, or that he with his own



hands placed them in his private box; but such is the natural and reasonable interpretation of his language. But, even if he did no more than examine the instruments as they lay before him upon the bank counter or table, and signify his acceptance of the offer of sale, and then, after paying the price, request the cashier, who was his agent for the purpose of collection, to deposit them in his box, we can conceive of no good reason why that would not be a good delivery. What constitutes delivery is, in a large degree, dependent upon the intent of the parties. The contents of a private box in a bank or safety deposit vault are, in a legal sense, in the actual possession of the owner or lessee of the box, even though he have no authority or control over the building or vault in which it is kept. Nor is his possession any less perfect if, for the convenience of his business, he intrusts a key to the cashier, with authority to remove the papers therein for the purposes of collection. Can there be the slightest doubt that the parties to this transaction intended it as a completed sale and delivery of the notes? They had the subject of the sale before them; they had mutually agreed upon terms; the price was paid and accepted. The notes were there in the power of the appellant, to take them and carry them away if he so desired. Instead of so doing, he either placed them in his private box or left them for Crocker to deposit there. When the notes were placed in the box, there was an actual, visible change of possession, although it was in the power of Crocker to abstract or convert them."

In the above case, it will be observed that plaintiff purchased and paid for particular notes which were passed from the possession of Crocker to plaintiff's private box. In the case at bar, as above stated, there is no evidence that Kiene ever offered the note to plaintiff, either as his agent for the purpose of loaning the money, or as the owner of the note for the purpose of negotiating a sale thereof to

plaintiff; or that plaintiff ever saw or knew anything about the note, except the entry on his book, and the payment of interest to him, as before stated. ' .

To constitute a sale of negotiable paper, if payable to bearer, delivery alone is sufficient; if to order, it must be by endorsement, completed by delivery. *Roy v. Duff*, 170 Iowa 319; *In re Estate of Wearin*, 167 Iowa 535; *Builders Lime & Cement Co. v. Weimer*, 170 Iowa 444; *Irwin v. Deming*, *supra*.

Plaintiff never saw the note until after Kiene's death, knew nothing of the endorsement thereon of interest payments or to plaintiff, knew only of the existence of the note from what appeared on his book, had no transaction with Kiene except the deposit of \$1,000, to be loaned on good security, and the receipt from him of interest. We reach the conclusion that the evidence is insufficient to show delivery of said note to plaintiff, or that he was, at the time of the trial, the owner thereof.

We need not discuss the remaining questions presented upon this appeal, as they may not arise upon a retrial of this case. For the reasons above indicated, the judgment of the lower court is reversed, and cause remanded.—*Reversed and remanded*.

GAYNOR, C. J., WEAVER and PRESTON, J.J., concur.

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MAUDE ARMSTRONG, Appellee, v. B. J. CAVANAGH, Appellant.

**EVIDENCE:** Parol as Affecting Writing—Subject-Matter Not Covered by Writing. Evidence of an oral contract, contemporaneous with a written contract, but on a subject-matter on which the written contract is silent, is not violative of the parol evidence rule.

**PRINCIPLE APPLIED:** A tenant rented, by written lease, a specified apartment in an apartment house at a specified rental. The only reference in the lease to garage privileges was: "An extra charge of \$5 per month without heat and \$7.50 per

month with heat, per car in the garage." This clause was inserted in the lease at the instance of the tenant. The garage apartment was in the rear of the apartment house, and on the same lot. *Held*, the tenant might show that, contemporaneously with the signing of the lease, he had an oral contract with the landlord by which he (the tenant) agreed to use the garage, and the landlord agreed to heat it to a degree sufficient to prevent freezing.

*Appeal from Des Moines Municipal Court.*—ESKIL C. CARLSON, Judge.

MARCH 18, 1918.

PLAINTIFF and defendant, on the 11th day of September, 1916, entered into a written lease for an apartment on the third floor of the Wright Building, in Des Moines, Iowa. This is an action to recover rent therefor. The defendant, in answer, alleged an oral contract to lease room in plaintiff's garage, situated upon the same lots and in the rear of the apartment house, for his automobile, and that, by the terms thereof, plaintiff agreed to furnish sufficient heat to protect his automobile from damages on account of the weather; that he placed his automobile in said garage on or about the 13th day of November; that he was, thereafter, absent from the city until the 17th, and, upon his return, found the water in the radiator frozen, resulting in damages to his automobile in the sum of \$286. He asks that this amount be offset against plaintiff's claim for rent.

The oral contract is denied by plaintiff, who asserts that the only contract touching the use of said garage was the written lease, which contained the following language: "An extra charge of \$5.00 per month without heat and \$7.50 per month with heat per car in the garage." These words were written in the lease by defendant at the time same was signed by him. Defendant took the stand in his own behalf; but the court, upon objection of counsel, refused to permit

him to testify to the alleged oral lease, or to the damages to his automobile, on the ground that the written lease was complete and unambiguous, and that the evidence offered tended to vary and contradict its terms; and, at the close of the testimony, instructed the jury to return a verdict for plaintiff.

Defendant then offered to prove that, when the written lease was presented to him by plaintiff's husband, it was prepared for signatures; that the question of using the garage, and its heating, were discussed, and the price for the use thereof agreed upon, as above stated; that later, the defendant called plaintiff and talked with her over the telephone concerning the use of said garage and the conversation and arrangement made with her husband that the garage would be properly heated at all times, and that plaintiff replied that the matter would be attended to, and the garage heated when necessary; that, in September or October, he again called plaintiff's attention to the matter of heating the garage, and was assured that heat would be supplied; that, after the water in the radiator froze, plaintiff informed him that she had depended upon her husband to turn on the heat, but that it had been overlooked or neglected.—*Reversed.*

*B. J. Cavanagh, pro se, and A. K. Little, for appellant.*

*Guy A. Miller, for appellee.*

STEVENS, J.—The objection urged to the admissibility of the testimony offered on behalf of the defendant was that same sought to vary, contradict, and add to the terms of the written contract. It is, of course, elementary that evidence to do this is inadmissible; but it is the contention of counsel for defendant that, while the oral contract was discussed and agreed upon at the time the written contract was signed, it is, nevertheless, separate and distinct therefrom, and is in no sense covered thereby.

By reference to the written lease, it will be found that the leased premises are described as: "Apartment No. Five, Third east of the Wright Building, situated at 3612 Ingersoll Avenue, Des Moines, Iowa." From the evidence it appears that this apartment is on the third floor of the building. The lease does not purport to cover the lots on which the building is situated, and includes only the apartment in question, with, of course, the implied right of ingress and egress. The evidence further disclosed that the garage was located on the same lots as the apartment house, and in the rear thereof. The lease does not, in terms, include garage privileges, nor is there anything therein from which an implied right to use the same appears, unless from the clause quoted above. There is no agreement on the part of plaintiff to lease garage privileges to defendant, nor does he agree to use the same or pay rent therefor. The lease does no more than fix the price for the privilege of using space for defendant's automobile. No obligation rested upon the defendant to use the same or pay rent therefor, unless he kept his car therein.

If a contract existed between the parties, requiring plaintiff to furnish, and defendant to pay for, the use of the garage, it must have been independent of the written contract. The rental to be paid for the apartment was definitely fixed, and, in case defendant placed his car in the garage, he was to pay extra therefor, at the rate of \$5.00 per month without heat, and \$7.50 with heat. Clearly, plaintiff assumed no obligation to furnish heat, nor did she undertake to keep the garage warm, so as to prevent the defendant's automobile from freezing. Unless the evidence offered by defendant tended to vary, contradict, or add something to the written lease, it could not be excluded upon the ground that it tended to have this effect. The instrument contained no provision as to when the defendant would place his car in the garage, nor the extent to which same would be heated,

nor when the rental should be paid. The offer made by defendant was to show that, prior to the time he signed the written lease, plaintiff notified him that she would send the same by her husband, who was authorized to transact the business for her and to make arrangements for the renting and leasing of the apartment and garage; that, at the time of signing said instrument, the matter was fully discussed by Mr. Armstrong and the defendant, and it was agreed that plaintiff would furnish the heat for said garage necessary to protect defendant's automobile from freezing; that a rental of \$5.00 per month was to be paid in advance, and the additional \$2.50 per month, for the time when heat was required, at the end of the winter season, when the full amount due was known; that, subsequently, defendant talked with plaintiff over the telephone, repeating to her, in substance, the conversation had with her husband, and she then informed him that the arrangement was satisfactory, and that the heat would be furnished whenever it was necessary for the protection of the car, and agreed to the time and manner of payment of the rental for said garage; that, between the 11th of September and the 1st of October thereafter, defendant again talked with plaintiff about the matter of heating the garage, at which time he informed her that he might desire to move into the apartment shortly before the 1st of October, and requested her to be sure and furnish sufficient heat for the protection of the car; that he was keeping the same in the city, in Leachman & Claiborne's heated garage; and that he wanted to be sure that the garage would be heated.

Was this evidence improperly excluded by the court? Manifestly, upon defendant's theory, the written contract did not contain the full agreement of the parties. It was complete in so far as it related to the apartment, but did not purport to include the garage. The oral contract alleged by defendant did not tend to alter, vary, or contradict a word

or sentence of the written instrument, but related wholly to a matter concerning which the written instrument was silent, except for the clause quoted above. Parol evidence of a contemporaneous, collateral agreement not purporting to be included in the written agreement is not inadmissible upon the theory that it tends to vary, alter, or contradict the terms of the written instrument, for the reason that it does not do so. The written lease referred to an apartment, the alleged oral agreement to a garage, and the two were wholly separate and distinct in their terms and character. The evidence offered by the defendant of the alleged oral contract should have been received, and it was error for the court to exclude same. *Hall v. Barnard*, 138 Iowa 523; *Ingram v. Dailey*, 123 Iowa 188; *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92; *Murdy v. Skyles*, 101 Iowa 549; *Sutton v. Griebel*, 118 Iowa 78; *Anderson v. Thero*, 139 Iowa 632; *Horner v. Maxwell*, 171 Iowa 660; *Witthauer v. Wheeler*, 172 Iowa 225; *Chicago Tel. & Sup. Co. v. Marne & Elkhorn Tel. Co.*, 134 Iowa 253.

It therefore follows that the court committed error in excluding the testimony of the defendant, and the judgment of the lower court must be reversed.

Other questions discussed by counsel do not properly arise upon this appeal, and we need not consider them.—*Reversed.*

PRESTON, C. J., LADD and GAYNOR, JJ., concur.

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J. A. BRUCE, Appellee, v. J. A. GALVIN, Appellant.

**APPEAL AND ERROR:** Reversal—Law Actions—Insufficiency of Evidence—Right to Retrial. Reversals in law actions, on the ground of insufficiency of evidence to support the verdict for plaintiff, send the causes back to the lower court for full retrial, subject to a directed verdict should the evidence on such retrial be the same as on the former trial.

*Appeal from Marion District Court.—J. H. APPLEGATE,  
Judge.*

MARCH 18, 1918.

AN action at law, brought to recover damages on account of the alleged alienation of the affections of plaintiff's wife. The cause was originally tried to a jury, which returned a verdict for the plaintiff; and from the judgment entered on the verdict, defendant appealed. Upon hearing the appeal in this court, the judgment below was reversed, on the ground that the verdict of the jury was without sufficient support in the evidence. See 159 N. W. 586 (not officially reported). Thereafter, a procedendo was issued, and, upon the filing thereof in the district court, the plaintiff procured the reinstatement of the cause upon the trial calendar, and noticed the same for trial. At this stage of the proceedings, counsel for defendant entered a special appearance therein, for the purpose of objecting to the jurisdiction of the court to take any further action in the case except to enter judgment against plaintiff for costs. The objection so made was based upon the ground that the cause had already been fully determined and adjudicated, and that the attempt on the part of plaintiff to retry the cause is inconsistent with the opinion rendered therein by the Supreme Court on appeal. On these grounds, defendant moved the court to strike the cause from the calendar for want of jurisdiction, and to enter judgment against plaintiff for costs. The court denied the motion, and from this ruling the defendant appeals.—*Affirmed.*

*W. H. Lyon*, for appellant.

*Berry & Watson* and *W. G. Vander Ploeg*, for appellee.

WEAVER, J.—It is the theory of the appellant that, this court having found and held upon the former appeal that the evidence produced on the trial was insufficient to justify



a verdict in plaintiff's favor, the decision is to be considered a final adjudication of the issue joined, and that, upon transmission of the procedendo, the district court acquired no jurisdiction to proceed further in the cause than to render final judgment against plaintiff for the costs of the action.

Were the question an open one in this state, much might be said in favor of the rule for which counsel contends. We are committed, however, to the proposition that, upon the reversal of a judgment on appeal of a law case because of insufficient evidence, the cause goes back to the lower court for a retrial, if either party demands it, unless it clearly appears from the record that, under no conceivable state of proof applicable to the issues, can the party against whom the reversal is ordered be entitled to judgment in his favor. *Landis v. Interurban R. Co.*, 173 Iowa 466; *Payne v. C., R. I. & P. R. Co.*, 47 Iowa 605; *Meadows v. Hawkeye Ins. Co.*, 67 Iowa 57. The precedents cited by appellant are not inconsistent with this holding. *Sanxey v. Iowa City Glass Co.*, 68 Iowa 542, *Shorthill v. Ferguson*, 47 Iowa 284, and *Adams County v. B. & M. R. R. Co.*, 44 Iowa 335, relied upon by appellant, are not in point. These cases were in equity, triable *de novo* on appeal, and it was there held that the losing party could not avoid the effect of a reversal by thereafter amending his pleading in the trial court and demanding a new trial.

Appellant's further proposition, that the finding or decision of this court is to be considered the law of the case, and binding upon the trial court as well as upon the litigants, is admittedly correct. But the one thing decided on the appeal was neither more nor less than that the evidence produced was not sufficient to sustain a verdict for the appellee; and if, on the retrial, the evidence offered shall appear to be only such as was before the court and jury on the first trial, then, of course, the rule referred to will be applicable, and it will be the duty of the court to direct a ver-

dict in appellant's favor. If, however, appellee shall support his claim by other competent evidence fairly tending to establish the truth of the charge made in the petition, he will be entitled to go to the jury, notwithstanding the reversal of the former judgment.

The ruling of the district court was right, and it is—  
*Affirmed.*

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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B. F. CRENSHAW, Trustee, Appellant, v. H. A. HALVORSON,  
Trustee, Appellee.

**FRAUDULENT CONVEYANCES: Transfers Invalid--Insolvency.**

- 1 Insolvency defined as such a condition of a person's affairs that the aggregate of his property is not, at a fair valuation, sufficient to pay his debts.

**FRAUDULENT CONVEYANCES: Confidential Relations--Husband**

- 2 and Wife--Indebtedness. A conveyance from husband to wife, on reasonably adequate consideration, in good-faith payment of a bona-fide debt from husband to wife, is not fraudulent, even though the husband was insolvent, and even though the conveyance will hinder or prevent the husband's creditors from collecting their claims.

**FRAUDULENT CONVEYANCES: Consideration--Transaction be-**

- 3 tween Husband and Wife. The bona-fide existence of a debt between husband and wife is sufficiently shown by evidence that the wife actually did deliver her property to the husband, and that the conduct and language attending the delivery were such as to exclude the claim of gift, and to fairly give rise to the inference that both understood that the husband would repay the wife.

*Appeal from Iowa District Court.*—R. P. HOWELL, Judge.

DECEMBER 11, 1917.

REHEARING DENIED MARCH 18, 1918.

SUIT in equity to set aside the conveyance of a forty-acre tract of land, as having been made in fraud of creditors. The petition was dismissed, and plaintiff appeals.—*Affirmed.*

*B. L. Wick and Baldwin & Baldwin*, for appellant.

*Stapleton & Stapleton and W. E. Wallace*, for appellee.

WEAVER, J.—The plaintiff, as the trustee of the bankrupt estate of Patrick J. Giblin, brings this suit in equity to subject to the payment of the debts of such estate a certain forty-acre tract of land, title to which is held by the bankrupt's wife, Ella M. Giblin. Cases of this type are of very frequent appearance in the courts, and the law governing them is well settled. As a rule, these actions turn largely, if not entirely, upon certain controverted matters of fact; and in this respect, the case before us furnishes no exception. It sufficiently appears that, in the year 1912, or 1913, Patrick J. Giblin and his brother, Mike Giblin, held some share or equity in certain property belonging to the estate of their deceased father. At the same time, Mike Giblin held a contract for the purchase of a forty-acre tract of land from one George Moore. The land was encumbered by mortgage, and Mike had made only a small initial payment on the contract. Patrick and Mike agreed upon an exchange, by which Mike took over his brother's interest in the estate property and transferred his contract with Moore to Ella M. Giblin, Patrick's wife. Later, Moore conveyed the title to her. In 1915, Patrick went into bankruptcy, and the plaintiff herein became the trustee of the estate. It is the theory of plaintiff that the taking of the title to the forty acres in the name of Ella M. Giblin was in the nature of a voluntary conveyance in fraud of creditors, and that the land is equitably subject to the payment of the claims of her husband's creditors. This is denied by the defendants. On trial to the court, it was found that the alleged fraud had

not been established by the evidence, and the petition was dismissed.

1. FRAUDULENT  
CONVEYANCES:  
transfers in-  
valid: in-  
solvency.

The testimony is very largely given over to the financial transactions of Patrick J. Giblin, from the time of his marriage until he went into bankruptcy, some fifteen years later, and especially to the question of his solvency at the time this particular tract of land was conveyed by Moore to Ella M. Giblin. We shall not attempt to recite the evidence, or to determine with any degree of certainty whether Patrick was, in fact, solvent at that date, because the right of his wife and the validity of her title do not necessarily depend thereon. It is quite evident that Patrick was then quite heavily indebted, but he also had considerable property in his own right; and, for two or more years thereafter, he continued actively in business, buying and selling property, paying some debts and contracting others; and, taking the evidence as a whole, it is fairly inferable that, in 1912 and 1913, he had a margin of several thousand dollars in the value of his property over and above his debts; though, had his creditors then united in pressing their demands and forcing him to liquidate, he might, in that sense of the word, have been found insolvent. Insolvency is a word of somewhat variable meaning. When applied to a person engaged in business as a merchant or trader, it is ordinarily defined as inability to meet one's obligations as they mature, in the ordinary course of business; but, as used generally, and as accepted generally in common speech, it means rather such a condition of a person's affairs that the aggregate of his property is not, at a fair valuation, sufficient in amount to pay his debts. Indeed, such is the statutory definition in the Bankruptcy Act itself. See 30 U. S. Stat. at Large 544, Sec. 1. That Patrick J. Giblin was insolvent, in this sense of the word, at the date of the transaction in question, is not, we think, established by the evi-

dence. But, as we have already suggested, the fact as to whether he was then solvent or insolvent is not decisive of the vital question whether the conveyance was in fraud of creditors. If the husband was, in fact, honestly indebted to his wife, and the conveyance was made, received, and accepted in good faith, in payment or satisfaction of such debt, and the consideration was not grossly inadequate, it was not fraudulent; and it will not be set aside nor the property be subjected to the payment of the husband's other creditors, even though it operates to hinder or prevent the collection of their claims.

2. FRAUDULENT  
CONVEYANCES:  
confidential  
relations:  
husband and  
wife: in-  
debtedness.

*First Nat. Bank of Wilmot v. Eichmeier*, 153 Iowa 154, 163; *Muir v. Miller*, 103 Iowa 127; *Fowler v. McDonnell*, 100 Iowa 536; *Sprague, Warner & Co. v. Benson*, 101 Iowa 678; *Mahaska County v. Whitsell*, 133 Iowa 335. The evidence shows, without substantial dispute, that Ella M. Giblin did furnish her husband \$800, soon after her marriage, and that she also brought to the farm live stock, which, with the increase, the husband sold and made use of in his business. It also shows, we think, that this was done with the mutual understanding that the wife should be reimbursed for such money and property. True, the showing of this understanding is, in some respects, vague, and it does not appear that any definite time was fixed for the payment; but business dealings between husband and wife are not apt to be expressed in exact and formal terms. It is enough if their conduct and language with respect to the subject-matter be such as to raise the fair inference that the money or property was not received by the husband as a mere gift or gratuity, but with the expectation on the part of both that, at some time, he will account or make payment therefor to her. It is shown that they did have an accounting, and made estimates of the amount justly due

3. FRAUDULENT  
CONVEYANCES:  
consideration:  
transaction be-  
tween hus-  
band and wife.

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the wife; and that this land was deeded to her in payment. The margin in the land over its encumbrances was small, and the consideration paid by her was not inadequate. It is true that the courts will carefully scrutinize transactions of this nature between husband and wife, and if such conveyance is found to be tainted with fraud, it will unhesitatingly be set aside. But there is no presumption of fraud because of the family relationship of the parties. The burden is at all times upon the party attacking the conveyance to prove fraud. The trial court found that the plaintiff had not sustained this burden by the requisite quantum of proof, and with this conclusion we are disposed to agree. The decree appealed from is, therefore,—*Affirmed.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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IN RE ESTATE OF JOEL DOORE.

**APPEAL AND ERROR: Review, Scope of—Findings of Fact—Pro-**

- 1 **bate Accounting.** A finding by the probate court of the amount due by an administrator to an estate on final accounting is conclusive on appeal, unless plainly against the clear preponderance of the evidence.

**WILLS: Rights of devisees—Life Tenant Refusing Possession—**

- 2 **Rents and Profits.** A life tenant who refuses to take possession of the devised property when such is his right, and the right is unobstructed, may not hold his testator's estate for rents and profits. And the life tenant's administrator has no greater right.

**WILLS: Construction—Life Estates—Power of Alienation. The**

- 3 **right of a life tenant (with remainder over) to sell the devised property, and even to consume the proceeds, does not carry an unexpended balance into the estate of the life tenant, to the defeat of the remaindermen.**

*Appeal from Floyd District Court.—J. J. CLARK, Judge.*

MARCH 18, 1918.

THE final report of H. C. Doore, as administrator *de bonis non* of the estate of Joel Doore, deceased, having been filed in court for approval, A. R. Eggert, as administrator of the estate of Sarah Doore, deceased, appeared, and made objections thereto on grounds stated in the opinion. After being amended under direction of the court, the report was approved, and the administrator *de bonis non* discharged. The administrator of the state of Sarah Doore appeals.—*Affirmed.*

*Eggert & Eggert*, for appellant.

*M. Hartness*, for appellee.

WEAVER, J.—The presentation of this case is unduly obscured by a mass of records setting forth matters of a merely formal character, and involved in no dispute. If, however, we have succeeded in sifting the grain from the chaff, the material facts are about as follows: In the year 1898, Joel Doore and his son, Allen J. Doore, together owned a quarter section of land in Floyd County. Whether this ownership was in severalty or in common is not shown, nor is it very material to know. About the date named, they entered into a contract, which is spoken of as a partnership lease of the land to Allen W. Doore, the son of Allen J. By the terms of this agreement, the lessors furnished certain live stock and other property to be kept and used on the farm, and the profits arising from the joint enterprise were to be divided, in the proportion of one half to Allen W. Doore and one fourth each to Joel and Allen J. This arrangement and the relation of the several parties to the property so provided for were continued from year to year during the life of Joel Doore, who died testate in the year 1907. By his will, which was duly probated, he devised to his surviving wife, Sarah Doore, a life estate in all his property, after which, and the payment of a legacy of \$200 each to two daughters, the entire residue was devised to Allen J.

Doore. The latter was made executor of the will, and the inventory filed by him shows that, aside from certain exempt items, the only personal estate to be administered upon was the fractional interest which the testator had in said live stock, of which Allen W. Doore was then in possession under the lease above mentioned. No change appears to have been made in the use or possession of the farm or live stock upon the death of the testator, but Allen W. Doore continued therein as before, until the death of Sarah Doore, in the year 1913. The evidence is very meager, but we think it sufficient to justify the presumption that this continued possession and use of the farm by Allen W. were by the common or tacit consent of all the parties in interest, and it follows that, so long as that relation was maintained, the rights of all said parties are to be ascertained by reference to the lease, except as the same is affected by the death of Joel Doore and the terms of his will. By the will, Sarah Doore succeeds to the right to the use of one half of the property; but it was competent for her to accept the situation as she found it, and, instead of demanding actual personal possession, to permit it to continue in Allen W., as before, in which event she was entitled to receive the rental or partnership share which would have been her husband's, had he survived. And this, we think, was the situation during all the period of the life tenancy. Allen J. Doore died in 1912, never having made settlement or final report in the matter of the estate of Joel Doore; and thereafter, another member of the family, H. C. Doore, was appointed administrator *de bonis non*, to close up the affairs of the estate. A. R. Eggert was also appointed administrator of the estate of Sarah Doore, who died in 1913.

Bearing, then, these admitted facts in mind, we may entertain some hope of understanding the following matters, more immediately connected with the controversy upon which we have to pass. In the matter of the estate of



Sarah Doore, a daughter and a granddaughter of the deceased filed a claim for support and care alleged to have been provided deceased in her lifetime, to the amount of \$2,600, and about the same time, the administrator *de bonis non* of the estate of Joel Doore filed a final report in that proceeding, upon which he asked the court's approval and for his discharge from the trust. Eggert, administrator of the estate of Sarah Doore, appeared, and opposed the approval of the report, on grounds which will later sufficiently appear. After hearing upon the objections made, and after the report had been amended in some respects, to comply with the court's directions, it was ordered approved, and, upon payment into the court of the sum of \$299.04 for the benefit of the estate of Sarah Doore, the administrator *de bonis non* was discharged. It is from this order that appeal has been taken.

Keeping in mind the fact that the estate, settlement of which is here contested, is the estate of Joel Doore alone, and that, except in an incidental way, we have here nothing to do with the estate of Sarah Doore or the estate of Allen J. Doore, the legal questions presented are not difficult of solution. The claim asserted against the estate of Joel Doore by the administrator of the estate of Sarah Doore, when reduced to its lowest or simplified terms, is: First, that, under the law, and the will of Joel Doore, his widow became the owner of certain personal property which she never, in fact, received, and the use of which she never enjoyed; and, second, that she was deprived of the use, rents, and profits of the lands by others of the heirs of Joel Doore. It is shown without controversy, and as already noted, that, aside from a few exempt items, the only personal estate possessed by Joel Doore at the time of his death was his undivided one-fourth interest in certain live stock, which was being kept on the farm by Allen W. Doore, under the terms of the lease. This property, it is manifest, was by the widow

allowed to remain on the farm, and with its increase was, for the most part, disposed of by Allen W. Doore, and by him accounted for to Allen J. Doore; and this was in accordance with the plan and custom of the business, as it had been carried on during the lifetime of Joel Doore. The administrator *de bonis non* of Joel's estate, having investigated the condition of the estate when it came into his hands, and what had been done therein by the deceased executor, Allen J., and having had an accounting with Allen W., the tenant in possession, made the report, the approval of which is here questioned. In addition to the records and files of the proceedings, substantially the only material and competent evidence is that which is given by H. C. Doore, administrator *de bonis non*, who was called into court and subjected to oral examination on the matter of his report. What prop-

1. APPEAL AND  
ERROR: re-  
view, scope  
of: findings  
of fact: pro-  
bate ac-  
counting.

erty, if any, had come into his hands for administration, and whether it was properly accounted for, and what other property, if any, had come into the hands of his deceased predecessor in the trust, and how it had been accounted for, if at all, and the amount of the unexpended remainder, if any, which the administrator should pay into court as a condition of his discharge, were all questions of fact, or of mixed law and fact, for the consideration of the trial court; and its findings thereon, unless plainly against the clear preponderance of the evidence, are binding upon this court. We shall not extend this opinion to set out the various items of evidence. The records are more or less vague, at various points. There is very little, if anything, indicating that the widow did not have the beneficial use of all the property, real and personal, during her lifetime, although the actual possession continued, as we have seen, in Allen W. Doore. That she was in any manner deprived of any of the property by the wrong on the part of her son or grandson, and that she

was in any manner deprived of her right therein without her consent, are matters of conjecture only, and not of proof. In short, we find no reason in the merits of the case, as disclosed, to discredit or set aside the findings of the trial court upon the matter of the administrator's accounting for the personal estate.

It seems to be argued, however, that the estate of Joel Doore should be held liable to the estate of Sarah Doore for the rents and profits of the land in which she held a life estate. But if she did not receive such rents and profits as they accrued, her husband's estate was in no wise liable to her for their payment. The land was there, it was hers to possess and enjoy during her lifetime, and if she did not avail herself of that right, it constituted no ground for recovery against the husband's estate. But there is no proof, nor any proper ground for assuming, that Sarah Doore was wrongfully deprived of the use and possession of the property, or that the estate of Joel Doore received any profit or advantage therefrom to her injury. There is evidence that, in the lifetime of Joel Doore, and with his consent, Allen W. Doore made his yearly accounting concerning their common or joint property with Allen J. Doore, and that this manner of doing the business was continued during the lifetime of Sarah Doore. There is no proof that Allen J. did not, in turn, make proper accounting to his mother; and, even if he failed in this respect, it would not, as we have already suggested, constitute a ground of recovery in her behalf against the estate of Joel Doore.

By the will of Joel Doore, legacies of \$200 each were provided for two daughters, subject to the widow's life estate. In the final report of the administrator *de bonis non*, he asked and was allowed credit for the payment of these legacies; and this is pointed out as a grave wrong to

2. WILLS: rights of devisees: life tenant refusing possession: rents and profits.

3. WILLS: construction: life estates: power of alienation.

the widow, or to her estate. It is somewhat difficult to understand the theory of this claim; but, if we correctly grasp counsel's point, it is that the life estate of the widow in the personal property was not limited to a mere use, but implied also a right in the widow to use and dispose of the corpus, and for that reason, the remnant remaining undisposed of by her passed, at her death, to her administrator. Assuming, for the purposes of this case (but not deciding), that the life estate of Sarah Doore in the personal property carried with it the right to consume or dispose of the principal, or corpus, the further proposition that the unexpended remnant passed to her estate has no support in the law anywhere. On the contrary, such remnant falls, at the death of the life tenant, into the remainder for which the will provides, and its application after her death by the administrator *de bonis non* of her husband's estate to the payment of the legacies provided by his will, was properly approved by the trial court.

Much is also said in argument of the peculiar merits of the claim filed against the estate of Sarah Doore by her daughter and granddaughter. But that claim is not before us for adjudication. It is not, nor could it properly be made, a claim against the estate of Joel Doore. The service on which it is said to be based was rendered to Sarah Doore after the death of Joel, and, if rendered under circumstances entitling the claimants to compensation, it is compensation to be paid for from her estate, and not from the estate of her husband, who died long before the service was rendered.

Finally, we may notice the assertion in argument for the appellant that Sarah Doore was the victim of gross fraud and imposition at the hands of her son, Allen J. Doore, and of counsel representing him. This assault upon the integrity of the son and his counsel appears to be wholly gratuitous. There is nothing whatever in the printed record, from beginning to end, to justify it. There is no plead-

ing charging or suggesting fraud, deception, or undue advantage. This court is never slow to rebuke fraud, or to set aside and nullify any advantage wrongfully obtained in the settlement of estates; but if claims or charges of that kind are to be investigated, it should be upon allegations duly made, and upon evidence duly offered. In the absence of such record, they have no place in the briefs of counsel.

We find no reversible error in the proceedings, and the order and judgment appealed from are—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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IOWA AUTOMOBILE & SUPPLY COMPANY, Appellant, v. EARL N. MANBECK, Appellee.

**NEW TRIAL:** Grounds—Misconduct of Counsel—Improper Argument. It is reversible error for counsel to *repeatedly* state to the jury that opposing counsel had objected to a jury trial (which statement was true in fact), and that said opposing counsel did not trust a jury, and fought to prevent a trial by jury.

*Appeal from Des Moines Municipal Court.*—JOSEPH E. MEYER, Judge.

DECEMBER 19, 1917.

REHEARING DENIED MARCH 18, 1918.

ACTION to recover certain commissions paid by plaintiff to the defendant by mistake, in the sum of \$225, for merchandise sold to defendant in the sum of \$48.50, and on a check made by defendant to plaintiff, upon which payment was refused, in the sum of \$185.49. Defendant denied the first two items, and admitted the execution of the check, but alleged that plaintiff had agreed to pay him any balance that might be found due, and set up a counterclaim amount-

ing to \$200 for commissions on alleged sales and expenses incurred. There was a trial to a jury and a verdict for defendant on the counterclaim for \$14.50, and this was the difference between the defendant's counterclaim and the check. Plaintiff appeals.—*Reversed*.

*Neiman & Neiman*, for appellant.

*Mulvaney & Mulvaney*, for appellee.

PRESTON, J.—Two errors are assigned: First, that the court erred in submitting the case to the jury over plaintiff's objection, because the demand for jury was not made in time; second, that the court erred in overruling plaintiff's motion for new trial because of misconduct in argument of defendant's counsel.

1. A rule of court made under Section 694-c42, Supplemental Supplement to the Code, 1915 (Municipal Court Act), provides that:

"If either party desires a jury trial, he shall file his request for the same with the clerk not later than the next day after the answer is filed."

The answer was filed December 9, 1916, and the trial commenced on December 12th. No demand was made for a jury until the case was called for trial, at which time defendant demanded a jury, and plaintiff objected. There was some discussion in the presence of the jurors, in regard to whether defendant was entitled to a jury. Plaintiff contends that defendant's failure to make the demand for a jury in accordance with the rule is a waiver of the right. Plaintiff cites *Haythorn v. Van Keuren*, 79 N. J. L. 101 (74 Atl. 502); *Phoenix Pottery Co. v. Perkins Co.*, 79 N. J. L. 78 (74 Atl. 258); *Klopp v. Chicago, M. & St. P. R. Co.*, 156 Iowa 466.

There is some claim that counsel for plaintiff finally acquiesced in a jury trial, after he had made his objection.

The trial court found as to this that, for some reason, no demand was made by either party for a jury, but that the case was treated as a jury case, if not by attorneys both for plaintiff and defendant, at least by attorney for defendant, who was led so to believe by what transpired in the assignment division, a part of which appears of record in this cause at the opening of the trial; and was of opinion that, because there was no delay in having a jury trial, there was no prejudice.

It is clear that no jury was demanded in the manner provided by the rule, and it is not clear that plaintiff did assent to a jury trial, or that plaintiff treated it as a jury case, though the court thought defendant did so treat it. But the objection is by plaintiff. We are inclined to plaintiff's view of this matter; but, in view of the confusion in the record, and because, in our opinion, the cause ought to be reversed on the second assignment, we do not definitely pass upon this point.

2. Plaintiff had the right to object to a jury trial and insist upon his claim that defendant had waived a jury because the demand had not been made in accordance with the rule. Counsel for defendant, in his argument to the jury, repeatedly referred to the matter of plaintiff's objection to a jury trial, and as to this point, the motion for new trial is as follows:

"2. For misconduct of counsel for defendant, John T. Mulvaney, in this: that he used the following language in his argument to the jury:

"That the plaintiff's attorney [Carl H. Neiman] was no man.

"That the plaintiff's attorney [Carl H. Neiman] had fought the jury, and attempted to deprive the defendant of his constitutional right of trial by jury.

"That the plaintiff's attorney was the only perfect man in the room.

"That the plaintiff's attorney did not trust a jury.

"That plaintiff's attorney [Carl H. Neiman] had induced plaintiff, and that if it had not been for the suggestions of plaintiff's attorney, plaintiff would not have thought of any allegations of fraud, they being legal conclusion and a frame-up on the part of plaintiff's attorney.

"That the charges of fraud set out in plaintiff's amended petition were the afterthought of its attorney, and would not have been made or thought of by plaintiff except as plaintiff's attorney had suggested them.

"That plaintiff's president [John H. Gibson] would have settled this action, had it not been for the acts of his attorney in inducing him to bring it; and that, when plaintiff's president was not under the influence of his attorney and the influence of this law suit and litigation, he would be friendly to defendant.

"That plaintiff's attorney scraped up the claims set forth in Count I of plaintiff's amendment to its petition, and the allegations of fraud therein contained, and that the same would not have been made except for this; and that plaintiff's president [John H. Gibson] would not have signed and swore to said petition and amendment, except on and at the direction of his attorney [Carl H. Neiman].

"That said language is now a part of the record, having been incorporated as such in two partial bills of exception, certified respectively by two bystanders, and by his honor, Jos. E. Meyer, judge.

"That the use of said language by counsel for defendant in his argument to the jury was objected and excepted to at the time, by this plaintiff, for the following reasons: that the same was improper, was not contained in the evidence or exhibits offered or introduced upon the trial of said case; that it prejudiced the minds of the jury against this plaintiff, and was used by aforesaid Mulvaney with an intent so to do; that the jury in said case was, in fact, prej-



udiced by said language, to the damage of this plaintiff thereby."

The foregoing matters were incorporated in a bill of exceptions, and presented to the presiding judge, who refused to sign the same, as presented, because he was not present during all of the argument. But a part of the matters are incorporated in the judge's bill of exceptions, and the others in a bill of exceptions signed by bystanders, and the other matters complained of are incorporated. The judge's bill of exceptions recites that he was not in the court room until called by the attorney for plaintiff, who stated to the judge that he objected to certain remarks which were being made in argument to the jury, in regard to plaintiff's attorney having fought a jury, etc.; and thereupon, the judge entered the court room, and the judge certifies to the argument had after that. The judge's bill of exceptions recites that, during the argument of this attorney, he did not caution the attorney in the use of his language. In overruling the motion, the court stated that the statements made and embodied in plaintiff's motion for new trial were not prejudicial. Defendant filed affidavits of some of the parties who, as bystanders, had signed a bill of exceptions, and others were examined in open court; and defendant and his counsel filed their affidavits, controverting and qualifying, to some extent, some of the statements in the bills of exception. Defendant moved to strike both bills of exception from the files, on various grounds; but this motion was not, as we understand the record, ruled upon; so that they both stand.

About 27 or 28 pages of the abstract are taken up in the printing of the bills of exception, affidavits, motion to strike, etc., in regard to this alleged misconduct. It is conceded by appellee that the record as presented is unusual; and it is. It is difficult to get at the exact situation, but the record is substantially as we have stated it. There

is, it is true, a discretion in the trial court in ruling on motions for new trial.

Appellant contends that counsel for defendant, without any support in the record, charged Mr. Neiman with matters which, if true, would be grounds for disbarment, under Sections 317 to 324 of the Code, and charged him with stirring up litigation, and the like, in addition to the remarks about plaintiff's objection to a jury. To our minds, the latter were highly prejudicial to the plaintiff. The demand for a jury had been opposed by plaintiff's counsel in the presence of the jury, and there was repeated argument by counsel for defendant that plaintiff's attorney did not trust a jury, and fought a jury trial, and the like. The tendency of this would be very strong to prejudice plaintiff's counsel in the minds of the jury, and thus prejudice the rights of plaintiff itself. That, no doubt, was the purpose of the argument. We are of opinion that it was prejudicial and reversible error. In view of a new trial, we ought not to discuss the merits of the case; but, from the entire record, we are satisfied that the plaintiff did not have a fair trial.

The judgment is reversed and remanded for proceedings in harmony with this opinion.—*Reversed.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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MARY LITTLE, Appellee, v. C. F. MAXWELL, Appellant.

**NEGLIGENCE:** Evidence—Sufficiency. Evidence held sufficient to  
1 sustain a verdict against defendant for damages by reason of  
the negligent operation of an automobile.

**EVIDENCE:** Opinion Evidence—Physical Condition of Injured Person—Qualification of Expert. The opinion of a physician as to  
2 the physical condition of an injured person is not necessarily  
erroneous to the extent of prejudice because based, in some degree,  
on information obtained from *hearsay* sources.

**TRIAL:** Reception of Evidence—Motion to Strike—Excessive Mo-

3 tion. Motions to strike the entire testimony of a witness which is in part competent and in part incompetent, are properly overruled.

**TRIAL: Instructions—Form, Requisites, and Sufficiency—Duties of**  
4 **Pedestrians, Etc., on Public Streets.** A request for a specific instruction as to the relative duties of pedestrians and the drivers of conveyances on public streets is sufficiently met by a general line of instructions from which the jury could draw no conclusion other than that both said parties had the right to use the street, and what their relative duties were in the exercise of such use.

**TRIAL: Instructions—Sufficiency—Correct but Not Explicit.** In-  
5 structions which are correct but not explicit are sufficient, in the absence of a request for a more explicit instruction.

**TRIAL: Verdict—Excessiveness—\$5,750.** Verdict for \$8,750, reduced by the trial court to \$5,750, for personal injury, sustained. Plaintiff was run over by an automobile, received a severe nervous shock, suffered numerous bruises, had the mesentery torn loose, in part, from walls of the abdomen, suffered an operation by reason thereof, and some possibility existed of some of her injuries' being permanent.

*Appeal from Polk District Court.*—THOS. J. GUTHRIE,  
Judge.

MARCH 18, 1918.

PLAINTIFF was injured by being struck and run over by defendant's automobile, on or about September 23, 1916, while attempting to cross Locust Street at its intersection with Tenth Street in the city of Des Moines. At the time of the accident, she was going south on Tenth Street, on the west crossing. The defendant, at the time of the collision, was proceeding east in his automobile, on Locust Street. The right fender of defendant's car struck plaintiff, and pushed or knocked her to the pavement, one wheel of the car passing over her body near the waistline, and probably another over her ankle. The evidence, however, is in conflict upon this point. Plaintiff was rolled underneath the car to a point about the center of the intersection, where she

was picked up and carried into a near-by building, after which she was taken to a hospital, where, a day or two later, an operation was performed. She remained in the hospital about sixteen days, and then went to her home, in the northern part of the state. The jury returned a verdict in her favor for \$8,750, which was reduced to \$5,750 at the time the court ruled on defendant's motion for a new trial.—*Affirmed.*

*Strock, Wallace & McConlogue*, for appellant.

*Thos. A. Cheshire*, for appellee.

STEVENS, J.—I. It is urged on behalf of  
1. NEGLIGENCE : appellant that the evidence fails to establish  
evidence :  
sufficiency. negligence on his part, but that it appears  
therefrom that plaintiff was guilty of contributory negligence causing her injuries.

Immediately preceding the accident, plaintiff and a companion started from the north side of Locust Street on the west crossing thereof, at its intersection with Tenth Street, to go to the south side thereof; and, when part of the way across, the driver of an automobile, some distance to the west, sounded his horn, and plaintiff's companion returned to the curb on the north side of the street, and plaintiff continued south until she arrived near the center of the crossing, when she apparently became confused, or frightened. The evidence is in some conflict as to what she then did, some of the witnesses testifying that she turned back and forth two or three times, and she testifying that she hesitated only, and then went on.

A man by the name of Snyder, who gave the warning above referred to, was proceeding east in an automobile on the south side of Locust Street between Eleventh and Tenth, and, observing the apparent fright or confusion of plaintiff, stopped his car, 30 or 40 feet west of the crossing. There was another car between this point and the south curb. The defendant was going east, in the rear of the

Snyder car, and, when the latter stopped, he turned his car to the north, for the purpose of passing on the north side of the Snyder car. Snyder testified that, when the defendant passed his car, he speeded up, and that his car was being operated at from 10 to 20 miles per hour when it struck plaintiff. Snyder was about 50 feet west of Tenth Street when he first observed defendant, who, after passing him, turned his car slightly in front of the Snyder car. Plaintiff, according to the testimony of this witness, at the time she was struck, was a little south of the center of Locust Street, on the east side of the west crossing. She was knocked or pushed down by the right fender of defendant's car, and, falling underneath the same, was rolled over several times, one wheel of the automobile, as above stated, passing over her body near the waistline; and plaintiff testified that another wheel passed over her ankle. Other witnesses testified that defendant's car was moving at 18 or 20 miles per hour; and one witness, called on behalf of defendant, testified that same was going less than 10 miles per hour. Several witnesses testified that the car was stopped east of the intersection and near the center of the block, and one witness placed it at about 30 feet east of the intersection; • while defendant said he stopped on or near the east side of the intersection.

There was evidence from which the jury might have found that, at the time the car struck plaintiff, it was being driven at a dangerous rate of speed. She was picked up a little east of the center of the intersection, in a dazed and, apparently, partially conscious condition. The evidence further showed that defendant saw plaintiff on the crossing and that he sounded his horn, and further tended to show that he observed her apparent fright or confusion. He testified that he reduced the speed of his car, when he approached the crossing, and that:

"I saw Miss Little and the other girl as soon as I turned

out from behind Mr. Snyder's car, and did not see them before, because his top was up. When I first saw them, they were substantially in the center of the street, walking towards the south. I gave them the horn. They looked up, and saw me coming, and both took a step or two back, and I proceeded along towards the east, or southeast. I went to get square with that south side of the street, and directly in front of Mr. Snyder's car; then one of the girls, Miss Little, suddenly broke away from her companion, and started in a southeasterly direction. I slowed the car down, and I think I blew the horn again, slowed the car down, and I then probably traveled half the distance up to the crossing from where I started out from behind Snyder's car, and she stopped again, and stepped a pace or two out of the line of my car, and looked at me, as much as to say, "Go on," and the same as any other pedestrians do when they are waiting for the car to pass and start on, and she then suddenly changed her mind, and started to run in a southeasterly direction, and I slowed the car down again and swung it to the northeast as far as I could, in an effort to miss her, but the right front fender caught her, and her dress might have caught in the spring, or she would have missed the car entirely, and kind of pushed her down, and I felt the car upon her."

The defendant had equal opportunity with the driver of the Snyder car to observe the apparent fright or confusion of plaintiff; and the jury may well have found, from the evidence, that he did observe same, and, in the exercise of ordinary care and prudence, would have stopped his car until she was out of danger.

In our opinion, the evidence does not convict plaintiff of contributory negligence. She was clearly confused, and whatever uncertainty is shown in her conduct was due to that fact. The evidence is sufficient to sustain a verdict against the defendant, and we cannot disturb it upon the

ground of plaintiff's contributory negligence, or that negligence on the part of the defendant was not established.

II. Expert witnesses called on behalf of plaintiff were examined as to her physical condition at the time of the trial, and were also required to answer certain hypothetical questions. Objection was urged by counsel to parts of the testimony of each of these witnesses; and, either at the close of their testimony or at the close of plaintiff's evidence, defendant moved that same be stricken from the record. The motions were overruled, and error is predicated upon this ruling.

None of the expert witnesses whose testimony defendant sought to have stricken saw plaintiff until shortly before the trial. The physical examination made by them was supplemented by information obtained in answer to questions propounded to her and a member of her family, touching her injuries and the effect thereof, and it is contended by counsel for defendant that their conclusions and answers to the hypothetical questions propounded were based upon the information elicited by questioning plaintiff and her father, and not upon knowledge acquired by the examination made, and were, therefore, based upon hearsay and self-serving declarations of plaintiff, and were wholly incompetent.

We held, in *Switzer v. Baker*, 178 Iowa 1063, that the opinion of an expert, based upon information obtained from third persons, or from statements by the patient not made in the course of treatment, is incompetent; and numerous authorities are cited to sustain this holding. Some of the questions propounded in this case come dangerously near to a violation of the above rule, and this is particularly true of a part of the testimony of Dr. Ely; but each of the several witnesses described plaintiff's condition, and some of the conclusions expressed by them were not unfavorable to the

defendant, and, on the whole, we are convinced that no prejudice resulted to defendant from this testimony.

The motion to strike did not point out or specify the particular portion of the testimony to which objection was urged, but included all of the testimony of each witness, much of which was entirely proper and competent. The motion was not sufficiently specific. *Reynolds v. Pray*, 148 Iowa 213; *McDermott v. Hawkeye Commercial Men's Assn.*, 158 Iowa 544; *Bank of Bushnell v. Buck Bros.*, 161 Iowa 362.

III. Counsel for defendant requested the court to instruct the jury that the right to the use of the streets by pedestrians and moving vehicles is equal, and that each must exercise such right with reasonable regard for the convenience and safety of others.

The court refused the requested instruction and this point was not covered in specific terms in its instructions. Defendant was entitled to have the jury instructed as to the relative rights of pedestrians and the drivers of moving vehicles to the use of the street, and the court should have given the requested instruction; but, considering the instructions as a whole, the refusal to give the same was not, in our opinion, prejudicial.

The petition contained an averment that the defendant was negligent in not stopping his car behind that of Snyder until plaintiff, who was upon and in possession of the crossing, had passed over same. It is urged that, as this language was quoted in the statement of the issues to the jury, without a proper instruction as to the relative rights of the parties to the use of the street, the jury may have been led to believe that a pedestrian who has entered upon a street crossing is entitled to the exclusive use thereof until same has been entirely crossed.



The court, in its instructions, however, defined the respective duties of plaintiff and defendant, and the only possible inference therefrom was that both had rights upon the streets which must be exercised with due regard for the safety of each other. For example, in its sixth instruction, the court told the jury that it was the duty of the defendant to operate his automobile in a careful and prudent manner and at such a rate of speed as not to endanger the life and limb of any person, and that, upon approaching a pedestrian upon the traveled portion of a highway, it was his duty to slow down, and give warning or signal of his approach; in another, that the statute requires the driver of an automobile passing a vehicle from the rear to pass to the left, and otherwise to travel upon the right-hand side of the street, as near to the curb as the street will permit; and in still another, that it was the duty of the plaintiff, in passing upon and over the street, to exercise ordinary care for her own safety, and that she could not recover unless the jury found, by a preponderance of the evidence, that there was no negligence on her part contributing to the injury, and further, that it was her duty, in passing over the street, to use her senses of sight and hearing to ascertain the approach of automobiles, and to act carefully and prudently at all times, considering the circumstances surrounding her. The jury could have drawn no other possible inference from these instructions than that both had the right to the use of the street; and the relative duty of each in the use thereof was specifically pointed out.

The instructions made it sufficiently clear that both had substantially equal rights to the use of the street, and defendant could have suffered no prejudice by the refusal of the court to give same.

5. TRIAL: in-  
structions:  
sufficiency:  
correct but  
not explicit.

IV. The court instructed the jury upon the duty of one confronted with sudden peril, and complaint is made of the instruction given, for the reason that it did not fully cover the law upon this point. It is conceded by counsel that, so far as stated, the law of the instruction is correct. No proper instruction covering this point was asked by counsel, and we think the instruction fairly complete, and not subject to serious objection.

6. TRIAL: ver-  
dict: excessive  
ness: \$5,750.

V. It is also contended by counsel that the verdict of the jury was excessive, and the result of passion and prejudice. Defendant's motion for new trial was overruled, on condition that plaintiff remit \$3,000 of the verdict.

That plaintiff suffered a severe injury, necessitating a serious operation, is conceded. It is contended, however, that no permanent injury resulted, and that she suffered no loss of earnings, or earning capacity, and incurred less than \$500 medical and hospital expense, is now fully recovered from her injuries and consequent operation, and possessed of good general health.

The physicians who attended her and the surgeon who performed the operation testified that she received a severe nervous shock; that her body was covered with bruises; that there was a large contusion on her head; that the mesentery which is attached to the posterior wall of the abdomen and extends over the bowel and holds it in place was torn loose from its attachment for two or three inches. There was a quantity of dark blood in the region of the injury, and considerable bleeding from the laceration of the mesentery. The operation consisted of an incision in the abdomen, about four inches in length, the removal of clots of blood from the abdominal cavity, and the suturing of the laceration of the mesentery. On account of the hemorrhage, a drainage tube was inserted in the wound. Several ex-

pert witnesses testified that adhesions follow the use of a drainage tube, and, in this case, might produce strangulation of the intestines, and will be, to some extent at least, annoying and uncomfortable to the plaintiff. The danger from this condition does not, from the testimony, however, appear to be greatly apprehended. Nevertheless, the question was for the jury. Plaintiff testified that she suffered pain in her shoulder and other injuries; that she has since been nervous, and unable to sleep as well as before the accident. Her general health was shown to be otherwise good.

While the verdict was large, the internal injury suffered and the operation performed to relieve the same were serious, and involved the hazard which generally attends abdominal operations.

The question whether the verdict, as returned by the jury, is indicative of passion or prejudice on its part, requires notice. The circumstances surrounding the injury were somewhat calculated to influence the belief that defendant was reckless in the operation of his automobile. The prudence of the driver of the Snyder car, in stopping same at a safe distance to permit plaintiff to clear the crossing, naturally gave an unfavorable appearance to the effort of defendant to continue, while the plaintiff, in a state of confusion or bewilderment, was hesitating what course to pursue upon the crossing. There was evidence from which the jury may have found that the defendant saw the confusion of plaintiff, and that ordinary care required him to promptly stop the automobile, thereby insuring plaintiff's safety. There was evidence from which a conclusion might be drawn that plaintiff's injuries were, to some extent, permanent, and that, on account thereof, she would be long threatened with serious and dangerous consequences. The evidence was sufficient to justify a verdict for the plaintiff, and we do not think the record sustains appellant's contention that the jury was influenced by passion or prejudice in reaching its

verdict. The court, who saw and heard the witnesses testify, reduced the verdict to \$5,750, and we do not feel warranted in further reducing it.

Other alleged errors urged by counsel have been discussed in argument, but they do not present questions of controlling importance, and we therefore omit discussion thereof. The record is somewhat voluminous, but we have examined it with care; and, while it is not entirely free from error, nothing of a prejudicial nature appears therein, and the judgment of the court below is—*Affirmed*.

PRESTON, C. J., LADD and GAYNOR, JJ., concur.

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AIELT MOLENDORP, Administrator, Appellant, v. FIRST NATIONAL BANK OF SIBLEY, Appellee.

**EXECUTORS AND ADMINISTRATORS: Collection of Estate—**  
**Payments to Legatee Instead of Administrators—Effect.** One who is indebted to an estate may legally pay directly to the one who, as heir or legatee, etc., would be unqualifiedly entitled to receive the payment from the administrator if made to the latter, *provided such payments are not needed to discharge debts or other prior claims against the estate.*

*Appeal from Osceola District Court.*—WILLIAM HUTCHISON,  
Judge.

MARCH 18, 1918.

THE opinion states the case.—*Affirmed*.

*W. C. Garberson and Parsons & Mills*, for appellant.

*L. E. Francis and Clark & Dicinell*, for appellee.

WEAVER, J.—The admitted facts are substantially as follows: In March, 1914, the defendant issued and delivered to Peter Davids its certificate of deposit for the sum of \$1,400. In June, 1914, Peter Davids died testate, leav-

ing an estate of the value of \$5,000 or more, including the certificate of deposit above mentioned. By the terms of his will, he devised and bequeathed the use of all his property and estate, real and personal, to his widow for life, with added power stated in words as follows:

"I also give my said wife the right to sell and dispose of any and all of my said property, either personal or real, if necessary for her comfort, and to use the avails thereof as in her judgment seems best, or to place the same at interest, and to control the same absolutely."

The will named as executor Ude Davids, son of the testator; but, for some reason not developed in the record, he appears not to have qualified under the appointment. In September, 1914, the widow presented the certificate of deposit, duly endorsed by her, to the defendant bank for payment; and the bank, understanding and believing her to be the rightful holder thereof, under the will of her husband, paid her the full amount thereof, principal and interest. Thereafter, the plaintiff, Molendorp, was appointed administrator, with will annexed, of the estate, and brought this action at law against the bank to recover the amount of said deposit for the benefit of said estate. In support of said claim, the petition alleges that the widow had no legal right or authority to collect the certificate of deposit; that the same was paid by the bank negligently and wrongfully; and that such payment had no effect to discharge the debt or to relieve the bank from its liability to account for said fund to the administrator. The defendant admits the deposit, and admits that it paid the amount thereof to the widow, but alleges that, under the terms of the will of Peter Davids, the widow was entitled to receive the money; that said sum was not needed or required by the administrator for the payment of debts, claims, or charges against the estate; and that, even if the payment to the widow was irregular, yet, as she is the one to whom the administrator

would have been bound to account for it, had payment been made to him, the law will not exact payment the second time at the hands of the bank. There is no dispute that the estate already in the hands of the administrator is more than sufficient for the discharge of all claims of creditors and expenses of administration. Upon this showing, the trial court held that, as a matter of law, plaintiff was not entitled to recover, and there was a directed verdict and judgment for the defendant. Plaintiff appeals.

The plaintiff's case is without legal merit, and the trial court did not err in entering judgment for the defendant. It is well settled by our decisions in cases of this character that, where a debt or claim due the estate of a deceased person is paid to the one who would have been entitled to the benefit thereof had such payment been made to the administrator, the debtor will not be required to pay a second time at the suit or demand of the administrator, unless it appears that the amount is needed for the payment of debts, charges, or expenses to which the law gives preference over the claim of the person to whom the money was first paid. *Douglas v. Albrecht*, 130 Iowa 132; *Christie v. Chicago, R. I. & P. R. Co.*, 104 Iowa 707; 18 Cyc. 222, 223. The one chief purpose of administration upon an estate is to collect the assets, apply the same to the payment of all proper charges and expenses, and turn the remainder over to the heirs or legatees entitled thereto. For this purpose, it is true that the legal title to the assets is in the administrator, and, in strict regularity, one who is indebted to the estate should make payment to him; but if, instead of so doing, the debtor, acting in good faith, should, by mistake of law or fact, make payment direct to the person who would be entitled to receive it through the administrator, and the money is not needed or required by the administrator for the payment of claims or expenses, the end of the law is accomplished, and it would be little less than ridiculous to hold

the debtor liable to pay his debt over again. But suppose the plaintiff's case is sustained, and the bank is compelled to pay the amount of the deposit to the administrator, he does not receive it in his own right, but simply as agent, or trustee, to pass it over to the widow, under the terms of the will. She will then have received twice the amount of the certificate of deposit, and the bank will have paid its debt twice over, with no redress except in the uncertainties of another law suit against her. The law requires no vain things. When the deposit was paid to the widow, the money reached the hands of her who was vested with the ultimate right to receive it; and, as no part of it was required to meet or defray the needs of administration, no one was in any manner injured or wronged by the "short circuiting" of the deposit from the bank to the widow, instead of passing it through the hands of the administrator. Counsel for appellant, while conceding that the authorities cited do, under some conditions, uphold payments made by a debtor direct to an heir or legatee, instead of to the administrator, point out the fact that these authorities say that such payments are made "at the peril of the debtor;" and from this an inference is sought to be drawn in support of the present action by the administrator. But the inference is unwarranted. It is true that such payments are made at the peril of the debtor, but this means no more than that the debtor takes the risk that the estate in the hands of the administrator may be insufficient to pay its debts and legitimate expenses of administration. In the event of such deficiency, he may be held liable to the administrator; and to such a demand, prior payment to an heir or legatee will constitute no defense. The admitted facts leave no room for an application of this rule. There is an allegation in the petition that, when she received the money, the widow was old, infirm, and mentally incapable of making a contract; but, if we understand the record, the allegation was eliminated,

upon motion or demurrer. Clearly, it constituted no cause of action against the defendant. If the widow is incapable of caring for her property and property rights, the law prescribes means for their conservation. It constitutes no ground or cause of action in favor of the administrator as against the bank. There is no prejudicial error in the record, and the judgment below is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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HARRY O'GRADY, Appellant, v. JOSEPH M. CADWALLADER,  
Appellee.

**PHYSICIANS AND SURGEONS: Negligence—Unsuccessful Operation.** An action for damages for malpractice may not rest on a simple showing that the treatment or operation was not successful. The all-essential is a showing that the shortcoming in the treatment or operation was due to a failure on the part of the physician to employ that degree of skill ordinarily possessed by practitioners, under like circumstances, in the locality in question.

*Appeal from Osceola District Court.*—W. D. BOIES, Judge.

MARCH 18, 1918.

ACTION to recover damages for alleged negligence in setting a broken arm. Judgment for the defendant. Plaintiff appeals.—*Affirmed*.

C. A. Babcock and Clark & Dwinell, for appellant.

W. C. Garberson and Dutcher & Davis, for appellee.

GAYNOR, J.—Plaintiff brings this action to recover damages for injuries alleged to have been sustained by him because of the unskillful and negligent manner in which the defendant, a practicing physician, reduced and treated a certain fracture of the radius of plaintiff's left arm. It is



claimed in the petition that, on the 4th day of June, 1914, plaintiff was kicked by a horse, and the radius in his left forearm broken about midway between the elbow and the wrist; that he applied to the defendant for treatment, and employed him as a physician and surgeon to treat the injury so received; that the defendant undertook to do so, but did not reduce the fracture, but carelessly and negligently treated and attended the same; that, in pretending to reduce the fracture, defendant at first used pasteboard splints, and afterwards used inadequate and improper splints, in the way of pieces of shingle; that the pasteboard and shingle splints did not keep the broken ends of the radius in proper place; that plaintiff submitted himself to the treatment of the defendant for the injury until about the middle of September, when plaintiff concluded that defendant had not properly reduced the fracture, basing this conclusion on the fact that plaintiff could not at that time rotate his forearm, hand, and wrist; that thereafter, on the 23d day of September, plaintiff consulted a physician and surgeon in Sioux City, one Dr. Cremin, who examined the forearm, and found that the same could not be rotated, and that a surgical operation was necessary to put the same in as good condition as possible; that, on the 26th day of September, Dr. Cremin performed an operation on the arm, and found that the radius had been fractured, as stated, and that, at and near the fracture, the radius had adhered and grown fast to the ulna; that the operation consisted in separating the radius and ulna, thus restoring rotation; that an incision was made in plaintiff's arm for that purpose; that the condition in which the arm was found was due to the careless, negligent and unskillful act of the defendant in reducing said fracture, and his carelessness and negligence in not putting and joining together the broken ends of the radius, and in not putting the ends in alignment or proper apposition, and in not applying proper bandages and splints and

appliances to keep the broken ends in alignment or proper apposition, thus not preventing the radius from adhering or growing fast to the ulna. The answer was a general denial. The burden of proof rested upon the plaintiff. The allegation of negligence upon which recovery is sought is: First, that the defendant was negligent in not reducing the fracture properly; second, that the defendant was negligent in using only pasteboard splints at first, and afterwards inadequate and improper splints, and in not applying proper bandages and appliances to keep the broken ends in alignment or proper apposition.

There is no direct evidence in this record showing that the fracture was not properly reduced. There is no direct evidence that the broken parts were not put in proper apposition. There is no direct evidence that the splints and bandages used for the purpose of keeping the broken parts in apposition and the bone in proper alignment were not the appliances that are usually and ordinarily used by physicians and surgeons in the treatment of fractures such as this. A physician is held to the exercise of the skill and learning of the profession generally in the community in which he practices.

This is purely a fact case, with the burden resting on the plaintiff. At the conclusion of the testimony, the court directed a verdict for the defendant. Plaintiff appeals.

As we have said before, there is no direct evidence to support the allegations made in plaintiff's petition, that the fracture was not properly reduced, or that the splints and bandages used for the purpose of keeping the broken bones in apposition or the bones in alignment were not the splints and bandages usually and ordinarily used by physicians in treating injuries of this kind. No witness was called, expert or otherwise, to establish either one of these facts charged by the plaintiff. The conclusion, then, that the defendant failed in the full discharge of his duty, to the injury of the

plaintiff, must be gathered deductively from the matters to which we will call attention later in this opinion.

It is fundamental that no negligence, if any exists, can be considered by the jury, in arriving at the verdict, except that negligence which is charged in the petition, and on which the plaintiff bottoms his right to recover; and but two acts of negligence are charged: First, nonprofessional and improper reduction of fracture; second, improper appliances used to keep the fracture in position. Any other acts, or omission to act, on the part of the defendant in the treatment of this injury, whether negligent or otherwise, which do not involve these two charges of negligence, afford no basis for recovery.

The evidence discloses the following: On the morning of June 4, 1914, plaintiff was kicked by a horse; the kick broke his left arm; he went to Ashton and consulted the defendant; he reached defendant's office about 8 o'clock, and found defendant in his office. He told the doctor he thought he had broken his arm, and asked the doctor to set it and attend to it. The doctor put pasteboard splints on it and put it in a sling, a splint on the inside and one on the outside, opposite each other. Then he bandaged it, and made a cloth sling in which to carry it. Plaintiff was at the doctor's office about half an hour; stayed around town awhile. He was told by the doctor to come back; that he might see how everything was. The doctor told him to come back the next day. Plaintiff came back the next day, on the 5th of June, in the afternoon. The doctor took the bandages off and put more on, but did not change the splints. On his return home, on the afternoon of that day, a cyclone passed through the county, and the buggy in which plaintiff was riding was tipped over. He was thrown into the water. This was about five or six in the afternoon. It was raining hard. When he reached his home that night, the splints were all wet and soaked with water. The home

folks unwrapped the arm and took off the wet bandages and splints and bandaged the arm up again. When he tipped over, he fell into the water, with others who were riding in the buggy, among whom was a young girl, about nine years of age. He carried the girl out of the water. He said he felt no bad effects from this. The next day, however, about noon, he went to the doctor's office. He reached there about one o'clock. The splints were then taken off by the doctor, and the arm was rebandaged, the doctor using wire net, or some other appliance, and placing wooden splints on the arm, shaped to his arm. The doctor bandaged the arm up, and told him to come back in a day or two. He went back in a day or two. Thereafter, he came back to the doctor's office two or three times a week, he says. In about a week after that, on June 12, 1914, he went to Sioux City, and remained until the 22d of June. The arm had no attention while he was in Sioux City. The splints were finally taken off some time in July. The witness was unable to say what time in July, but thinks not later than the 15th of July.

Plaintiff testifies that he had pain in his arm while the splints were on; that he had also pain in his shoulder and his wrist; that he told the doctor about these pains; that the doctor told him he would get all right,—that that was the case with a broken bone; that, when the splints were taken off in July, he could not rotate his arm, could not turn it over; that it hurt him when he tried to turn it over; that defendant told him to go ahead and do a little work, and it would get all right. The doctor never put any more splints on, but told him not to try to lift too much, but to be careful with it. Some time after, the exact date of which is not shown in this record, the plaintiff met the doctor in a hardware store. At that time, some talk was had between them touching an X-ray examination. It was,

however, the last day that plaintiff saw the doctor. He testifies:

"I don't remember just when it was. I didn't agree to see him again, and I didn't refuse to have an X-ray taken. The doctor said he would take me to have an X-ray, and if the arm was not right, he would foot the bill; that if it was, I was to pay it. I never saw him again until after the operation was performed at Sioux City. I went to Sioux City on the 22d of September, and was operated on by Dr. Cremin on the 26th. I had an X-ray examination taken and photographed."

These photographs were introduced in evidence. Later in his testimony, he excused his not having an X-ray examination sooner, on the ground that the defendant told him it would be all right, and that he didn't care to incur the expense of an X-ray examination.

This is all the testimony offered in the record showing the treatment administered by the defendant.

Experts were, however, called by the plaintiff,—among them, Dr. Cremin. This doctor testified that he operated on the plaintiff on the 26th day of September; that he found that the radius of plaintiff's left arm had been broken somewhere near the center, between the wrist and the elbow; that he made an incision, laid the bones bare, found a large callus thereon at this fracture; that it had adhered and grown fast to the ulna. He testified that, in the most skillful setting of bones, there will be a little ridge around the place of the fracture. He testified:

"I freed the attachment by cutting the callus from the ulna, so that the bones could rotate. After the fracture, the alignment should have been the same, with the exception of what little callus formation there might have been, and it would have been that way if it had been properly reduced and cared for. After a radius is broken, the tendency is to pull it towards the ulna. The object of the splints

is to keep the two ends of the bone in a line, but the splints would not keep the bones directly touching one another. If the radius be properly reduced and properly healed from a proper reduction, they will, after such reduction and healing, be in about the same position they were before the fracture. When I cut down to the bone of the arm, the condition was different than was shown by the X-ray, for the X-ray showed there was no union of the two bones, and showed the bones were more out of alignment than they were. I found there was a good union of the bones, but the callus had bridged across the space between the radius and the ulna, and the bones were bound together by it, and this prevented the rotation. The fracture was an oblique one, downwards towards the hand. In spite of all a surgeon can do, and all the skill he can exercise, there is always some departure from a true alignment, in cases of a fracture. It is good practice for a surgeon, in cases of this kind, to exhaust every effort to secure a good functional result without an open operation."

He was asked this question:

"Now do you remember whether or not the radius lay upon the ulna or against the ulna down toward the wrist, other than right against the fracture in any other place? A. I don't think there was anything at any place except at the line of the fracture. There was some space between the two bones. You could see between the two bones with an X-ray."

He was asked this question:

"Was the space normal,—was there as big a space there as there would have been had the radius not been broken? A. Well, I think this callus might have pulled the radius closer to the ulna. Q. So that it affected the space clear down to the wrist? A. It may have. Q. What would you say as to whether the two ends of that broken radius had been properly set,—that is, put in proper apposition

to each other at the time of the reduction of the fracture?

A. All I could testify to is as to what the condition was at the time I examined it. I don't know whether they were put together right at the time or not. Q. Well, then, from the fact of that line as you saw, the bones there not being straight,—that is, with the exception of that little ridge there might be, made by the callus,—what do you say as to whether or not, on the theory that the patient had followed the doctor's directions, and was not to blame for anything, whether or not that fracture had been properly reduced? A. The fracture could have been properly reduced, but, due to the injury, and the possibility of the other bone being inflamed, it might have been pulled apart later. Q. But where a physician had charge of the fracture, which took place on the 24th of June, 1914, up to about the middle of September, seeing it on an average of twice a week, seeing the patient, and supposing the patient had followed the physician's directions as to the care and how he should treat the arm in the absence of the physician,—from what you saw there, the bones not being in alignment, what would you say as to whether the physician had done his duty or not,—as to whether he was to blame for that condition? A. Well, a physician might do all in his power to set a bone properly; and, as I stated before, if there was trouble with the other bone, regardless of what he might do, there might be some adherence there. Q. As I understand, your operation was to chisel away or remove in some way the callus separating the radius and the ulna, so that rotation would be possible? A. Separating the callus from the radius and ulna,—yes, sir. Q. Making it so it would rotate? A. Yes, so it would rotate. Q. And in order to do that, you had to chisel away the callus? A. Yes, sir. Q. And round it up and smooth it so it would roll? A. Yes, sir. Q. That is all you saw that was necessary to be done? A. At the time of the operation,—yes, sir. The X-ray I exam-

ined deceived me as to the true condition of the arm, and I reached the conclusion, from an examination of the X-ray picture, that there was no union, and that the bones were much more out of alignment than they actually were, when I got into the arm, after making the incision. I found there was excessive callus. Q. So far, then, as the position of the bones with reference to each other at the time is concerned, there could have been rotation of the arm, if it had not been for this bridge of callus? A. Yes, sir. Q. What would you say, Doctor, with the excessive amount of callus removed that you found there, whether this radius was in sufficient alignment to give good functional results? A. I would say, yes. Q. So I will ask you if it isn't true that the condition you found there, aside from the excessive callus, was a good result from the treatment of the fracture of the radius? A. Yes, I think that was all right. Q. And when you made your incision, and found what the actual conditions were, as distinguished from the conditions you were deceived into believing by the X-ray, you didn't perform the operation you intended to make? A. No, sir. Q. You didn't do it because you found the bones united, and good alignment? A. Yes, sir. Q. And if you had found, after making this incision, that the bones were not in sufficient alignment to produce a good functional result, it would have been your duty, as a physician and surgeon, to operate and correct that deformity at that time? A. Yes, sir. Q. And it was because you found the condition of good alignment and union of the bones that you did not operate,—that is, you did not perform the operation you intended? A. Yes, sir."

The doctor further testified:

"The amount of callus in a normal case depends upon the extent of the fracture and the degree of excitement or nervous state of the patient, and irritation occurring at the seat of the fracture, and the amount of callus thrown out,



is a thing over which the physician and surgeon has no control. In some cases, due to reasons we know nothing about, there is a deficient amount of callus thrown out, and in some cases, an excessive amount thrown out. Where there is an excessive amount of callus thrown out, there is always a possibility that a portion of it will be absorbed, and it is a fact that there is, in the normal case, part of the callus absorbed, even after union takes place—it goes on for months. Q. Is there any way, now, that the surgeon treating such a fracture as the plaintiff had can tell whether there is excessive callus being thrown out, sufficient to cause a bridge between the radius and ulna, until he actually makes the test and finds the arm will not rotate? A. No. The time when it is safe to rotate is not the same in any two individuals. While it might be proper with one person in four or five weeks, in another case it might not be safe to rotate within six or seven weeks. When it is proper to rotate, is a matter of judgment. I think it can be determined by an outsider as well as by the attending physician. Even where there is excessive callus, and rotation is obstructed, no one can be sure that the excessive callus would not be absorbed. When I last saw the arm after my operation, he could rotate and supinate the arm freely. He had all the functional use of the arm he ever had. In the face of the highest degree of skill and care, there is practically never a straight line after a fracture. Skill and care, even the best, will not mend a broken bone and make it just as good as before the break or fracture, and will not insure that there is, after the healing, the same space between the ulna and radius as before. As much depends upon the conduct, constitution, and habits of the patient as upon the physician or surgeon attending him. Where a fracture of the radius is caused by the kick of a horse, there is liable to be some damage done to the ulna. That would encourage inflammation of the ulna, and the

bruise and inflammation would encourage the formation of callus, such as would bridge over between the two bones. No physician could prevent that."

Dr. Heatland, for the plaintiff, testified, in substance, that, as soon as a human bone is broken, nature immediately starts the process of repair, by throwing out an exudate, in the form of serum, that, in the course of time, runs around the fracture and thickens, and forms a jelly-like mass, and then that forms into a harder substance, called callus, and it is that callus that causes the bone to unite, and this acts as a splint around the bone.

"The closer the bones are got together, the less of this jelly-like substance is thrown out, and the farther apart the bones are, the more has to be thrown out, to bridge over the space. If it were found that the bones had adhered together at the place of the fracture, and the adhesion was not too strong, and the fracture held fairly strong, it is possible that it might be overcome by forcible rotation; and if not, the only other method left would be to open the arm and chisel away or remove that part of the callus. The callus might, in time, absorb and disintegrate itself, if the adherence was a small one. It might thin enough so that it could break loose by muscular exertion."

He further testified:

"If a fracture is properly reduced, the bone is put in proper apposition, there is but little pain in the process of healing. There is always a slight pain at first, on account of the swelling and the pressure on the nerves; but if there is excessive pain, and it continues, it shows that something is wrong. If the fracture has not been properly reduced, it might be the cause of the pain."

He further testified that, if the fracture is properly reduced, there is practically no loss of motion or function. There may be temporarily, but in course of time, that function will be restored, and the arm be practically as good as

before. But in case of a fracture from the kick of a horse, there might be more or less injuries to the soft part surrounding the seat of the fracture. There might be hemorrhage surrounding the fracture. There might be laceration of the tissues surrounding the seat of the fracture. To attach significance to pain, we would have to find out the extent to which the nerves were involved in an injury. Some people are more susceptible to pain than others. In the same injury, the pain will be different in different persons. There is more or less swelling, in case of a fracture of the radius, and the swelling depends upon the amount of injury to the soft parts surrounding the fracture. Nature will sometimes throw out more callus than is necessary. The amount thrown out depends a good deal on the extent of the injury, and the amount of irritation. The amount of callus that nature throws out is something the physician has no control over, unless he allows irritation, and that so excites it. The closed method is the ordinary method of treating fracture. The open method should not be resorted to unless the closed method fails. There is danger of infection from the open method. There is sometimes a bad result, in the face of the most skillful treatment. All the surgeons can do is to put the bones in apposition and put the splints on; and then it depends upon nature and the patient himself, as much as upon the surgeon, as to the result. The cases where there is a perfect union of a fracture, with no deformity at all, are rare. There is no fixed time in which the bones will unite. Sometimes they will not unite at all, under most skillful treatment. It is possible that, in a fracture from the kick of a horse, the periosteum of the ulna might be injured. If there was a bruising of the periosteum of the ulna on the side that is next to the radius, at or near the seat of the fracture, that might produce a complication.

Dr. Cram was called, and testified that the fracture

may have been properly reduced, and gone wrong subsequently; but, if it had been properly reduced, it certainly did not maintain the properly reduced condition, otherwise there couldn't be an abnormal condition at any time afterwards.

"It has nothing to do with the skill of the physician in the case at all. The physician may have skillfully reduced the fracture and put on his dressing, and it may have been knocked out afterwards and never been reduced again; but the bones indicate in the picture a union in an imperfect apposition. [It will be noted from the testimony of Dr. Cremin that the pictures did not show the true condition of the bones as he found it upon incision.] The adherence of the radius and ulna would not have anything to do with causing the pain, unless the nerve was involved; but in a callus, that is often the case. That is where the nerve is. The nerve is involved in the callus, and the callus is hardening and causes an increased pain. The amount of pain depends upon the injury to the soft parts and the nerves surrounding the fracture. A nerve may be involved in the callus formed, and thus cause pain."

Dr. Brock, called for the plaintiff, testified that if, in the operation on September 26, 1914, it was found that the callus had overflowed from the broken radius and adhered to the ulna for an inch or an inch and a half, absolutely preventing rotation, the only way it could be remedied was by sawing or chiseling off the superfluous callus.

We have not attempted to set out all the evidence, but have set out all the evidence bearing upon the negligence charged in the petition.

There is no direct evidence that the fracture was not properly reduced, no direct evidence that the splints and bandages were not the splints and bandages that are usually and ordinarily used by physicians in the treatment of such injuries, no direct evidence that they were not prop-

erly placed on the arm by the doctor at the time. We have only the following showing as a basic fact upon which to conclude, deductively, that the fracture was not properly reduced, or that the proper appliances were not made to hold it in position after reduction: Some of the doctors called by the plaintiff testified that, from an examination of the X-ray pictures, the bone did not there appear to have been placed in proper apposition, and that the alignment was not perfect; and that this condition might be due to the manner in which the fracture was reduced in the first place, or to the manner in which it was treated after it was reduced.

There are authorities saying that, where the condition found upon an examination is of such a character, so out of harmony with conditions that ought to exist under proper treatment, a physician, seeing the result, may, as an expert, testify that the proper treatment was not administered, or such a result would not be found. Now it is true, as a general proposition, that the result furnishes no evidence of negligent treatment, but some cases may arise where evidence of the poor result alone might convince an expert that the treatment must have been improper. An opinion based upon such a showing would be competent evidence to establish the ultimate fact charged. But such a case is not before us here. The only expert called by the plaintiff who is shown to have been in a position to know just what the condition of the bone was after it had healed, and the manner in which the fracture was reduced, is Dr. Cremin, and he tells us that he found the bone in proper apposition, and properly healed; that the alignment was as good as you could expect, under the conditions which he found there. The only condition which he found that required treatment was the callus which nature throws out, and over which the attending physician has no control. It seems that an excessive amount of callus had been

thrown out around the wounded part. The excessive callus, as this record shows, may be due to many causes, none of which are under the control of the attending physician; and a careful examination of the X-ray pictures shows that the deformity appearing in the pictures is caused by the excessive callus, and when this was removed, the arm was left with all its functional properties normal. It is apparent that the plaintiff relies upon negligence—negligence of the attending physician in the treatment of the arm. It rests on the plaintiff, therefore, to show affirmatively that the condition of which he complains was due, at least in some measure, to the negligence of the physician, in respect to the matters relied upon as constituting negligence. A verdict to the effect that the doctor was negligent in reducing the fracture, or negligent in the treatment of the fracture after it was reduced, would rest, necessarily, upon mere speculation. The evidence pointed to no act of negligence on the part of the defendant. Every doctor who testifies or who assumes to say that the result was not perfect, tells us, in this record, that, even with the best treatment, with the fracture perfectly reduced, and proper bandages and appliances used to keep it in position, the condition here found might fairly be expected. There is no implied guaranty of results, and all the law demands is that the practitioner bring to the service of his patient and apply to the case that degree of skill and care, knowledge and attention, ordinarily possessed and exercised by practitioners of the medical profession under like circumstances and in like localities; and it is the general holding of the courts that the bare fact that full recovery does not result, or that a surgical operation is not entirely successful, is not, in and of itself, evidence of negligence; and, in the absence of any showing from those learned in the profession that there was a failure to do that which ought to have been done in the treatment of the injury, or that there was that done which

ought not to have been done in the treatment of the injury, there can be no recovery. The fact upon which negligence is predicated must be shown, either affirmatively, by direct evidence, or deductively, by conditions shown to exist after the treatment. But, as said before, conditions, even though they show bad results, are not, in and of themselves, sufficient; but such results may form a basis upon which an expert, learned in the profession, may be permitted to base an opinion that the operator failed in the full discharge of his duty in the treatment of the case, or the results would not appear as they are. We affirm that, in this record, there is no testimony from any expert offered by the plaintiff affirming that the treatment made by the defendant was not good, based upon the result as it actually existed, and was actually found to exist by Dr. Cremin when he made the incision baring the bone and finding its true condition. The most that can be said of the experts who have testified for the plaintiff is that, in their opinion, based upon an examination of the X-ray pictures, the bones were not in proper apposition; or, if originally placed in proper apposition, were not held there by the treatment which the plaintiff received at the hands of the defendant. But it also appears, from the plaintiff's own expert, that these X-ray pictures do not show the true condition of the bone, its position and alignment, as it was actually found by him when he made the incision baring the bone, and do not show the true relationship of the radius to the ulna, and the true condition of the fracture. Dr. Cremin's testimony leads the mind to the conclusion that the only defect or deformity found was due to the excessive callus adhering to the ulna; that, when this was chiseled away, the arm was left with all its functions perfectly normal. All the doctors say that the incision is the last thing to be resorted to; that the closed method should be followed, until it is conclusively shown that the callus is not reducing itself in a natural way, and that rota-

tion cannot be brought about by manipulation. Then is the open method resorted to.

There is nothing in this record to show that, when the plaintiff ceased his treatments at the hands of the defendant, the period had passed when the doctor, in good judgment, should have resorted to the open method for relief. As said before, this is purely a fact case. There is no controversy as to the law. Upon the facts shown in this record, we feel that any verdict rendered by a jury would rest upon the merest speculation, and could find no support in any tangible fact shown by the plaintiff. A verdict for the plaintiff could not stand, upon this record, and the court was justified in directing a verdict for the defendant, and its action in so doing is—*Affirmed*.

PRESTON, C. J., LADD and STEVENS, JJ., concur.

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S. I. REDFIELD, Appellee, v. BOSTON PIANO & MUSIC COMPANY, Appellant.

**PLEADING: Motions—Striking Nondefensive Matter—Master and**

- 1 **Servant.** Nondefensive matter is properly stricken on motion. So held where, in an action for damages for the wrongful discharge of a servant, the master pleaded that, prior to the contract of employment, the servant had represented that he was a skillful salesman; but did not plead that the representation was *false*.

**PLEADING: Issue, Proof, and Variance—Evidence Admissible.**

- 2 Principle recognized that one may not prove that which he has not alleged.

**APPEAL AND ERROR: Harmless Error—Failure to Show Nature**

- 3 **of Answer Sought.** Error may not be predicated on the exclusion of general and indefinite questions, accompanied with no showing concerning the nature of the answers which were sought to be elicited.

**MASTER AND SERVANT: The Relation—Wrongful Discharge—**

- 4 **Defense.** A master may not, in defense of an action for wrongful discharge, plead and prove that he offered to retain the servant in his employ at a reduced wage.



**MASTER AND SERVANT: The Relation—Wrongful Discharge—**

**5 Defense.** A master may not, in defense of an action for wrongful discharge, plead and prove that the servant, since the discharge, has made "profits" out of his business ventures, and should account therefor.

**EVIDENCE: Relevancy, Competency, and Materiality—Master and**

**6 Servant—Correspondence Relative to Discharge.** In an action by a servant for wrongful discharge, the correspondence relative thereto which passed between the parties may become competent, relevant, and material.

f.

*Appeal from Johnson District Court.*—R. P. HOWELL, Judge.

DECEMBER 11, 1917.

REHEARING DENIED MARCH 18, 1918.

ACTION at law to recover upon a contract of employment. There was a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*C. H. Van Law* and *O. A. Byington*, for appellant.

*Dutcher, Davis & Hambrecht*, for appellee.

WEAVER, J.—The plaintiff sues to recover for damages for his alleged wrongful discharge from defendant's employment, and sets out the written agreement by which defendant engaged his services for one year from September 1, 1914, at the rate of \$150 per month. The defendant in answer admits making the contract, and that, on January 7, 1915, it discharged the plaintiff from its service; but alleges that such discharge was justified by the failure of plaintiff to properly perform the work for which he was employed. Many other things are pleaded in defense, much of which is irrelevant or merely argumentative. In so far as they present defensive or issuable matter, they will be considered in the course of this opinion. A counterclaim was also pleaded for the recovery of damages which it alleged it had sustained by plaintiff's failure to perform his

work properly. On trial to a jury, there was returned for plaintiff a verdict for \$792.20, with interest from September 1, 1915. Many errors are assigned, but we shall give attention to such only as have been argued.

I. Complaint is first made of the ruling of the trial court striking out certain matter in the third division of the answer. The matter so referred to by counsel is to the effect that, before making the contract, plaintiff represented to the defendant that he possessed the necessary skill and experience to perform the duties of the position, and that defendant, relying thereon, entered into the agreement. Counsel say in argument that such representations were material, and that if, on trial, they were found to be false, and plaintiff was not qualified for the position, it would justify his discharge. Conceding the correctness of the abstract proposition of law as stated, it is sufficient response to say that the so-called affirmative defense in this division of the answer contains no allegation whatever that the representations there charged to have been made were not, in fact, true. The matter stricken pleaded no defense, and in striking it out, defendant suffered no prejudice. Appellant seeks to avoid the obvious effect of this condition of the record by pointing out that, on the trial, it offered evidence on the same proposition, but it was ruled out; and error is assigned on this ruling also. But this is immaterial; for appellant raised no such issue in its answer, and it was not entitled to prove a defense not pleaded. Moreover, the question to which answer was excluded was a mere inquiry as to what conversation the witness had with plaintiff on the subject of his prior experience and his competency for the work. There was no statement or suggestion to the court concern-

1. PLEADING :  
motions :  
striking non-  
defensive mat-  
ter : master  
and servant.

2. PLEADING :  
issue, proof,  
and variance :  
evidence ad-  
missible.

3. APPEAL AND  
ERROR : harm-  
less error : fail-  
ure to show  
nature of an-  
swer sought.

ing the nature of the answers to be elicited from the witness, or offer to show that the plaintiff's statements on such occasion were false or misleading. There was no error in the ruling complained of.

4. MASTER AND  
SERVANT:  
the relation.  
wrongful dis-  
charge: de-  
fense.

II. Appellant further assigns error on the ruling of the court in striking out the seventh division of the answer. The division of the answer here referred to affords something of a novelty in the line of defenses to an action for breach of contract of employment. We quote it in the pleader's own language, as follows:

"For further answer, and by way of affirmative defense, this defendant avers and charges the fact to be that, after the dismissal of the plaintiff from the services of the defendant company, the plaintiff refused to continue in the employ of the defendant company in a clerical capacity at the offered salary of \$100 per-month until the first day of September, 1915; that the plaintiff wholly failed to use any diligence in seeking employment elsewhere, after he had refused the employment thus offered him by the defendant. However, this defendant avers and charges the fact to be that the plaintiff has been and is now employed in and about Roswell, in the state of New Mexico, as the manager and superintendent of a fruit farm, and that the plaintiff has other business interests to which he has devoted his time and attention, and from which he has derived profit to himself, and for which he in no ways now accounts; that, for all of which reasons, the defendant denies it is indebted to the plaintiff in any amount whatsoever."

That an employer may discharge an employe, contrary to the terms of his contract, and then plead and prove, by way of affirmative defense to an action for damages, that he offered to retain plaintiff in his service on condition that the latter would accept compensation at a fraction of the contract wage, is so opposed to all reason and authority

that its bare statement is its own sufficient refutation.

5. MASTER AND  
SERVANT:  
the relation:  
wrongful  
discharge:  
defense.

Scarcely more reasonable is the further allegation that the plaintiff has been employed, since his discharge, as manager and superintendent of a fruit farm, and "has other business interests from which he has received profits for which he in no ways accounts." If, as a matter of fact, the plaintiff has obtained other employment which should be taken into account in ascertaining the damage he has sustained by his discharge, the defendant was entitled to show that fact by any proper evidence, without specially pleading the fact as a defense. But the plaintiff is under no duty to "account" to the defendant or to the court for any "profits" he may have acquired from his business interests.

The matter found in this division of the answer is not only redundant, but it also is frivolous, and was properly stricken out.

III. The appellant's contention that whatever plaintiff earned for personal services rendered for others during the remainder of the year after his discharge should be considered in reducing his damages, in case he was found entitled to recover at all, is no doubt correct; and, as the court so charged, it must be presumed that the jury gave the defendant the benefit of all such deductions as the testimony showed it was entitled to. What other income, if any, the plaintiff derived from rentals, or from buying and selling sheep, or from investments or business enterprises generally, is a matter into which defendant had no right to inquire. Had plaintiff been so fortunate as to discover a rich gold mine in the interval of his nonemployment, proof of the fact would have been wholly immaterial in this case.

IV. On the trial, plaintiff offered in evidence certain letters written him by W. F. Main, the president and general manager of the defendant corporation, and they were admitted into the record over the defendant's objection. This ruling is also said to be erroneous.

6. EVIDENCE:  
relevancy,  
competency,  
and materiality: master  
and servant:  
correspondence relative  
to discharge.

It is difficult to understand upon what theory the letters could properly have been excluded. Mr. Main was president and director of the corporation. Indeed, the record seems to indicate that, in a very just sense of the word, he is the corporation, and that it is through and by him that the corporation speaks. It was he who represented it in employing the plaintiff and in discharging him. The letters relate almost exclusively to the matter of the plaintiff's hiring, to his services and his discharge. They are very pertinent in their bearing upon the merits of the case. They were clearly admissible, and the assignment of error thereon cannot be sustained.

It is finally contended that, in any event, the verdict is excessive in amount. We do not think so. The jury was fully justified in finding that plaintiff's discharge was wrongful. It was made when only about four months of the year of employment had passed. For the remaining eight months, plaintiff's wages, at the agreed rate, would amount to \$1,200. The verdict returned was for \$792.20, indicating that the jury had given the appellant the benefit of a reduction of about \$400 on account of plaintiff's earnings from other sources. This was a fairly conservative estimate, and the verdict must be permitted to stand.

The merits of the controversy are clearly with the appellee. Other questions suggested by counsel are governed by the conclusions already announced, and require no fur-

ther consideration. The judgment of the district court is—  
*Affirmed.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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SELMA SAVINGS BANK, Appellee, v. H. A. HINKLE, Appel-  
lant.

**BILLS AND NOTES: Delivery—Conditional Delivery—Principal**

1 **and Surety.** A surety on a promissory note may show, against the original payee, and as a complete defense, that the note in question was delivered to said payee on the condition that said note should not become effective against the surety until the payee first secured from the principal maker certain specified indemnity in favor of the surety, and that the payee wholly failed to fulfill said condition.

**PRINCIPAL AND SURETY: Discharge of Surety—When Liability**

2 **Re-attaches.** When a promissory note upon which one is liable as surety is surrendered and cancelled by being computed and embraced in a new note to the same payee, and signed by the same principal and surety, and said new note never becomes effective against the surety, by reason of the nonfulfillment of the condition upon which it was delivered, the former liability of the surety under the old surrendered and cancelled note immediately re-attaches (in equity).

*Appeal from Van Buren District Court.*—SENECA CORNELL,  
Judge.

MARCH 18, 1918.

SUIT on a promissory note. Opinion states the facts.  
Both parties appeal.—*Affirmed on both appeals.*

*Walker & McBeth*, for appellant.

*J. C. Calhoun and Sloan & Sloan*, for appellee.

GAYNOR, J.—This case was originally

1. **BILLS AND  
NOTES: deliv-  
ery: condi-  
tional deliv-  
ery: prin-  
cipal and  
surety.**

brought on a \$545 note, executed by one Harlan to the plaintiff, on which this defendant was surety. In that case, no defense was made by Harlan, the maker of

the note; but this defendant, Hinkle, interposed defenses that are now urged here. The cause was tried to a jury, and, at the conclusion of the testimony, the court directed a verdict for the plaintiff. From this, defendant, Hinkle, appealed, and the cause was reversed, on the ground that the defense interposed was a good defense if the facts upon which the defense was predicated were proven, and that the evidence presented a fair question for the jury as to the sufficiency of the proof to establish the defense. That case is reported in 167 Iowa 673. The case was remanded to the district court and another trial had, but, upon the second trial, plaintiff amended its petition, alleging that the plaintiff accepted the \$545 note in full payment of three other notes, on one of which defendant, Hinkle, was surety; that this note on which defendant was surety was surrendered on the theory that the \$545 note was delivered in lieu of that note; that note was a \$375 note. In such amendment, plaintiff says that, in the event the court should find that said \$545 note was delivered to plaintiff upon the conditions alleged by the defendant, Hinkle, then the \$375 note was surrendered and cancelled through a mistake, and plaintiff is entitled to have said settlement and delivery set aside and held for naught. That, in the event the court should find and determine, for any reason, that the said \$545 note was delivered to plaintiff on conditions, and that, because of such conditions, the same did not become effective, then, the plaintiff alleges, the said \$375 note has not been paid, and is due and still the property of the plaintiff, and he asks that, in that event, plaintiff have judgment for the \$375, with interest.

Upon the filing of this amendment to the petition, without objection, the cause was transferred to equity. Upon this trial, the court found that the \$545 note, the one originally sued upon, did not become effective as an obligation against the defendant, but found that in the \$545 note was

included this \$375 note, which was also signed by the defendant as surety, and that, by failure of the \$545 note to become effective, for the reasons urged by the defendant, the payment and delivery of the \$375 note should be cancelled and set aside, and plaintiff allowed to recover on the \$375 note, with interest.

Plaintiff appeals from the holding of the court that it was not entitled to recover on the amount of the \$545 note. Defendant appeals from the finding of the court in favor of the plaintiff on the \$375 note.

A proper understanding of this case makes it necessary to state the transactions as they appear in the record. The \$375 note on which recovery was had was dated December 5, 1911. It was executed by Harlan, and plaintiff claims that defendant was a surety thereon. This note was due in six months. On March 25, 1912, Harlan and wife executed another note to plaintiff bank for \$30, payable on demand. On June 3d, the bank loaned Harlan \$140, and took the note of Harlan and his wife therefor. So it is apparent that, at the time the \$545 note was executed, there was due from Harlan to the bank, if plaintiff's contention is correct, this \$375 note, a \$30 note, and a \$140 note, making, in all, \$545. This \$545 note was dated August 20, 1912, and was signed by Harlan, with Hinkle as surety.

So it is apparent that the plaintiff is asking an alternative judgment. First, he prays for judgment on the \$545 note; but, in the event it is found by the court that the \$545 note did not become effective, then defendant asks judgment on the \$375 note, which was surrendered on the theory only that the \$545 note did become effective.

The defense urged by Hinkle, the defendant, against the enforcement of the \$545 note is that, when he signed said note, he signed it as surety for Harlan; that some arrangement had been made between him and Harlan by which Harlan was to give him an assignment of his interest in his fa-



ther's estate, to secure him for signing it as surety for Harlan. The contention of Hinkle is that, when he signed this \$545 note as surety for Harlan, he gave it and a blank assignment to the plaintiff's cashier, together with instructions that, when Harlan and his wife signed and acknowledged the assignment, and signed a note to him for the amount of the \$545 note, then the \$545 note to the bank was to become effective, and not before. That is, when he delivered this \$545 note sued upon, it was understood between him and the bank that that note, as against Hinkle, was not to be effective until this assignment, duly signed and acknowledged both by Harlan and his wife, and another note made by Harlan and his wife to this defendant, Hinkle, to represent the amount which he had secured by the execution of the \$545 note, were properly executed and delivered. It was the claim of Harlan, at the time, that he had a one-fourth interest in his father's estate, which consisted of 200 acres of land and some personal property. The assignment was left with the bank for execution, in accordance with such agreement. We think the record shows fairly that the understanding was that the cashier of the bank would procure the signature of Harlan and wife to the assignment, have the same duly acknowledged, and also secure from Harlan and his wife a note in favor of the plaintiff, and that the \$545 note sued upon was not to become effectual, as against Hinkle, until this assignment was procured. Without setting out the evidence, it appears that this assignment was not procured, as called for by this understanding, and Hinkle did not become vested with the interest of Harlan in his father's estate, to secure him against loss on this \$545 note, signed as surety. In the former case (167 Iowa 675) it was said:

"It is plain from this recital that the evidence raised the issue of whether the note [that is, the \$545 note] was to take effect only on the contingency of the bank first pro-

curing the execution of the note by Harlan and wife, and the acknowledgment of the assignment by them. \* \* \* That a promissory note may be delivered on condition the observance of which is essential to its validity between the original parties thereto, is recognized by Section 3060-a16, Code Supplement, providing that in such case 'the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring property in the instrument,' and is in harmony with the decisions of this and other courts. *Ware v. Smith*, 62 Iowa 159; *Johnston v. Cole*, 102 Iowa 109; *Niblock v. Sprague*, 200 N. Y. 390 (93 N. E. 1105). If the agreement was as testified by Hinkle, there was never any authorized delivery of the note, and it never became binding on the defendant. \* \* \* His claim is that such contract was never entered into at all, for that the contingency upon which the note was to be deemed delivered never occurred. Parol evidence of the condition was admissible; for it was not an attempt to vary or contradict the written instrument."

We think the court was justified in finding that the condition was exacted and was never performed, and that the note did not become effectual as against Hinkle, and the district court was right in so finding.

The cause was in equity. The court reached the conclusion that the \$545 note did not become effective, because of the failure of the condition on which it was to become effective; that, Hinkle having signed that note for \$375 as surety, and the cancellation thereof having been made upon the supposition that the \$545 note was effective, the cancellation of the \$375 note should be set aside, and judgment entered against the defendant, Hinkle, for the amount of the \$375 note, with interest. It was said on the former appeal:

"But it is said the cashier was without authority to

2. PRINCIPAL  
AND SURETY:  
discharge of  
surety: when  
liability re-  
attaches.

surrender the old notes without payment. If so, doubtless recovery thereon may yet be had [that is, upon the old notes].”

As to this \$375 note, the only defense interposed by Hinkle was that he never signed the note. To sustain his contention, he assumes to show that, on the date this \$375 note purports to have been signed, he was not in the bank. The testimony on the part of the bank is that the note was signed in the bank on the date it appears to have been signed. The contention of the defendant is that he was sick on that day, and had been sick for several days before, with throat trouble. The record discloses, we think, with a fair degree of certainty, that his sickness was not of such a character as would disable him from visiting the bank on that day. The distance from his home to the bank and return would not consume in passage over half an hour. Expert evidence was introduced by the bank, from which it appears that the signature on this \$375 note is in the genuine handwriting of the defendant, Hinkle. The evidence is of such a character that we cannot escape the conclusion that Hinkle is mistaken in saying that he did not visit the bank on that day. More than two years had intervened, and undoubtedly many things had occurred during that intervening time. Hinkle testified that he was in the habit of signing notes as surety. He said, “In the habit of helping fellows out.” The evidence at least convinces us that the signature on the \$375 note is in the genuine handwriting of the defendant, Hinkle, and that he is bound by it.

The law questions involved in this suit are, we think, fairly settled in the last decision, at least so far as the \$545 note is concerned. As to the second note, the \$375 note, the record presents only a question of fact.

We are satisfied with the holding of the court under the

record made, and the case is affirmed on both appeals.—*Affirmed.*

PRESTON, C. J., LADD and STEVENS, JJ., concur.

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PETER THUESEN, Appellant, v. ALBERT JOHNSON, Appellee.

**FRAUD: Evidence—Weight and Sufficiency.** Evidence bearing upon an exchange of properties, the exaggerated values placed thereon by both parties, and the alleged fraudulent representations inducing the trade, reviewed, and held insufficient to establish fraud.

*Appeal from Pocahontas District Court.*—N. J. LEE,  
Judge.

MARCH 18, 1918.

✓ SUIT in equity to rescind and set aside a contract for the sale of land. Upon trial to the court, the petition was dismissed, and plaintiff appeals. The material facts are stated in the opinion.—*Affirmed.*

*Ralston & Shaw* and *J. M. Graham*, for appellant.

*H. M. Boorman*, *V. Lingby*, and *J. M. Berry*, for appellee.

WEAVER, J.—The plaintiff, being the owner of certain machinery, fixtures, and materials constituting what is known as a lightning rod factory, at Council Bluffs, Iowa, and the defendant, being the owner of 315 acres of land in Pocahontas County, Iowa, entered into a written contract, under date of December 12, 1912, whereby defendant undertook to sell and convey the land to plaintiff, at the agreed price of \$40,950. By the terms of the contract the defendant acknowledged the receipt of an advance payment of \$10,745, and plaintiff undertook to pay the remainder of the consideration by assuming an existing mortgage incumbrance on the land for \$8,000, and by the payment of the

further sum of \$22,155 in cash on July 1, 1915, with interest at six per cent after February 1, 1913. Though not specifically stated in the contract, it is admitted as a fact that the advance or initial payment of \$10,745 on the land was made by the transfer and delivery to the defendant of the lightning rod factory, machinery, and materials, owned by the plaintiff. On October 3, 1913, this action was begun to cancel the contract, on the ground that it had been procured by fraud and misrepresentation on the part of defendant and of others acting in his interest. Issue being joined upon these allegations, the trial court heard the evidence, found that the alleged fraud had not been sufficiently established to justify the equitable relief demanded, and, as already stated, dismissed the bill.

The law applicable to cases of this character is too familiar to be the subject of dispute between counsel, and the arguments in this court have been directed almost exclusively, as, indeed, they must be, to the question of fact: Was the procurement of this contract on the part of defendant accomplished by fraud and misrepresentation? The substance of the alleged fraud is that defendant, in person and by his agent, one Frederickson, and also by combining and conspiring with one Hurley and one Smith, induced and led the plaintiff to believe that the land in Pocahontas County was of good agricultural quality, well located, not subject to overflow, and reasonably worth \$130 per acre; and that plaintiff, having no prior knowledge or information concerning said property, and believing and relying upon the truth of said representations, entered into said contract and assumed the obligations thereof. It is further charged that said representations were false; that the land was of very inferior quality, much of it subject to frequent overflow, not well adapted to agricultural use, and not, in fact, worth to exceed about \$70 per acre; and that, having discovered the fraud so perpetrated upon him, he notified the

defendant of his election to rescind the contract. As is usual in litigation of this character, the alleged representations are, for the most part, the subject of sharp conflict in the testimony, and, in so far as the alleged statements are admitted, their substantial truth is also involved in controversy. The printed abstract of the testimony fills a volume of 250 pages, and it includes the examination of a large number of witnesses; and it is manifestly impracticable, even if it were otherwise desirable, to set it out, even in condensed form. Moreover, as each fact case depends so largely upon its own peculiar combination of circumstances, and upon the ever-varying degree of credibility of individual witnesses, its decision is of little value as a precedent. It may be said, however, that evidence on the part of plaintiff tends to show that he is a native of Denmark, who came to America after he had reached his majority, since which time he has lived principally in southwestern Iowa. He is a butter maker by occupation, and has worked in that capacity most of the time. It appears, however, that he developed some capacity for business generally, and, before the deal now in question, had made various ventures in buying, selling, and trading property, with a reasonable degree of success. The defendant is also of Danish birth, and was in business as a merchant at Atlantic, Iowa. He was also, to some extent, a dealer and trader in lands and other property. He acquired the Pocahontas land in 1908, in exchange for a stock of goods, at an estimated price of \$75 per acre, and had owned it about four years when he made the contract with plaintiff. He had listed it with Frederickson, an agent, for sale at \$125 per acre. Plaintiff also acquired the lightning rod property in a trade or exchange for other property, and desired to dispose of it for land. Frederickson mentioned to plaintiff the land owned by defendant, and suggested that he call on defendant with reference to it; but plaintiff expressed the thought that he

could not well handle so large a property. Within a short time, plaintiff, in company with a brother, called upon the defendant, and discussed the terms upon which an exchange could be made. Following this interview, and at defendant's suggestion, the plaintiff, in company with his brother and Frederickson, went to Pocahontas County to see the land, and, after the inspection so made, he returned home, and the written contract in suit was finally executed, and the lightning rod property was turned over to defendant, who has since sold it. Defendant did not accompany plaintiff on his trip to see the land, and says he told plaintiff to examine it and satisfy himself in regard to it, and then, if he desired, they could further discuss the terms of an exchange. On going to the land, plaintiff found one Hurley in possession as tenant, and also met Smith, a loan agent, at the near-by town of Rolfe; and he claims to have been considerably influenced in deciding to take the land by statements and representations made by these men; and it is charged in the petition that they were both agents of, or conspirators with, the defendant, assisting him in deceiving the plaintiff with respect to the quality and value of the land. It must be said, however, that the charge of collusion between defendant, Hurley, and Smith is without substantial support in the record. It is also urged that the effect of plaintiff's inspection of the land as evidence that he was not deceived is lessened by the fact that a slight snow had just fallen, rendering it difficult for him to ascertain the quality of the soil for himself, and rendering him more dependent upon the defendant's representations; and this is doubtless true, in some degree, and if it were satisfactorily shown that defendant, or Frederickson, his agent, took advantage of such situation to mislead him to his injury, it would be no defense to his action for them to say that, had he been more diligent in his examination, he would have discovered the deception and saved himself from loss.

But the bald misrepresentations charged by the plaintiff are denied by the defendant and Frederickson; and, as fraud will not be presumed, and the burden is upon plaintiff to establish it, as alleged, we are inclined to the view taken by the trial court that the showing made by plaintiff is insufficient to justify the relief prayed for. The most which can be said for the plaintiff's case is that it presents some features which suggest ground for suspicion of fraud; and, if it clearly appeared that the contract price of the land grossly exceeded its real market value, we might be inclined to attach more weight to such indications. It is evident, however, that plaintiff, no less than defendant, put a trading price or estimate upon the property he proposed to exchange, and that, in each instance, such figure was in excess of the real market value. Such is the way of the land trader in general, and, if not accompanied with misrepresentation or deceit, it is entirely compatible with fair dealing. Defendant had listed his land with his agent for sale at \$125 per acre; but, in negotiating with plaintiff for this exchange, he made his first offer on the basis of \$135 per acre. The deal was finally closed at \$130 per acre. Of the testimony upon the question of market value at the date of the contract, the witnesses for plaintiff place it at from \$60 to \$85 per acre, and say it has since advanced; while the witnesses on the part of defendant estimate it at from \$100 to \$125 per acre. On the other hand, the trading price of \$10,750 put upon the lightning rod property appears to have been several thousand dollars in excess of its actual value; and, if we make due allowance for the exaggeration of values on both sides, it is reasonably clear that defendant did not realize in excess of \$120 per acre for the farm. While this may have been a good price, it is not, in our judgment, shown to be so excessive as to suggest fraud or undue advantage on the part of defendant. Indeed, it is difficult to read the entire record without a conviction that plain-



tiff became the victim of his own mistake in judgment in attempting so large a transaction without sufficient means to render the venture a safe one.

We are satisfied with the conclusion of the trial court that the charge of actionable fraud and misrepresentation is not established by a preponderance of the evidence, and the decree appealed from is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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OTTO H. BOECK et al., Appellees, v. MODERN WOODMEN OF AMERICA, Appellant.

**APPEAL AND ERROR:** *Reversal—Retrial—Law of Case.* A holding on appeal that stated that evidence (a) presented a jury question, or (b) established a complete defense to the claim sued on, necessitates the same holding on a subsequent appeal which presents substantially the same evidence.

*Appeal from Floyd District Court.*—C. H. KELLEY, Judge.

APRIL 1, 1918.

ACTION at law upon a benefit certificate issued by the defendant, a fraternal insurance society. Two defenses were pleaded. There was a verdict for the plaintiffs, and the defendant appeals.—*Reversed*.

*Truman Plantz, Geo. G. Perrin, and J. C. Campbell, for appellant.*

*Senneff, Bliss & Witwer, for appellees.*

\*EVANS, J.—I. Paul Boeck died November 28, 1909. At the time of his death, he was a member of the defendant society. The benefit certificate was payable, in the first instance, to the father and mother of the insured. Both of these having died before the insured, the plaintiffs herein,

being the brothers and sisters and only heirs at law, claim as such under the terms of the policy. Boeck became a member of the order on December 28, 1898. The first defense is predicated upon alleged fraudulent representations, and a breach of warranty made in his application, whereby he reported himself as never having been intoxicated, and whereby he reported his daily consumption of liquor as a "glass of beer a week." It is averred in the answer that Boeck had been intoxicated prior to such date, and that he did consume a greater quantity of liquor daily than therein reported, and that he thereby breached his warranty, as therein made. Proof was introduced in support of this defense. It is urged by the defendant that such proof was conclusive, and entitled the defendant to a directed verdict. The case was before us on a former appeal (162 Iowa 159). We held at that time that, as to this defense, the state of the evidence was such as entitled the plaintiffs to go to the jury. The evidence in the present record is not substantially different from that in the former, and we must, therefore, treat our former holding as decisive of the question now.

II. The second defense was predicated upon Section 14 of the certificate of insurance, as follows:

"Prohibition against Intemperance. If any member of this society, heretofore or hereafter adopted, shall become intemperate in the use of intoxicating liquors, or in the use of drugs or narcotics, or if his death shall result directly or indirectly from his use of intoxicating liquors, drugs, or narcotics, then the certificate held by said member shall by such acts become and be absolutely null and void, and all payments made thereon shall be thereby forfeited."

It is averred that the death of Boeck did result from his use of intoxicating liquors, and much testimony was introduced in support of the averment. It is urged by the defendant that this evidence was conclusive, and entitled

the defendant to a directed verdict. The same question was before us on the former appeal, wherein we sustained the defendant's contention as to this defense and reversed the case accordingly. The evidence in that regard was quite fully discussed in the opinion on the first appeal, and the discussion need not be repeated here. 162 Iowa 163, 164. It is contended for the plaintiffs that the evidence in the present record is materially different from that in the former, and that the former opinion is, therefore, not necessarily controlling. This is the crux of the present appeal. With some exceptions, to be noted, the evidence introduced at the last trial was read from the transcript of the former trial. Some of the defendant's witnesses were subpoenaed for further cross-examination by the plaintiffs. Also, a medical expert for the plaintiffs answered a hypothetical question. Were the controlling facts in the case materially modified by this additional evidence? These facts, stated briefly, are that Boeck was a confirmed inebriate, for several years prior to his death. He had taken the Keeley cure at one time. Later, in January, 1907, his father, the then beneficiary of his insurance certificate, had filed information against him as an inebriate, and he was adjudged to be such, and sent to the asylum at Knoxville, where he remained for some months. He returned again to his home in the vicinity of Charles City, and after a few months, resumed his drinking habits. He was an unmarried man, forty years old, at the time of his death. After his return from the asylum, he does not appear to have engaged in any particular line of occupation. In November, 1909, he went to Independence, and engaged a room at a rooming hotel. He remained at Independence for about a week. He had no apparent business there, except to visit the saloons, which were then in operation at such place. He did visit one or more of them constantly, during each day. He attracted the attention of the city marshal, who was a wit-

ness upon the trial. As a witness, he testified that he noticed Boeck as one who was drinking heavily, and who was intoxicated much of the time. On two or three occasions, the marshal ordered him to his room. Saturday afternoon, November 28th, he asked his hotel landlord, who was a retired physician, for cocaine. He was at that time "trembling." Being refused the cocaine, he went down the street. This was the last time that the landlord saw him. Later in the night, the landlord heard him return to his room. The marshal saw him in the evening, and observed that he was then intoxicated. Sunday morning, he was found dead upon his bed. He was fully clothed. His only companions in death were a bottle of whiskey and an empty whiskey bottle and a bottle of milk. The relatives were notified, and some of the plaintiffs herein came. A coroner's inquest was held, and the same was held open until the arrival of the relatives. The verdict of the coroner's jury was that he came to his death from heart failure, caused by excessive indulgence in liquor. The plaintiffs caused proofs of death to be made to the defendant society. In such proof, the cause of death was given as heart disease, caused by "alcoholism." The report of the coroner's inquest was also attached. These proofs were verified by the affidavit of each of the plaintiffs herein.

The foregoing comprise the material and important facts upon which the former opinion was based. We find nothing in the additional oral cross-examination of the defendant's witnesses which was had at the last trial which modified any of these facts to any degree. The plaintiffs introduced the testimony of some additional witnesses. One of these was the saloon keeper at whose saloon Boeck had spent the greater part of the last week of his life. The purport of his evidence is sufficiently indicated by the following quotations therefrom, which have been selected by

the plaintiffs in their brief, and from which we quote the same.

"I never to my knowledge saw Mr. Boeck in my saloon when he appeared to be under the influence of liquor or drinking excessively. I saw him in there at different times; I observed him drinking there. I saw him take some drinks. \* \* \* Boeck was usually in the saloon in the evening. I have seen him there during the day, but not as often as later on, and I couldn't say that he was in there each day, because I hardly think he was. I became acquainted with him in a passing way. He would take beer, and sometimes whiskey. We didn't permit persons to remain around in our place intoxicated. We made it a rule when we could detect or discover they were intoxicated not to have them in the place. \* \* \* I couldn't say whether he was in my saloon on Saturday night before he died. In the conduct of my business, I would not sell a man I thought was drinking too much."

The witness McGready was the doctor who was called by the coroner at the inquest. He also made the affidavit pertaining to the cause of death which was attached to the proofs of death and sent to the defendant society by the plaintiffs herein. He testified, in substance, that his opinion was not formed upon an observation or examination of the dead body, and that he could not have formed any opinion as to the cause of death upon such observation, and that he formed his opinion upon the facts adduced at the inquest. He also testified that he wanted to make a post-mortem examination, but the relatives would not permit it.

A medical witness, Burke, was called by plaintiffs. A lengthy hypothetical question, purporting to recite the facts of the case, was propounded to him, and was answered by him. In the additional testimony thus introduced, we are unable to find anything that affects the important facts considered by us in our former opinion. The testimony of the

first witness simply sets forth his standards of conduct as a saloon keeper. Such facts as appear in his testimony corroborate the claim of inebriety. Boeck was a stranger to him, and a stranger in the city of Independence, and had no business there except to patronize its saloons. There is nothing in McGready's testimony which impeaches or contradicts the verdict of the coroner's jury. Such a verdict always is, or ought to be, based upon the facts developed by evidence.

The medical expert evidence was based purely on a hypothetical question. The question was vulnerable, but we pass that. The question was so framed as to call for the opinion of the witness on the evidence in the case as a whole. It would be difficult to say that a medical expert would be any more competent to answer it than would any other intelligent witness or juror. Be that as it may, the answer of the witness added nothing to the case. At the close of the hypothetical statement, which is too lengthy to be set forth herein, the following questions and answers appear:

"Would you, from that history, Doctor, form an opinion as to whether or not, in your judgment, this man, thus found dead under the conditions and the history as I have given it,—whether he died from the use of alcohol, either directly or indirectly? Answer that by yes or no. A. No, I would not. Q. I say, could you form an opinion? A. Form an opinion as to what was the cause of his death? Q. Yes, have you an opinion? I am asking you whether you have an opinion,—not what it is, but— A. Yes, I have. Q. \* \* \* and I will now ask you, Doctor, whether or not the finding of the man dead, under those conditions,—whether you would say that his death was due, directly or indirectly, to the use of alcohol? \* \* \* A. No, I would not. Q. You say it didn't,—is that what you mean? A. Yes, sir, under the circumstances."

Disregarding the ambiguity of the foregoing answers,

the evidence, such as it was, was quite conceded away in the cross-examination. On redirect examination, the final summing up of the witness was as follows:

"A. In order to cause a death from alcohol, you would have to have—they have to take a pretty excessive amount of alcohol. Deaths from alcohol,—that is, the immediate deaths from alcohol,—are rare, and they are not so rare, but then they are drawn over a considerable period of time, usually several hours. An alcoholic will go into a coma and stay in a coma for several hours. As far as immediate quick death from alcohol is concerned, there are not so many of them, in proportion to the amount of alcohol that is consumed."

It would be trifling with judicial candor to say that such evidence changed, in any material sense, the record as it appeared before us on the former appeal. We must, therefore, treat the former opinion as controlling, upon the present record. A verdict should have been directed for the defendant, upon the ground here indicated. The judgment is, accordingly,—*Reversed*.

PRESTON, C. J., LADD and SALINGER, J.J., CONCUR.

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M. R. DILLY, Appellant, v. PAYNESVILLE LAND COMPANY,  
Appellee.

**LANDLORD AND TENANT: Possession of Premises—Wrongful**

- 1 **Deprivation—Damages.** In working out the measure of damages for wrongfully depriving a tenant of the possession of leased premises, reserved *cash* rent must be compared with fair *cash* rental of the premises, and reserved crop rent must be compared with fair *crop* rental. For instance, if the reserved cash rent be \$10 per acre, and the fair cash rental be \$12 per acre, then the damages are \$2 per acre; if the reserved crop be 10 bushels per acre, and the fair crop rental be 12 bushels per acre, then the damages are 2 bushels per acre, which, when reduced to money value, represents the ultimate and required form of the damages.

**EVIDENCE: Opinion Evidence—Competency of Expert—Lack of**

- 2 **Knowledge of Material Condition.** An expert witness is not competent to testify to the value of a thing, when such value depends materially on a condition as to which the expert shows no knowledge.

**PRINCIPLE APPLIED:** A landlord rented the cultivated land of his farm at a stipulated rent, but as a further inducement, granted the *free* use of the pasture land to the tenant, stipulating, however, that such use should not interfere with any work which the landlord might want to do on or with the pasture land. The tenant was wrongfully deprived of the possession of the premises. In an action for damages, a witness testified as to the rental value per acre of the pasture land, without any knowledge, or showing as to what work the landlord contemplated with reference to the pasture land, or the effect of said work thereon. *Held*, the witness was not competent.

*Appeal from Harrison District Court.*—J. B. ROCKAFELLOW,  
Judge.

APRIL 1, 1918.

ACTION for damages consequent upon failure of tenant to obtain possession under lease, resulted in a directed verdict for plaintiff on first two counts of petition, and for defendant on last count, and judgment thereon. The plaintiff appeals.—*Affirmed*.

*Cochran & Barrett*, for appellant.

*C. W. Kellogg*, for appellee.

LADD, J.—On January 3, 1913, defendant leased to plaintiff, for a term of one year, commencing March 1, 1913, a quarter section of land. The latter undertook to pay defendant rent for same in manner following: that is to say, one half of all grain raised on said farm, to be delivered in the towns of "Orson and Pisgah, Iowa, on or before the 1st day of February, 1914, at the option of the party of the first part. This lease is only for the farm land on the above described land, but the said M. R. Dilly can use the pasture free of charge, not to interfere with any work that the said



first party may want to do on the land not now in cultivation." The tenant could not obtain possession, and recovery of damages was sought (1) for time spent in leasing another farm, (2) for work of plaintiff and team in dyking along the river, and (3) for the difference between the rent reserved in the lease and the market value of the use of the premises, on conditions specified in the lease. Only the last item is involved in this appeal, as verdict for the first two was directed for plaintiff. The rulings on the admissibility of evidence are not challenged in brief point or argument, nor by specific assignment of error, the assignment being of rulings found on "pages 5 to 32, inclusive." But the second assignment of error clearly raises the inquiry as to whether enough evidence remained in the record to have exacted the submission of the last item of damages to the jury. That the tenant may recover damages consequent upon being denied possession to which he is entitled under the lease, was settled in this state by *Adair v. Bogle*, 20 Iowa 238, and for this case, on the former appeal. *Dilly v. Paynesville Land Co.*, 173 Iowa 536. The measure of damages as determined by the last case is the difference between the rent reserved, if specified in money, or the fair value of commodity or share of products or crop, if so specified, and the fair value of the use of the premises during the term of the lease, if the latter exceeds the former, and in any event, at least nominal damages. See cases cited above; and also *Alexander v. Bishop*, 59 Iowa 572; *Hall v. Horton*, 79 Iowa 352. This is the measure; but, of course, it does not matter much in what manner it is attained. Suppose the evidence disclosed that the fair rental on shares was more than reserved in the lease, the same result would be reached by ascertaining the difference in share rent, and then the money value of such difference. Or suppose it should appear that the fair rental

1. LANDLORD  
AND TENANT:  
possession of  
premises:  
wrongful depri-  
vation: dam-  
ages.

of the cultivated land was the share reserved in the lease, then the difference would be the fair cash rental of the pasture land. In each of these methods, the result would be the same: i. e., the difference between the rental value reserved and the fair value of the use of the land for the term fixed. What the law exacts, as a measure of damages, is fair compensation for the injury done; and it is not a stickler as to the road pursued in order to reach that result.

The plaintiff testified that the reasonable rental value of the land, on the conditions specified in the lease for the term, was \$1,000; that:

" $\frac{1}{2}$  the crop raised on the place would be equivalent to \$1,000; that that would not include the entire place. It includes about \$1,200. At \$5 per acre, the whole place would be \$815. That is all at cash rental value. \* \* \* Q. Did you consider, when you agreed to pay the Paynesville Land Co.  $\frac{1}{2}$  of the crop,  $\frac{1}{2}$  of the alfalfa, and  $\frac{1}{2}$  of the wild hay, delivered at Pisgah or Orson, that you were paying all that the 160 acres was worth, more or less? A. That was a fair rent. \* \* \* The \$1,000 I fixed was cash rent. In fixing \$1,000, I do not include the pasture land. With it included, the value of the leased premises during the term, with all these conditions attached to the pasture land, would be \$1,200 to \$1,300."

Re-cross examination:

"Q. Mr. Dilly, you are now fixing a valuation as a basis on what you thought a tenant might make off the place if he went on there and farmed it himself, are you not? A. Yes, sir; and paid cash rent. I would make more money renting it for one half."

All of plaintiff's answers with reference to the rental property, based on a cash rental valuation, were stricken, on defendant's motion. The witness Lee estimated the rea-

2. EVIDENCE:  
opinion evi-  
dence: com-  
petency of  
expert: lack  
of knowledge  
of material  
condition.

sonable cash rental for the term at \$6 per acre, but this was subsequently stricken, on motion. This recital of evidence and the elimination of a large portion of it dispose of the contention that there was no error in directing a verdict. Whether the rulings on the motions to strike the evidence and on objections to questions were erroneous, we express no opinion; for these rulings are not questioned in brief point or argument. It may not be amiss to direct attention to the condition of the lease saying that it "is only of the farm land on the above-described land, but the said M. R. Dilly can use the pasture free of charge, not to interfere with any work that the said first party may want to do on the land not now in cultivation." "Any work" must have been intended, else the use of the pasture would not have been given without compensation. No evidence of what "work" lessor intended to do, or to what extent it might interfere with the beneficial use of the 60 acres of pasture, was adduced; and, in the absence of such evidence or knowledge on the part of the witness, it was utterly impossible for a witness to estimate the value of the use thereof. Suppose such work were breaking all the land, it would be useless for pasture; or suppose such work was to be in the way of laying tile drains, this would considerably impair its rental value. If, then, the rental value of the cultivated land were such as specified in the lease, no basis for ascertaining the fair value of the pasture land on condition specified was submitted to any witness. Even though the court might well have been more liberal in its rulings in relation to the measure of damages, many of the rulings are to be justified, on the ground mentioned.

The evidence remaining in the record was not such as that directing a verdict was erroneous.—*Affirmed.*

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

AARON FLOYD, Appellant, v. E. MISNER et al., Appellees.

**BROKERS: Compensation—Evidence—Sufficiency.** In a controversy between rival brokers over the right to a conceded commission, evidence reviewed, and held sufficient to support a judgment for intervenor.

**BROKERS: Compensation—Rival Claimants.** A broker must recover his commission, if at all, on the strength of what he did under his contract with the owner, and not on the weakness of the case made by a rival claimant for the same commission.

*Appeal from Cass District Court.*—J. B. ROCKAFELLOW, Judge.

APRIL 1, 1918.

PLAINTIFF brought action against defendant Misner to recover commission alleged to be due for the sale of real estate. Intervenors claim that they were the ones who made the sale and were the efficient cause of bringing the seller and purchaser together, and that they were entitled to the commission. The defendant admitted liability to someone, but denied liability to plaintiff. After a trial to the court, without a jury, the court found for the intervenors, and the plaintiff appeals.—*Affirmed.*

*A. M. Fagan*, for appellant.

*B. A. Goodspeed*, for appellees.

PRESTON, C. J.—1. The question presented is largely one of fact as to what the contract was, and which of the parties was the efficient or moving cause in bringing the parties together. Defendant listed his property with both plaintiff and intervenors, neither of whom had the exclusive right to sell. Plaintiff's claim is that defendant agreed to pay plaintiff the commission if he would find a

1. BROKERS:  
compensation:  
evidence: suf-  
ficiency.

purchaser for defendant's property, and that he procured a purchaser for the real estate, in the person of one Morrison. Intervenors claim that they procured the purchaser of said real estate in the person of said Morrison, who entered into a valid and binding written contract with the defendant Misner and that thereafter, Morrison became the purchaser thereof from Misner. Intervenors deny that plaintiff procured the purchaser, or in any way contributed to or in any manner participated in the sale of said real estate. The circumstances are not such as that Misner is liable to both plaintiff and intervenors, and we do not understand either of them to so claim.

It appears that, on August 4, 1916, plaintiff took Morrison to the Misner farm, and that Misner was present at the farm and went with plaintiff and Morrison over the farm and about the buildings. Morrison offered to trade his 80-acre farm in Guthrie County for the Misner 153 acres and pay the difference, but Misner refused to consider a trade. Morrison sold his 80 acres about September 4 or 5, 1916, and purchased the Misner farm September 5, 1916, after the written contract, which intervenors claim they were instrumental in procuring, was executed. Defendant listed his land for sale with plaintiff and intervenors at \$160 per acre, cash, or not less than \$4,000 down, payable on the first of the following March, and the assumption of a mortgage upon the property for the balance of the purchase price. After that, and about two weeks before the sale, defendant notified both plaintiff and intervenors that he had raised the price of the land to \$165 per acre, cash.

We have given the substance of all that took place between plaintiff and defendant. It is true that the purchaser, Morrison, was not again shown the Misner land by intervenors or anyone else; but no further effort was made by plaintiff to bring Misner and Morrison together, and there was never any meeting between plaintiff and Morrison, and

no word ever passed between them after plaintiff had received notice from defendant of the raising of the selling price. About a month later, Morrison asked plaintiff what had become of the Misner farm, and plaintiff said he did not know whether Misner had sold the farm yet or not. Thereafter, Morrison was brought to Atlantic by intervenors, and finally, through their efforts, as intervenors claim, and as the court could have found from the evidence, signed a contract with Misner for the purchase of the farm at \$165 per acre. Later, a deed was executed, pursuant to the contract.

Under the authorities, the minds of the vendor and the proposed purchaser must meet upon the terms of sale offered by the vendor. Under the record we have set out, it cannot be claimed that plaintiff procured the purchaser on defendant's terms, and sold the land at \$165. We think, too, that the mere fact that plaintiff showed the property to Morrison, and did what the evidence shows he did do, was not sufficient to make him the efficient cause of the sale. The evidence tends to show, too, and the court could have so found, that plaintiff abandoned further effort to bring the parties together, after defendant had raised the price.

The purchaser, Morrison, testifies that he had thought of buying the defendant's land if he could sell his 80 acres, and that, at the time he signed the contract for defendant's land, he had not yet sold his 80 acres, and that he never offered defendant \$165 an acre, and did not know the price had been raised, until informed thereof by intervenors; that plaintiff had never informed him of the raise, and that he had never offered defendant \$165 an acre until he came to Atlantic with intervenors; that plaintiff never offered to take him to Misner after the raise; that plaintiff never gave him the terms that defendant accepted; and that plaintiff had nothing to do with his going to Atlantic or signing a contract; and that plaintiff never priced the land to him at \$165. Defendant testifies that plaintiff did not procure

anyone who offered to buy the land on defendant's terms, and says that the purchaser did not make any offer, when on the place, and that he never had any offer from him other than the offer to trade the 80 acres, until he (Morrison) came to Atlantic with intervenors. Intervenors sold the Morrison 80 about a week after they had sold defendant's land to Morrison.

A case somewhat similar in its facts, and having a bearing, is the case of *Hunn v. Ashton*, 121 Iowa 265.

In so far as there is any conflict in the testimony, the finding of the trial court is binding upon us, there being sufficient evidence to sustain such finding.

It is thought by appellant that the evidence is not sufficient to show that defendant ever promised or agreed to pay intervenors the amount awarded by the court, or any other sum, or that the reasonable value of their services was the amount awarded. But we think this is a matter between defendant and intervenors, and is no affair of plaintiff's. Defendant has not appealed. Plaintiff is suing to recover his alleged commission; and before he can recover, he must prove his case, and show that he was the inducing cause of the sale.

As bearing upon this proposition, see *Haswell v. Thompson*, 181 Iowa 248.

One or two other questions are argued, but they are of minor importance, and not controlling.

It is our conclusion that the judgment of the district court is right, and ought to be, and it is,—*Affirmed*.

LADD, EVANS, and STEVENS, JJ., concur.

2. BROKERS:  
compensation:  
rival claim-  
ants.

FULTON BANK, Appellee, v. VIOLET MATHERS et al., Appellees, BENNETT AUTO SUPPLY COMPANY, Appellant.

**APPEAL AND ERROR: Perfecting Appeal—Notice—Service—Non-**  
1 interested Parties. A party who has lost all interest in the subject-matter of the litigation need not be served with notice of appeal.

**SALES: Rescission by Buyer—Buyer Transferring Title—Effect.** A  
2 vendee of personal property may rescind *after he has lost all title to the property*, provided he is able to cause, and does cause, the property to be delivered or tendered on his behalf to the vendor.

**SALES: Rescission by Buyer—Nonavailability of Warranty To Buyer of a Buyer.** A warranty to the vendee of property, and the  
3 right to rely thereon, with consequent right to rescind for breach of said warranty, do not pass to one who subsequently takes or purchases of said original vendee.

**CONTRACTS: Construction—Parties—Privity.** Ordinarily, there is  
4 no privity of contract between the original seller and the buyers of the same property in subsequent sales. So held on the question whether a warranty and the right to rely thereon passed to a donee of the original vendee.

**PRINCIPAL AND AGENT: Implied Agency—Husband and Wife.**  
5 The act of a husband in personally attempting to exercise a right which he did not possess gives rise to no presumption that what he did was *on behalf of his wife*, who did possess such right. So held where a husband attempted the rescission of a contract, when such right rested only in the wife.

*Appeal from Woodbury District Court.*—DAVID MOULD,  
Judge.

APRIL 1, 1918.

THE Fulton Bank sued Violet and T. C. Mathers on a promissory note, executed by them to the Bennett Auto Supply Company as the price of an automobile, and by said company transferred to said bank. The defendants answered, and, by way of petition of intervention, impleaded the Bennett Auto Supply Company, alleging that it had



warranted the automobile, that there was a breach of said warranty, and that defendants on this account had rescinded the contract of purchase; and they prayed recovery of the purchase price. Judgment was entered in favor of the bank for the amount payable on the note. Execution was issued, and was levied on the automobile, which was sold, and the proceeds were applied in satisfaction of the costs, and the remainder on the judgment. The balance owed on the judgment has been discharged by the Bennett Auto Supply Company, in compliance with its guaranty, and the claim has been taken over by it. Thereafter, the issues raised by the petition of intervention and answer thereto were tried, and resulted in a judgment in favor of Violet and T. C. Mathers and against the Bennett Auto Supply Company for an amount equal to the portion of the judgment unsatisfied by execution. The Bennett Auto Supply Company appeals.—*Reversed.*

*Henderson & Fribourg*, for appellant.

*W. G. Sears* and *C. B. Stiger*, for appellees.

PER CURIAM.—I. As the Fulton Bank recovered judgment, and it has been fully paid, it has no further interest in the litigation. For this reason, it was not essential to the disposition of the appeal of the Bennett Auto Supply Company from the judgment against it in favor of the Mathers that notice thereof should have been served on the bank, and the motion to dismiss is overruled. On the former appeal, we held that, as to whether there was a rescission, and whether this was within a reasonable time, were issues for the jury (161 Iowa 634); and, as these rulings are the law of the case, there is no occasion to review them, save as the evidence adduced at the last trial may require.

1. APPEAL AND  
ERROR: perfecting appeal:  
notice: service  
noninterested parties.

II. The defendant Violet Mathers purchased the car,

and executed a promissory note therefor, dated August 2, 1910, and payable January 1, 1911, for \$1,800, representing that she expected to pay the same out of money coming to her from England. Both she and her husband, T. C. Mathers, testified that he signed merely as surety, and she

testified as follows:

"I made him (T. C. Mathers) a present of the machine. Q. When did you make him a present of it? A. The moment it came. Q. Who was there when you made this gift? A. We were. I wanted him to have a good one. \* \* \*

Redirect examination: "Q. In regard to this present, had you talked with Ted about making him a present? A. Yes, sir,—that is, I wanted it at the end of July. Q. His birthday? A. Yes, sir, I wanted it for his birthday."

T. C. Mathers testified:

"I knew I was going to get it (automobile) for a birthday present, the day Mr. Waliston drove it down. I knew it before the day that Mr. Bennett and Waliston came down. That was the time my wife told me that she was going to give me the present of the automobile. Q. When did she present it to you? A. The second day of August. Q. You never complained to her afterwards about the kind of gift she made, did you? A. No, sir."

At the close of all the evidence, the Bennett Auto Supply Company, as a ground for its motion to direct a verdict for it, suggested that, at the time of the attempted rescission, Violet Mathers was not the owner of said automobile, and therefore could not rescind the contract of the sale to her of said automobile, and that T. C. Mathers could not rescind the contract, for that he was not a party thereto. This motion was overruled, and error is assigned on the ruling.

The only inference to be drawn from evidence set out

2. SALES: rescission by buyer: buyer transferring title: effect.

3. SALES: rescission by buyer: non-availability to buyer of a buyer.

is that title to the automobile passed from Violet Mathers to her husband on the day of the purchase. He then became the owner, but the warranty of the company did not pass with the title. In the sale of personal property, the warranty thereof is not negotiable, nor does it run with the article sold. *Smith v. Williams*, 117 Ga. 782 (45 S. E. 394); *Nelson v. Armour Packing Co.*, 76 Ark. 352 (90 S. W. 288); *Thisler & Schneider v. Keith*, 7 Kan. App. 363 (52 Pac. 619); *Sturgis v. Whisler*, 145 Mo. App. 148 (130 S. W. 111). As said in *Nelson v. Armour Packing Co.*, supra, and *Bank of Montreal v. Thayer*, 7 Fed. 622, it is addressed to some particular person, and ordinarily, there is no privity of contract between the seller and the buyer of the same property in subsequent sales. Each purchaser can resort, as a general rule, only to his immediate seller. Here, the sale and the warranty were to Mrs. Mathers. She immediately transferred title by gift to her husband, but this did not carry to him the warranty or the right to rely thereon. No privity arose between him and the seller by virtue of the contract of sale with his donor and the transfer of title to him. For this reason, he could not avail himself of the warranty, nor was he in a situation to complain of any breach thereof. As there was no warranty by the Bennett Auto Supply Company to him, it necessarily follows that there was no breach on which he might base a rescission. She only might rely on the warranty, which was made to her alone, and therefore she only might rescind because of a breach of contract. His sole connection with the purchase from the company was that of surety on the note, and this in no manner changed her relation as sole purchaser nor his as donee, without the advantage of the warranty. He took the car as it was turned over to him, and was not in a situation to question its quality. One may not look into the mouth of a gift horse. He, then, might not rescind, for

4. CONTRACTS :  
construction :  
parties : priv-  
ity.

that the warranty was not to him, and it is contended that she could not do so, because of not being able to restore the automobile to the seller, and thereby put it *in statu quo*.

The mere circumstance, however, that she had parted with title did not, as a matter of law, defeat her right to rescission. Such transfer did not deprive her of right to rely on the warranty, or to elect to rescind on the breach thereof, even though this might not be enough to entitle her to maintain an action for the purchase price, and thereby be restored to the situation in which she was prior to the sale, as nearly as may be. To do this one thing more is essential, and that is that the seller be put *in statu quo*; for the buyer may not demand such remedy for himself without first at least tendering to the seller restoration of the property purchased. In other words, he may not insist upon restoration of the purchase price to himself without returning or tendering the return of the property purchased. All essential to complete the rescission, after the breach of the warranty and the election to rescind because thereof, with appropriate notice, is that the seller be put *in statu quo*; and it is quite immaterial how this is done, whether the return be by the buyer or someone who had acquired title under the buyer, provided this is in behalf of such buyer, and in such manner as to fully restore the prop-

5. PRINCIPAL  
AND AGENT  
implied a-  
gency: hus-  
band and wife.

erty to the seller. The trouble here is that there is no evidence whatever that Mrs. Mathers ever tendered the automobile back, save by demanding a new machine instead; and all T. C. Mathers swore to was that the company refused to allow him to remove the automobile from its garage without first paying for the repairs, and that he said no more than that he would leave the machine, and demanded the return of the note, denominating it "my note." There is no room for an inference that he was acting for his co-defendant in what he then did. The mere fact that she was his wife did not

constitute him her agent, nor did he represent himself as such, and the circumstance that he demanded the surrender of the note he had signed as surety with her did not warrant the conclusion that he was acting for her in attempting to obtain it.

On the former appeal, we held that the evidence of rescission by defendants as joint purchasers was sufficient to carry such issue to the jury. The evidence quoted above was brought out on the last trial, and we are satisfied that, though it demonstrates that Mrs. Mathers only might rescind, it falls short of showing that she did anything essential to accomplish that purpose. For this reason, a verdict might well have been directed against defendants.

III. The contention that defendants are estopped from rescinding by reason of T. C. Mathers' exercising dominion over the automobile after he knew it was not complying with the warranty, is disposed of by what we have said. Other suggestions of error not argued require no attention.—*Reversed.*

PRESTON, C. J., LADD, EVANS, and GAYNOR, JJ., concur.

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LAURENCE JAMES, Administrator, Appellant, v. IOWA CENTRAL RAILWAY COMPANY et al., Appellees.

**NEGLIGENCE: Contributory Negligence—Avoidance—"Last Clear Chance"**—**Pedestrian on Railway Track.** Two persons may be so contemporaneously negligent that, if such negligence continues unbroken, no recovery may be had for a resulting injury to one of the parties; but if one of the parties actually discovers the other party in his position of reasonably manifest danger, at a time when the one discovering can avoid the injury by the exercise of reasonable care, such discovery presents to the one discovering it the last clear opportunity to avoid the injury; and if he does not, from the time of such discovery, exercise such reasonable care, and thereby avoid such injury, he is guilty of a *new, independent, and proximate* negligence—a negligence which neutralizes the former or continuing negligence of the one injured.

**PRINCIPLE APPLIED:** In a populous city, deceased, 42 years old, and wholly deaf, entered upon and walked down the center of a railway track. Thereafter, she looked neither to the right nor to the left nor to the rear. A passenger train, 350 feet long, consisting of engine and four cars, and running in the same direction as deceased was walking, came into unobstructed view of deceased for a distance of some seven blocks. The engineer and fireman were both looking forward, and out of the engine windows. The fireman saw deceased for a distance of over four blocks. The jury might have found that the engineer saw deceased about the same time. When some 700 feet from deceased, the fireman said to the engineer, "I don't believe she is going to get off." The engineer did not reply; but, long before deceased was hit, the warning whistle was repeatedly sounded, and the bell rung continuously, to all of which deceased paid no attention. The "service" brake was applied when the train was several hundred feet from deceased, but the "emergency" was applied only when the train was some three or four rail lengths from deceased. The train could have been stopped in less than 350 feet,—at least the jury might have so found.

*Held*, the doctrine of the last clear chance should have been submitted to the jury.

*Appeal from Marshall District Court.*—B. F. CUMMINGS,  
Judge.

JANUARY 10, 1918.

REHEARING DENIED APRIL 1, 1918.

ACTION for damages resulted in a directed verdict for defendant, and judgment thereon. The plaintiff appeals.  
—*Reversed*.

*E. N. Farber, H. C. Lounsberry, and Rickel & Dennis,*  
for appellant.

*C. H. E. Boardman, W. H. Bremner, and F. W. Miner,*  
for appellees.

LADD, J.—The only question submitted is whether the cause should have been submitted to the jury, on the theory that, notwithstanding decedent's negligence, defendant's em-

ployees discovered her perilous situation in time for them, in the exercise of ordinary care, to have avoided the collision. She was a woman of 42 years, wholly deaf, and was struck by a train on defendants' main track between Fourth and Fifth Streets in the city of Marshalltown. This track ran northwesterly from defendants' station. The train, consisting of engine, three passenger coaches, and baggage car, came in at about 9 o'clock in the morning of June 17, 1910, at a speed of 20 to 25 miles per hour, when it reached Tenth Street, and slowed down to 18 or 20 miles an hour by the time it reached Sixth Street, but continued moving at that rate until immediately before the collision, when the emergency brake was thrown on. The decedent had gone on the track at Fifth Street, and was walking between the rails, in a southeasterly direction. When struck, she was 275 feet beyond Fifth Street. The distance from Sixth to Fifth Street was 442 feet. After the train left the curve at Twelfth Street, there was a clear view of the track all the way, and the fireman testified that he saw her when the engine was between Tenth and Ninth Streets, and, at about the same time, the engineer caused the engine to whistle "for the Sixth Street crossing, and sounded the danger alarm,—whistled for danger."

"Q. About where was the engine when the engineer first sounded the danger whistle? A. Well, it was northwest of Sixth Street. \* \* \* Q. From there on down until the lady was struck by the engine, tell the jury whether the whistle was continuously sounded by the engineer. A. Well, he blowed the whistle at different times, trying to call her attention, like anybody would. Of course he did not pull the whistle open and keep it continuously blowing; the danger sound is short blasts of the whistle. Q. Were these blasts of the whistle short? A. Short and long, and in every way possible to alarm anybody that was on the track."

The bell was rung by the fireman all the time from Twelfth Street until the collision. The witness testified further that decedent gave no heed to the warning, but "walked straight ahead in the middle of the track, and never looked to the right or left;" that he kept his eyes on her, and, when northwest of the Sixth Street crossing, said to the engineer, "George, I don't believe she is going to get off the track;" that the engineer made no response; that the train was about 350 feet long, and ran about two train lengths to the point where decedent was hit. The engineer made the service application before reaching Sixth Street, and, as the witness first testified, applied the emergency three or four rails long before reaching decedent. It seems service application runs down the air pressure, and makes the application less effective on emergency.

The engineer did not apply the emergency brake when the fireman told him that the woman was not going to get off the track. The latter testified that this happened "just before he struck the lady." The engineer was looking out of his window all the time. Other witnesses gave testimony corroborating the above. We have assumed the facts to be as some of the evidence tended to prove, but without intending to intimate that they should be so found. This is done in pursuance of the rule that, when the propriety of directing a verdict is challenged, the evidence shall be considered in a light most favorable to the party asserting error in the ruling. It may be conceded, as it must be, that decedent was negligent in walking along the track, and in so continuing until she was struck. This, however, did not excuse defendant in running her down, if her position of peril was discovered, and her obliviousness to the approach of a train was appreciated in time so that defendants' employees might, in the exercise of ordinary care and vigilance, have stopped the train before the engine struck her. That such is the law appears from *Bruggeman v. Illinois Cent. R.*



Co., 147 Iowa 187; *Lundien v. Fort Dodge & S. R. Co.*, 166 Iowa 85; *Kelly v. Chicago, B. & Q. R. Co.*, 118 Iowa 387; *Tarashonsky v. Illinois Cent. R. Co.*, 139 Iowa 709.

Said employees had the right to assume that decedent would leave the track, up to the time when it became apparent to them, as ordinarily cautious and prudent men, that for some reason she was not likely to do so. This might have been found to have happened when or before Sixth Street was reached. The fireman so said to the engineer when or before Sixth Street was reached; and, though the latter would not necessarily be bound by what the fireman said, it brought the situation to the engineer's attention. Indeed, the jury might have inferred, from the signals given, and the evidence that the engineer was looking out of his cab, with an unobstructed view, that he saw decedent as soon as the fireman did, and therefore observed decedent's conduct from Ninth Street on. *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa 667; *Bacon v. Iowa Cent. R. Co.*, 157 Iowa 493.

With danger signals sounding, as was testified to by several witnesses, together with the ordinary noise of a train approaching so near, a normal person would not be likely to give no heed to the danger of her situation; and surely, the issue of whether defendants' employees, as ordinarily careful men, did or should have discovered this, and so have acted as not to have run her down, was for the jury. According to the fireman, the train was stopped, after moving about twice the train's length, or 700 feet.

Another witness testified that the train *stopped*, but did not run its length after the collision before being stopped. From this evidence, the jury might have found that, had the engineer undertaken so to do upon discovering decedent's peril, he could have brought the train to a stop before injuring her. The law is well settled, the only doubt being as to whether a case was made out by the evidence.

The suggestion that this case necessarily is one of concurrent negligence is disposed of by *Bruggeman v. Illinois Cent. R. Co.*, supra. The jury could not well have found otherwise than that decedent was oblivious of her peril. If defendants did discover her peril, as the jury might have found, then, notwithstanding her negligence in being where she was, the defendants' employees were bound to do whatever ordinary prudence and care exacted, to avoid injuring her. It will not do to say that the assumption that an adult will leave the track before the train reaches him may be carried beyond the point where a person of ordinary prudence would infer from appearances the contrary; and from that moment, those in charge of the train are required to exert all reasonable effort to avoid a collision. The decisions cited dispose of every issue presented. The cause should have gone to the jury.—*Reversed*.

PRESTON, C. J., EVANS, GAYNOR, and SALINGER, JJ., concur.

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J. F. LEWIS et al., Appellants, v. PRYOR DRAINAGE DISTRICT et al., Appellees.

**DRAINS: Establishment—Objections—Requirements.** Objections to  
1 the *establishment* of a drainage district need not be in *writing*, nor in any particular *form*, nor made at or before any particular *date*. The all-essential requirement is that such objections be raised in *some* intelligent manner before the board of supervisors, in ample time for due consideration.

**DRAINS: Establishment—Modifying Engineer's Report—Appeal.**  
2 An order establishing a drainage improvement by eliminating a portion of the engineer's recommendations, *without previous notification of intention to so eliminate*, is appealable by those adversely interested, without presentation of *any* objections before the board.

*Appeal from Mills District Court.*—SHELBY CULLISON, Judge.

APRIL 1, 1918.

IN the district court, this was an appeal from an order of the board of supervisors, establishing a drainage district. The appeal was taken in due form, and a petition filed, as required by statute. The appellees moved for a dismissal of the appeal, on the ground that the appellants had filed no objections before the board of supervisors. At the close of appellant's evidence, this motion was sustained. From such order of dismissal, they have appealed.—*Reversed and remanded.*

W. S. Lewis, for appellants.

Genung & Genung, Cook, Cook & Cook, and H. M. Logan, for appellees.

EVANS, J.—I. The drainage district established by the order of the board is known in the record as the Pryor Ditch. The proceedings pertaining thereto were in due form. The project was approved by the engineer as practicable, with a recommendation, however, that certain laterals, A, B, C, and D, be included as a part of the plan.

1. DRAINS :  
establish-  
ment : objec-  
tions : re-  
quirements.

Notice was published, in accordance with Section 1989-a3, fixing the date of hearing as November 22, 1915. This notice required that all objections and claims for damages should be filed in writing before six o'clock P. M., November 21st. That the landowners affected by the project became divided at once into two opposing groups is without dispute. The purpose of the project was to drain certain lands on the Missouri River bottoms. It is made to appear that, in this locality, a large quantity of water is cast from a large watershed of the high lands upon these low lands. The problem of drainage is to conduct this water into the Missouri River in such a way as to prevent its spreading over a large surface of the low ground. From the high lands to their foot there is a fall of 32 feet. The natural course of the water upon the low lands is south-

erly and slightly westerly. The surface elevation of these low lands has this peculiarity: that a ridge of comparatively higher ground extends from north to south, about midway between the river and the hills. Between this ridge and the hills is the lower ground, which receives the first discharge of the water. The fall toward the Missouri River is slight, and the water, therefore, moves slowly. On the west side of the ridge, the elevation gradually decreases towards the river. The objective is to so carry the water that falls from the high watershed upon the low lands lying east of the ridge in question as to prevent its spreading thereon. This can only be done by building levees to conduct the water over the lower ground, and by digging excavations through the higher ground. The Pryor Ditch takes its head in the northeast corner of the established district. It will run nearly due west until it cuts through the ridge in question, and will then turn southerly and southwesterly, through what is called Haney's Slough. In order to follow this course, levees must be built across the low ground, and a deep excavation must be made across the ridge. Naturally, the owners of the ridge lands and of the lower lands west of the ridge object to such course of the ditch, both because of its interference with the cultivated lands, which have no need of drainage, and because of the diversion of water upon the lower lands west of the ridge.

Such landowners include the appellants. Their method of resistance was to put forward a counter scheme of drainage. On October 29, 1915, they filed with the auditor a petition for the establishment of a drainage district covering substantially the same territory as the Pryor District, though not exactly. In this scheme, the proposed ditch also took its head near the northeast corner of the district, and proceeded along the natural course of the water flow southwesterly to the Missouri River. This scheme was known as the Welch petition. This scheme was

also approved by the same engineer, who also testified on the trial that it was the better of the two. The proposed ditches were almost identical in length. On November 22, 1915, the board adjourned the consideration of the Pryor petition to a future date. Successive adjournments were had until January 24, 1916, on which date the board had set both petitions for hearing at the same time. The order of adjournment to January 24th was made on January 10th, and was as follows:

"Record Jan. 10, 1916. Now at this time, viz., Jan. 10, 1916, the board of supervisors being in regular adjourned session with all members present and acting in the matter of the Pryor petition was taken up and duly considered and there having been objections filed to the report of the engineer (commissioner) and claims for damages in the aggregate sum of \$11,355 having been filed, the same were taken up and considered and another petition by S. M. Welch and others asking for a ditch to serve the same purpose being on file and pending before this board and has been set for hearing on Jan. 24, 1916. The further proceedings of the Pryor petition are continued until Jan. 24, 1916, at 10 o'clock."

On January 24, 1916, the following record was made:

"Record Jan. 24, 1916. Now on this 24th day of Jan., 1916, the board being regular adjourned session with all members present and acting, they took up and considered the petition of A. B. Pryor et al., and also at the same time they took up the substituted petition of S. M. Welch and others asking for the drainage and relief from the same waters, but along a different route of the Missouri River and by agreement of the council for both petitioners and objectors, the board proceeded to hear evidence for both of these petitioners at one and the same time and the board finds that at this time that both the Pryor and Welch petitions are in legal form and sufficient in description and de-

tail to give the board jurisdiction in the matter, and the board further finds that due and legal notice has been given all parties and interests of the pending of both petitions and that the surveys made and plans and estimates of costs reported by Seth Dean, Commissioner, for each of the above petitioners are sufficient in detail to furnish the board with the necessary information for acting."

After this date, the record of the proceedings pertaining to both projects was carried as a joint record, under the designation "Welch and Pryor ditches." The same appraisers of damages were appointed at the same time for both ditches. These projects received the consideration of the board on scores of subsequent dates, pursuant to adjournments, from time to time. Every adjournment carried both projects together, and every consideration was a consideration of both projects. The record of the last three meetings of the board pertaining thereto was as follows:

"January 2, the board now takes up the matter of each of said ditches and finds that there are now objections pending to each of the said petitions and in order to better adjust these objections and in the best interest of drainage the board now postpones final action thereon and adjourns each of said proceedings until March 15, 1917.

"Record March 15, 1917, the board being in regular adjourned session takes up the petitions. It was considered for the best interest of all parties that a further hearing is now set for March 21, 1917, to which all further business in connection with these petitions are now adjourned. \* \* \*

"Record March 22, 1917, in the further matter of the Welch, Wright and Pryor ditches, the board on this 21st day of March, 1917, takes up the consideration of said matter and orders the establishment of the Pryor ditch and the rejection of the Welch and lateral C. and D."

On April 2d, a formal resolution was adopted, establishing the Pryor ditch and rejecting the Welch ditch. It

is from such order that the appellants have appealed. The question before us is whether the appellants were entitled to a trial upon the merits of their appeal, or whether the motion to dismiss was properly sustained for want of proper objections before the board of supervisors.

It will be noted from the foregoing that the published notice which fixed a date of hearing in the Pryor petition required all objections and claims for damages to be made in writing before 6 P. M., November 21st. No written objections were ever filed by the appellants before the board, unless the presentation of the Welch petition could fairly be deemed as such. Nor is it made to appear that they actually appeared in person before the board to make objection before 6 P. M., November 21st. Nor is it disclosed by the evidence whether they actually appeared in person before the board on November 22d. The appellants raise no question as to the legality or regularity of the procedure leading up to the final action of the board. They ask to be heard on appeal only on what may be termed the ultimate merits of their controversy. Their general contention is that they were entitled, as landowners, to be protected against the diversion of this water from its natural course, and that the scheme presented by them was a better scheme, in a practical sense, and was more just and equitable in a legal sense than was that adopted by the board. Are they now precluded from being heard because of failure on their part to bring their objection properly before the board? The drainage statute requires claims for damages to be made in writing, and by the date fixed by the board. It makes the same requirement as to objections to assessments of benefits. It does not require that objections to the establishment of a district shall be made in writing, nor that they shall be made in any particular form, nor that they shall be made by any particular date. It is the contention of appellee that we have held in previous cases that objections

must be filed before the board, in order to entitle the objectors to appeal. This appears to have been the view, also, of the trial judge. The ground of his ruling was indicated as follows:

"If the Supreme Court had never said anything at all about the necessity of filing objections before the board of supervisors, I would have very little hesitancy in determining this motion; because I think logic, reason, justice, and everything else require that a person have the opportunity to appeal from an order of the board to the effect that the benefits do not exceed the costs, whether they file any objections or not. That the law itself makes that an issue for determining whether any pleadings are filed, or objections are filed by the parties in interest, and, that issue having been presented by the statute, there should be a right of appeal from it, and in view of these various cases of the Supreme Court that have been cited here, and the apparent practice, as disclosed by them, it leads me to the view that objections are necessary, although I think it is an unreasonable requirement, and my present view of the matter is that the motion to dismiss that has been made at the proper time would be good."

The foregoing is a clear and concise statement of the view of the trial court as it would be except for our previous decisions. The view thus expressed appeals to us as eminently sound; and we are able to find nothing in our previous decisions which stands in the way of its adoption. Some of the cases cited in the brief of appellee to this proposition were cases relating to damages and benefits which are controlled by a different provision of the statute. Such include *In re Farley Drainage Dist.*, 144 Iowa 476; *Lightner v. Greene County*, 145 Iowa 95; *Hampe v. Hamilton County*, 146 Iowa 280.

We have held that, in order to entitle a person to appeal from an order of establishment, an issue must have



been raised before the board "in some manner." *Lyon v. Sac County*, 155 Iowa 367. A person will not be deemed aggrieved, for the purpose of an appeal, unless he has suffered an adverse decision below on some issue. We have also held, in cases where specific objections were in fact filed, that such specifications operated as a waiver of other objections not included; and especially that a person could not make objections on appeal pertaining to mere errors and irregularities in the details of procedure before the board, or as to the sufficiency of the data furnished by the engineer's report, if such objections were not made to the board at a time when they could have been remedied. *Kelley v. Drainage Dist.*, 158 Iowa 735; *Prichard v. Woodbury County*, 150 Iowa 565; *Lyon v. Sac County*, 155 Iowa 367.

We have never held that the objections must be in writing nor that any particular formality was requisite, nor that they must be made before the date fixed for hearing. Where the complaining party objects to the scheme on its larger merits, or *in toto*, there is little occasion for requiring formality. These schemes usually affect scores of landowners. To require from each one a formal written statement of his objection could only serve to encumber the record of the board, and to burden it with the examination of mere formalities. Objecting parties in such a case frequently appear in groups, and a group may well be represented by a spokesman, at the time of consideration by the board. In this case, consideration was had upon scores of dates, extending over a period of nearly 18 months. The record of the board shows repeatedly that it recognized objections as pending. There was no record of what the objections were, nor is there any dispute as to what their general nature was. We do not think it material whether these objections were presented before 6 P. M. of November 21, 1915. Nor was it material that they should have been presented prior to any other particular date, provided that they were fairly

brought to the consideration of the board, in abundant time to guide its action. As was well stated by the trial judge, the issue between petitioner and objector as to the general merits of the project is practically made by the statute. Even if the statute had required written objections, we should incline strongly to hold that the presentation and filing of the petition for the counter scheme of drainage would have fairly met such a requirement. The record of the board shows that their consideration of one always included the counter consideration of the other. To adopt one was necessarily to reject the other. Such was the form of the final order made by the board. There appears to be no reason why the appellants should not be entitled to have consideration on appeal of the same question as was considered by the board.

II. There is another feature of the case which militates against the sustaining of the motion of appellees. The approval by the engineer of the Pryor drainage scheme carried with it the recommendation that laterals

2. DRAINS:  
establishment:  
modifying en-  
gineer's re-  
port: appeal.

erals C and D be included as a part of the scheme. In the final order of establishment by the board, laterals C and D were rejected, and the scheme was adopted without such laterals. The appellants had had no advance opportunity to object to such an order. There was no advance notice that it would be made. From the very nature of the case, therefore, the appellants should be heard upon the propriety of the order in that respect, even though no objections had been filed or presented before the board. Whether these laterals should be deemed as a principal part of the improvement, or only a subordinate part thereof, we do not inquire, nor do we intimate any opinion as to the merits of the objection. We only hold now that the objection is one which could not be made before the board, and we see no valid reason why it should not be considered on appeal.

We reach the conclusion that, in a broad and general way, the objection of the appellants to the Pryor scheme was fairly brought to the consideration of the board, and was considered by the board, within the lines indicated herein. Disregarding, therefore, all technical objections relating to the formalities of procedure, the appellants were entitled to a hearing of their appeal upon the larger merits of the controversy. This would involve a consideration of the comparative engineering merits and of the comparative fairness and justice of the two drainage schemes presented for the consideration of the board. The order sustaining the motion for dismissal must, therefore, be reversed.—*Reversed and remanded.*

PRESTON, C. J., LADD and STEVENS, JJ., concur.

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FANNIE S. McALLISTER, Appellee, v. JOHN H. McALLISTER et al., Appellants.

**WILLS: Construction—Statutory Substitution—Predeceased Legatees—Legatee's Wife as Heir.** A devise or bequest to one who predeceases the testator passes, under Section 3281, Code, 1897, in the absence of a contrary intent, to the devisee's heirs; but the devisee's wife, in such case, is not an heir of devisee's.

**WILLS: Construction—Share of Legatee—Decree—Effect.** A will-  
2 construing decree, *based solely on the effect of a purported cancellation and erasure*, and finding that said cancellation and erasure were nullities, and that the will should stand as originally executed, and ordering (a) that the wife of testator was entitled to one half of the estate, in accordance with the unquestioned provisions of the will, and (b) that the remaining one half, which was devised to testator's son, who predeceased testator, should pass "*to the heirs of said son*," is not a judicial determination that the one-half portion to the wife is the *full measure* of her right—is no impediment to the wife's taking also a portion of the share which would have passed to said issueless son, had he survived testator.

**JUDGMENT: Conclusiveness—Controlling Issues.** A judgment or  
3 decree, when construed in the light of the issues upon which

it is based, may show that it is less comprehensive in its conclusiveness than the general language might fairly indicate.

**PRINCIPLE APPLIED:** A will devised one half of an estate to testator's wife, and one half to a son—his only child. The son predeceased the testator. The testator then informally indorsed a cancellation on the will, as to the devise to the son. He also drew lines through said devise to the son. After the death of testator, the executor asked for a decree construing the will, *in so far only as it was affected by said purported cancellation and erasure*. The decree held that the cancellation and erasure were nullities; that the will should stand as originally executed; and that the wife was entitled to half the estate, and the "heirs" of the predeceased son to the remaining half. *Held*, the decree was not a judicial determination that the said one half to the wife was the *full* measure of her right; that the wife was entitled to also take a statutory portion of the share which would have passed to said issueless son had he survived the testator.

**WILLS: Right of Devisees, Etc.—Election—Estoppel.** A wife, by  
4 electing to take under the will of her husband, is not estopped to take, through her husband, a portion of an unexpired devise to the husband's predeceased issueless son by a former marriage.

**DESCENT AND DISTRIBUTION: Persons Entitled—How Determined.** Heirs must be determined by the law in force at the  
5 time of the death of the person whose estate is under consideration.

**WILLS: Construction—Substitution—Stepmother of Predeceased Issueless Devisee.** A wife, upon the death of her testate husband without descendants, will take one half of a devise to her issueless stepson who predeceased her husband. (Sec. 3381, Code, 1897.)  
6

**WILLS: Construction—Substitution—Course of Descent.** A devise  
7 to a devisee who predeceases the testator passes, in the absence of a contrary intent in the will, in the following order:

First. To devisee's heirs, *to the exclusion of devisee's wife*. (Sec. 3281, Code, 1897.)

Second. To devisee's surviving parents in equal portions, provided devisee has no issue. (Sec. 3379, Code, 1897.)

Third. To the surviving parent, provided one parent is dead. (Sec. 3380, Code, 1897.)

Fourth. To each deceased parent in equal portions, if both be dead, and from thence to the heirs of the deceased parents. (Sec. 3381, Code, 1897.)

Fifth. *To the wife of said predeceased devisee*, provided a deceased parent has no heir for his or her portion. (Sec. 3382, Code, 1897.)

*Appeal from Clay District Court.*—D. F. COYLE, Judge.

APRIL 1, 1918.

Suit in partition resulted in a decree finding that plaintiff was owner of  $\frac{5}{8}$  of the realty involved, Sue A. McAllister,  $\frac{1}{4}$ , John A. McAllister,  $\frac{1}{6}$ , Edward A. Mechling,  $\frac{1}{2}$ , and Milo Miller,  $\frac{1}{8}$  thereof. All the defendants appeal. —*Affirmed.*

*Frank O. Campe, Heald & Cook, J. P. Goble, F. F. Faville, Charles H. Wright, and J. W. Cory & Son, for appellants.*

*Buck & Kirkpatrick, for appellee.*

*H. Chamberlain, guardian ad litem for unknown heirs, etc.*

LADD, J.—Charles McAllister died testate, July 20, 1913, leaving him surviving as widow, Fannie S. McAllister, and no descendants. His will was admitted to probate, and by its terms gave his widow the family residence and certain bank stock, and the residue of his estate to his “wife, Fannie S. McAllister, and son Alexander McAllister in equal portions, that is, one half of the residue of my estate to each.” Alexander was his only child, the mother of whom, Laura McAllister, had departed this life many years previous. Alexander died, May 13, 1912, leaving surviving him his widow, Sue A. McAllister, and one child, who departed this life May 26, 1912.

The mother of Alexander left no heirs. John H. and George H. McAllister are sons of a brother of testator's. George has assigned his interest in the estate to John H. McAllister. Elbertine Miller is the granddaughter, and

1. WILLS: construction: statutory substitution: predeceased legatees: legatee's wife as heir.

her brother, Milo Miller, the grandson, of another brother of testator's. The latter disappeared in 1906, and has not been heard from since. Elbertine Miller assigned her interest in the estate to Edward A. Mechling. These are all the heirs of testator, and our task is to ascertain the shares in the estate to which each is entitled.

I. Sue A. McAllister survived the devisee, Alexander A. McAllister, as widow, and she complains of the ruling of the court that she was not entitled to one half of the devise to said predeceased devisee, the same as though he had outlived the testator and been seized of the estate devised at the time of his death. This decision was in accord with the prior construction of Section 3281 of the Code, which declares that:

"If a devisee die before the testator, his heirs shall inherit the property devised to him unless from the terms of the will a contrary intent is manifest."

Nothing to the contrary appeared in the will. Though the devise passes to the heirs of the devisee, they take directly from the testator, and not through the devisee. *In re Hulett's Estate*, 121 Iowa 423. In the absence of such a statute, such a devise must have lapsed, and been disposed of as intestate property. This statute was enacted to obviate that result, and to substitute in place of the devisee those persons "who would presumably have enjoyed the benefits of such devise had the devisee survived the death of the testator and died immediately afterwards." In view of this benevolent design, it would seem that the widow of the devisee might have been accorded the position of heir; but, in construing this statute, the court held otherwise, in *Blackman v. Wadsworth*, 65 Iowa 80. That decision was followed in *In re Estate of Freeman*, 146 Iowa 38. This was in harmony with *Braun v. Mathieson*, 139 Iowa 409, *Kuhn v. Kuhn*, 125 Iowa 449, *Phillips v. Carpenter*, 79 Iowa 600, *Rausch v. Moore*, 48 Iowa 611, and somewhat incon-

sistent with *Smith v. Zuckmeyer*, 53 Iowa 14, and *Wilcke v. Wilcke*, 102 Iowa 173, deciding that, where the husband dies intestate, without issue, the widow is heir to one sixth of his estate,—that is, the difference between the one-third dower interest and the one half taken under Section 3379 of the Code, which provides that:

“If the intestate leaves no issue, one half of the estate shall go to the parents, and the other half to the spouse; if no spouse, the whole shall go to the parents.”

This last statute is held to be inclusive of the widow's third, or dower interest (*Burns v. Keas*, 21 Iowa 257); and, though she takes the third as dower, and in accord with Sections 3366 and 3376 of the Code, the additional sixth passes to her as an heir, and is, therefore, subject to the indebtedness of the husband. The ruling of *Blackman v. Wadsworth*, supra, was in the light of most of these holdings, as well as *McMenomy v. McMenomy*, 22 Iowa 148, and *Will of Overdieck*, 50 Iowa 244, which were regarded as in accord therewith. The court may have been influenced by the thought that the heirs of the predeceased devisee take their interest under the will, directly from the testator, and concluded that the heirs intended were those of consanguinity,—were it not for a prior decision (*Moore v. Weaver*, 53 Iowa 11), holding otherwise. In any event, the opinion holding the widow not an heir ought not to be disturbed, after the lapse of so many years. The decision has stood unchallenged for over 30 years, during which time the general assembly has been in session many times, and the statutes of the state revised, without changing the section to mean otherwise than stated in this opinion; and it may well be assumed that the legislative branch of the government is content with the construction excluding the widow of a predeceased devisee from the word “heirs,” as found in Section 3281 of the Code. Enlarging her share in her deceased husband's estate, as was done by the thirty-fifth gen-

eral assembly, does not obviate the conclusion. See Section 3379, Code Supplement, 1913.

II. Appellants other than Sue A. McAllister contend that the former decree construing the will limits and defines the plaintiff's interest in the property in controversy, and necessarily excludes anything she might take as heir of the devisee. The executors under the will applied to the court in probate for a construction of the will, on which there appeared an endorsement, as well as an erasure; and the court found that:

2. WILLS: construction:  
share of  
legatee: decree: effect.

"The portion inserted in said will in longhand, 'being the following words, to wit: 'canceled June 21, 1912, because Alexander McAllister, my son, died May 13, 1912, and his only surviving son May 26, 1912,' has never been witnessed in the same manner as the making of a new will, and that the same is of no force and effect under the laws of the state of Iowa, and that the same cannot be considered as any part of the will of said decedent."

The court further found:

"That the typewritten portion of said will in the third paragraph thereof, which contains the following words, to wit, 'A son, Alexander McAllister, equal portions, that his half of the residue of my estate,' through which lines have been run with a pen and ink, is still intelligible, and can be read through said lines. And it is therefore found by the court that said will is not affected by the running of said lines through said portion thereof."

The court then adjudged that:

"The said will shall be considered and construed as it was originally written, signed, and witnessed, and without reference to the said attempted changes in the wording thereof, and that said will shall stand and be, for all intents and purposes, the same as originally written, executed, and witnessed. And the court, having further examined



the said will with reference to the disposition of the residuary estate thereunder, finds that one half of the said residuary estate shall go to and become the property of Fannie S. McAllister, widow of deceased, absolutely. And it appearing to the court that Alexander McAllister, son of said deceased, has died before the decease of the said testator, and that one half of said residuary estate was devised and bequeathed to the said son, it is therefore ordered, adjudged, and decreed by the court that the said one half of the residuary estate which was devised to the said son under the terms of said will, will go to and become the property of the heirs of said Alexander McAllister, in pursuance of the statutes in such cases made and provided. And it is therefore ordered by the court that the said heirs of said son shall inherit the property devised to him under said will."

The manifest design of this decree was, first, to ascertain whether the attempted cancellation and erasure had been effective in eliminating the devise to the deceased son,

and, having found these ineffective, to determine, in a general way, the division to be made of the property under the terms of the will; and the court found that the one half

3. JUDGMENT :  
conclusiveness :  
controlling  
issues.

would go to the widow, instead of all, as would have happened had the cancellation or erasure been effective, and the half left to Alexander, to his heirs, and did not undertake to determine who were the heirs of Alexander McAllister, nor to ascertain whether the widow of the testator was such heir or not. This being so, the decree interposed no obstacle to ascertaining in this suit who were the heirs, and awarding to each, including the widow of testator, the portion to which he is entitled.

*Ward v. Congregational Church*, 66 Vt. 490 (29 Atl. 770), is not an authority to the contrary. There, the estate had been settled, and the order of distribution had given complainant a life estate in the property. Subsequently,

in a suit in equity, she sought to be declared to be absolute owner; and the court held the order or judgment in probate *res adjudicata*, saying:

"It was the province of the court to determine and adjudge the kind of estate which the oratrix took, under the will and under the laws of this state, in the property left by her father; and if it did not decree to her the kind of estate therein to which she was entitled, she could and should have appealed from its decree."

There, the court had determined the estate to which the oratrix was entitled; while here, no attempt was made to ascertain,—much less to decide,—who were the heirs of the devisee, or the portion of the property to which each is entitled. Nor is there anything in the decree even intimating that the heirs of the devisee are to be determined otherwise than under Section 3281 of the Code. As his heirs would not have taken but for that section, the natural inference is that the finding of the court was in pursuance thereof. But for it, the devise must have lapsed, and gone to the heirs of testator. There is nothing in the point.

III. The wife of testator, plaintiff herein, elected to take under the will, and it is contended by appellants McAllister and Mechling that, having so done, she is estopped from claiming anything as heir of Alexander McAllister.

4. WILLS: right  
of devisees.  
etc.; election:  
estoppel.

Had the devise to said Alexander lapsed, this must have been our conclusion, as it was of the Supreme Court of Minnesota in *Mechling v. McAllister*, 135 Minn. 357 (160 N. W. 1016), in passing upon this identical issue. But, as seen, the devise is saved from lapsing in this state, by Section 3281 of the Code, and the heirs of the predeceased devisee take by substitution under the will,—that is, the heirs of said devisee are substituted by statute in place and stead of the devisee, and are entitled to the property devised precisely as the devisee would have been, had he

outlived the testator. In other words, by virtue of this statute, said heirs take under the will, instead of the predeceased devisee. By her election to take under the will, the widow merely chose between the portion of the estate tendered her in that instrument and the distributive share to which she was entitled under the law. Having elected which she would take, she might not thereafter, owing to some contingency not anticipated, reconsider such election, while retaining that taken under the will also, or claim a part of the estate not disposed of by that instrument. Thus, as was held by the Supreme Court of Minnesota, after electing to take under the will, she was estopped from claiming a share of a devise which, under the laws of that state, had lapsed and become intestate property; for that, by her election to take under the will, she waived all right to the distributive share to which otherwise she would have been entitled. Here, the devise to Alexander H. McAllister did not lapse. It did not become intestate property. It passed under the will, and, as heir of said devisee, who departed this life before the decease of the testator, the plaintiff, as testator's widow, in asserting her right to take as such heir, is not claiming a share of intestate property, but under the will, precisely as she elected to do. There was no estoppel.

IV. Appellant Edward A. Mechling contends that, inasmuch as the heirs of Alexander H. McAllister take under the will, Sections 3378 to 3382 of the Code, which re-

5. DESCENT AND DISTRI- BUTION: per- sons entitled: how deter- mined.	late to the descent of intestate property, have no application; but he does not undertake to point out how the "heirs" of the predeceased devisee are to be ascertained.
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It is well settled that those are heirs of a person deceased who are designated by the statutes in force at the time of his death. *Thompson v. Northwestern Mut. L. Ins. Co.*, 161 Iowa 446. These statutes necessarily are resorted to in or-

der to determine who are the heirs of a person deceased. Nothing to the contrary is to be found in *McMenomy v. McMenomy*, 22 Iowa 148, *Journell v. Leighton*, 49 Iowa 601, or *Will of Overdieck*, 50 Iowa 244, relied on by appellant, which construe a statute which, as amended, appears in Section 3378 of the Code.

V. The statutes of descent applicable where decedent left a widow, but no descendants, are Sections 3381 and 3382 of the Code. The former provides that:

6. WILLS : construction : substitution : stepmother of predeceased issueless devisee.      "If both parents are dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on, through ascending ancestors and their issue."

Counsel for John H. McAllister contends that relationship by consanguinity only was contemplated by this statute, and that the suggested survival of the parents is a fiction, instantaneous in duration, to direct the blood line of descent. But for the prior decisions of this court, the writer would have no hesitation in so construing this section; but our predecessors appear to have entertained a different view, as appears in *Moore v. Weaver*, 53 Iowa 11, and *In re Estate of Parker*, 97 Iowa 593, and we have followed them in *Lawley v. Keyes*, 172 Iowa 575. Under these authorities, one half of the devise of one half of the estate to Alexander H. McAllister is assumed to have passed to his father, Charles McAllister, and, as he (Charles McAllister) left surviving him a widow, the plaintiff herein, and no descendants, said widow is heir to one half thereof, or one eighth of the entire estate, as the trial court found.

VI. The mother of the predeceased devisee departed this life many years previous to the death of the testator, and left no heirs. Section 3382 of the Code provides that:

7. WILLS: construction: substitution: course of descent.

"If heirs are not thus found, the portion uninherited shall go to the spouse of the intestate, or the heirs of such spouse if dead, according to like rules, and if such intestate has had more than one spouse who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation."

Heirs of the mother, Laura McAllister, not having been found, the widow of the intestate, i. e. the predeceased devisee, took, under this statute, the portion which would have gone to the mother, Laura McAllister, had she survived the devisee. The "portion uninherited" is that which would otherwise have passed to the heirs of the deceased's mother, and, but for the above statute, must have lapsed. By "spouse of the intestate" is meant spouse of the person whose heirs are sought to be ascertained, as entitled to the property in probate. This conclusion is not inconsistent with the ruling in *Blackman v. Wadsworth*, 65 Iowa 80; for all there held was that a widow is not one of the heirs, by virtue of Sections 3366 and 3379 of the Code, defining the widow's share in the estate of which her husband dies seized.

Section 3382 of the Code contemplates a situation where, under the statutes preceding it, including Sections 3366 and 3379, no heirs are in existence, and in these circumstances, declares that the uninherited portion shall go to the widow of the intestate or her heirs, under the rules previously enacted. We are content with the decree entered by the trial court. Each party will pay his own costs, except those for filing and printing abstract and amendment thereto, which will be paid in equal portions by the widows, Mechling, and John H. McAllister.—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

HARRIET E. STEWART, Appellant, v. BOARD OF SUPERVISORS  
OF FLOYD COUNTY, Appellee.

**DRAINS: Establishment—Appeal—Failure to File Petition.** Failure of one who appeals from an order establishing a drainage improvement, to file, on or before the first day of the next term of the district court succeeding the taking of the appeal, a petition setting forth the order appealed from, with his objections thereto, is fatal to the appeal, when the drainage authorities availed themselves of said failure by motion to dismiss, filed before such petition is filed. (Sec. 1989-a14, Code Supp., 1913.)

**DRAINS: Establishment—Inclusion of Lands—Benefits—Presumption.** The inclusion of lands within a drainage district is a finality on the question of *some* benefit to the land.

*Appeal from Floyd District Court.—C. H. KELLEY, Judge.*

APRIL 1, 1918.

APPEAL from an order of the district court confirming the establishment of a drainage district by the board of supervisors of Floyd County, Harriet E. Stewart appellant.—*Affirmed.*

*Eggert & Eggert, for appellant.*

*J. C. Campbell, for appellee.*

LADD, J.—Proceedings to establish a drainage district were begun by the filing of a petition signed by J. E. Case and Geo. W. Brown. A competent engineer was appointed, and, upon the filing of his report recommending the formation of such district and the laying of tile drains, a day for hearing objections was designated. An owner of a forty acres bordering Charles City, Mrs. Harriet E. Stewart, filed objections, and a hearing was had. The board of supervisors overruled these objections, and established the

1. **DRAINS: establishment: appeal: failure to file petition.**

district as recommended in the report of the engineer. Thereupon, on November 7, 1916, Mrs. Stewart appealed to the district court. The auditor filed a transcript of the proceedings with the clerk of the district court, as required by Section 1989-a14, Code Supplement, 1913, but appellant did not file a petition setting forth the order of the board of supervisors "appealed from and her claims and objections relating thereto" until January 17, 1917. The next succeeding term of court after the appeal was taken commenced November 27, 1916. The first day of the term next thereafter was January 8, 1917, and on January 13th of that year, counsel representing the board of supervisors and proposed district moved that the appeal be dismissed because of failure to comply with Section 1989-a14, Code Supplement, 1913, which provides that:

"When an appeal authorized by this chapter is taken, the county auditor shall forthwith make a transcript of the notice of appeal and appeal bond and transmit the same to the clerk of the district court, and the clerk shall docket the same upon payment by the appellant of the docket fee; and on or before the first day of the next succeeding term of the district court, the appellant shall file a petition setting forth the order or decision of the board appealed from and his claims and objections relating thereto; a failure to comply with these requirements shall be deemed a waiver of the appeal and in such case the court shall dismiss the same."

Manifestly, there was a failure to comply with the requirement that a petition be filed on or before "the next succeeding term of the district court," and the consequence prescribed was the dismissal of the appeal. This was not obviated by the filing of what is denominated a "Brief History of Drainage System and Brief and Argument," immediately after the filing of the motion to dismiss, and, four days later, the petition exacted by statute, nor by change

of attorneys in the prosecution of the appeal. The waiver of the appeal was complete upon the failure to have the petition on file November 27, 1916, the first day of the term of court next succeeding the taking of the appeal; and, the board of supervisors having elected to take advantage of the waiver by presenting the motion to dismiss, prior to the filing of any pleading by the appellant, the court had no option to do otherwise than follow the statute declaring that "in such case, the court shall dismiss same." The court so ruled; but, in order to finally dispose of the appeal in event of ruling otherwise, heard the case on the merits, and, finding that appellant's land would be benefited by the proposed improvement, affirmed the order of the board of supervisors. As the order dismissing the appeal is affirmed, we may not review the evidence bearing on the merits.

2. DRAINS: establishment: inclusion of lands: benefits: presumption.

Some idea of the situation may be obtained from *Brown v. Honeyfield*, 139 Iowa 414.

As the inclusion of any land in the district determines that it probably will be bene-

fited by the proposed improvement, and as this issue may not again be raised, whether land shall be so included is not a matter of discretion with the board of supervisors or courts, but an issue of fact, to be decided on the evidence submitted. In so doing, however, some consideration may be given to the advantages in ascertaining the truth possessed by the board and the trial court, even though such appeals are triable *de novo*. See *Wood v. Honey Creek Drainage Dist.*, 180 Iowa 159; *Chicago & N. W. R. Co. v. Board of Supervisors*, 182 Iowa 60. A careful examination of the record leaves no doubt that appellant lost nothing through failure to obtain a review on the merits. The order dismissing the appeal is—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.



DAVID H. WAITE, Appellee, v. GEORGE J. CONSIGNY, JR., Appellant.

**SPECIFIC PERFORMANCE: Contracts Enforceable—Contract of**

- 1 **Exchange—Mutual Mistake in Quantity of Land.** Evidence reviewed, and held sufficient to establish mutual mistake in the quantity of land actually conveyed, with consequent right to a decree of specific performance.

**SPECIFIC PERFORMANCE: Contracts Enforceable—Exchange of**

- 2 **Land—Definiteness.** A contract by which one party is to receive, in exchange for certain land, double the area thereof, which latter is to be located between the extension of definite lines, is sufficiently definite to permit specific performance.

**JUDGMENT: Conformity to Pleadings—Permissible Variance.** A

- 3 decree in equity, which is in full accord with the undisputed evidence of both parties, will not be disturbed, in the absence of objection in the trial court, even though such decree is slightly variant from the pleadings.

*Appeal from Palo Alto District Court.*—N. J. LEE, Judge.

APRIL 1, 1918.

SUIT in equity to reform a deed and enforce specific performance. There was a decree for the plaintiff, and the defendant appeals.—*Affirmed.*

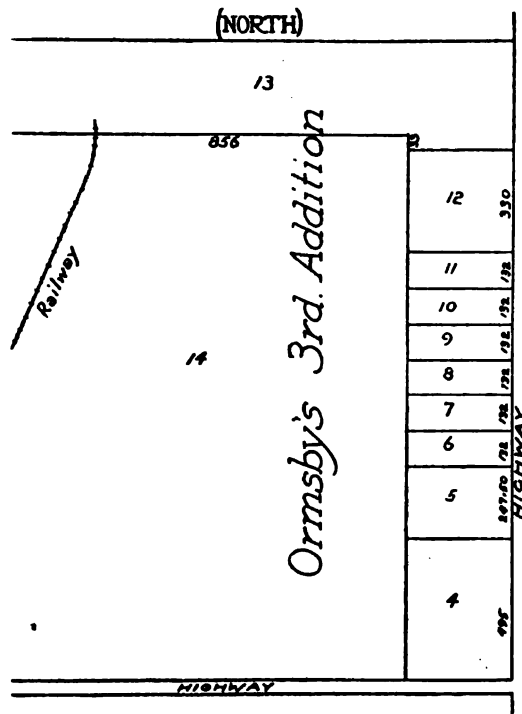
*E. A. & W. H. Morling*, for appellant.

*Thos. O'Connor*, for appellee.

EVANS, J.—In June, 1914, the parties entered into an oral agreement to exchange ground. Measurements were made and deeds executed accordingly. The claim for the

1. **SPECIFIC PERFORMANCE: contracts enforceable: contract of exchange: mutual mistake in quantity of land.**

plaintiff is that a mutual mistake occurred in the making of the measurements, which resulted in a very substantial deficiency against him. The following plat will aid to an understanding of the case.



Prior to the exchange, the plaintiff was the owner of Lots 8, 9, 10, 11, and 12, appearing upon the plat. His improvements were located upon Lot 12. The defendant was the owner of Lots 5, 6, 7, and 14. Lot 14 comprised about 34 acres of ground, being the residue of a 40-acre tract, less the platted portion indicated. It is plaintiff's claim that the defendant proposed to acquire from him Lots 8 and 9, and in exchange therefor to convey to the plaintiff a strip of ground of double area, which should lie in a rectangle to the west of Lots 10, 11 and 12. The county surveyor was called, to make the measurements. He measured the area of Lots 8 and 9, and thereafter staked out a tract lying west of Lots 10, 11, and 12, for the full length thereof, and 56 feet and 4 inches wide. The plaintiff

went into possession of the same. The defendant prepared both deeds, in accord with such measurement. More than a year thereafter, the plaintiff discovered, as he alleges, that there was a mistake in the measurements, and that the tract laid off by the surveyor, instead of being double the area of Lots 8 and 9, was only one half of the area of such lots. That is to say, the area of Lots 8 and 9 was double the area of the tract laid off by the surveyor. The mistake, if such, was so egregious that a considerable burden is laid upon the plaintiff to overcome the fact that he failed to discover it at the time. The circumstances of his discovery were that he was undertaking to sell his property, and someone else discovered that he did not have as large an area as he claimed to have. The deed executed by the defendant to the plaintiff was left for the plaintiff at a bank, and had never been called for by the plaintiff until his attention was directed to the alleged shortage. Plaintiff's evidence, in some respects, is indefinite, but the more strategic facts are well proven. We are satisfied that a basis of exchange was orally agreed on before the survey, and that this basis was proportionate to the area of Lots 8 and 9. This is indicated by the fact that the surveyor measured the area of Lots 8 and 9 before staking off the other ground. The strong preponderance of the evidence is that the plaintiff was to have at the rate of two acres for one. Not only does the plaintiff testify to this effect, but he is corroborated by three or four witnesses, to whom the defendant had communicated the same fact. There is no evidence on either side of any different proportion as the basis of exchange. While the defendant admits that there had been talk between them about that proportionate basis, he contends that such talk related to a strip at the north, and extending from Lot 12 to the railroad track. He does not claim, however, that any different basis was ever agreed on in advance of the execution of the deeds.

It is certain that the dimensions of the strip as fixed by the surveyor had not been agreed upon in advance, except as they should be ascertained by the surveyor as a matter of computation. The defendant, as a witness, testified that no basis of exchange was agreed on in advance as to the land which he conveyed. He was, therefore, driven to the further statement that there was no advance oral agreement at all, until after the surveyor had staked the ground. This position is contradicted by undisputed circumstances. Prior to the survey by the surveyor, Briggs, the defendant's employee, following the instructions of both parties, had measured out the ground which should be conveyed to the plaintiff. The tract thus measured by Briggs seemed so large to the plaintiff himself that he believed Briggs had made a mistake. Thereupon, the surveyor was called in. His lines were accepted, and the fence built thereon by Briggs. The plaintiff went into possession of the new tract, and so continued for more than a year before his discovery. The strong circumstance against him, as already indicated, is that he could fail to discover by observation so great a mistake. And yet the fact that one tract was practically square and that the other was a narrow rectangle was somewhat calculated to throw him off his guard, and to cause him to accept the figures of the surveyor. The circumstances of the case seem to favor the plaintiff strongly. The testimony of the defendant as a witness is not at all assuring.

From a careful reading of all the evidence, we have become fully persuaded that there was the mistake contended for. It was probably the mistake of the surveyor, in reversing the proportions. It thereby became the mutual mistake of the parties, by their adoption of it. If the mistake was not mutual, it was because the defendant had perceived the same and had not disclosed it.

It is urged that the particular land involved is too in-

definite in description to enable specific performance. The trial court awarded to the plaintiff a tract in rectangular form, lying to the west of Lots 10, 11, and

2. SPECIFIC  
PERFORM-  
ANCE: con-  
tracts enforce-  
able: exchange  
of land:  
definiteness.

12, its north and south lines being extensions of the north line of Lot 12 and the south line of Lot 10. The width thereof was such as to make double the area of Lots

8 and 9. We think this was sufficiently definite.

It is also urged that the trial court thus awarded a tract which was other than that claimed in the petition. There is a slight discrepancy as between the petition and the decree. The petition claimed a some-

3. JUDGMENT:  
conformity  
to pleadings:  
permissible  
variance.

what narrower strip, extending to the north line of Lot 14. It will be noted that there is, upon the plat, a little jog of 33 feet

between the north line of Lot 12 and the north line of Lot 14. Both parties testified, however, that the tract to be conveyed to the plaintiff was to extend to the north line of Lot 12, and no more. The decree was, therefore, in accord with the undisputed testimony on both sides. No effort was made in the trial court to obtain a correction of the discrepancy between the pleading and the decree. In the absence of motion in the court below, we would not be justified in reversing on account of such discrepancy. If we did so, we should have to remand the case, with leave to the plaintiff to amend his petition to conform to the undisputed evidence. We think the district court did not err in the conclusion reached. The decree is, therefore,—*Affirmed.*

PRESTON, C. J., LADD and SALINGER, JJ., concur.

S. S. DILENBECK, Appellant, v. LUM HERROLD, Appellee.

**BILLS AND NOTES: Transfer—Evidence.** The declaration of one  
1 acquiring a note to which he was not a party, to the effect that  
he wishes to "take up" the note, does not necessarily exclude  
the purpose to *purchase* it.

**EVIDENCE: Parol as Affecting Writing—Bills and Notes—In-**  
2 **dorsement as to Payment.** The indorsement "Paid," on the face  
of a promissory note, while prima-facie evidence of a complete  
satisfaction, is, nevertheless, subject to oral explanation or con-  
tradiction, especially as against the maker, who was not a party  
to the transaction which resulted in such indorsement.

**EVIDENCE: Relevancy, Competency, and Materiality—Intent and**  
3 **Purpose.** The holder of a note (not a party thereto on its face)  
may testify, in an action thereon, that, in acquiring the note, it  
was not his *intention* to voluntarily pay the note, but that it  
was his *intention* to purchase the note.

**BILLS AND NOTES: Actions—Title to Sustain Action.** Plaintiff's  
4 title to a note, though acquired from one who was without au-  
thority to sell it, may not be questioned by the maker, in an ac-  
tion thereon, when the former owner acquiesced in and ratified  
the unauthorized sale.

*Appeal from Dallas District Court.—L. N. HAYS, Judge.*

OCTOBER 25, 1917.

REHEARING DENIED APRIL 2, 1918.

SUIT upon a promissory note. At the close of the  
plaintiff's evidence, there was a directed verdict for the de-  
fendant. The plaintiff appeals.—*Reversed and remanded.*

*Dugan & Dugan*, for appellant.

*H. G. Giddings, White & Clarke*, and *Harry Wifvat*, for  
appellee.

EVANS, J.—The note sued on was for \$1,070, and was  
drawn payable to the Citizens Trust and Savings Bank, of  
which bank the plaintiff, Dilenbeck, was the president, and

1. **BILLS AND  
NOTES: trans-  
fer: evidence.**

owner of the majority of its stock. The defendant claiming a defense to the note and having repudiated the same, the plaintiff claims to have acquired the note from the payee by paying therefor its full amount of principal and interest. The method by which the plaintiff claims to have acquired the note was informal and more or less defective, and the defendant challenges its legality. The defendant contends that the plaintiff did not acquire the note, though he paid the amount thereof to the payee. He also contends that what was done by the plaintiff amounted to a voluntary payment of the note, whereby it was fully discharged as against the defendant.

The circumstances surrounding the parties become of important consideration. The plaintiff transacted the business with the defendant out of which the note originally arose. The real consideration for the note was the purchase of stock in the Shorthill Corporation, which was being urged and promoted by the plaintiff. So far as the payee bank was concerned, however, the transaction amounted to a loan. The corporate enterprise appears to have failed before it fully materialized. One of the defenses set up by the defendant was that he had been induced to enter into his undertaking through the false representations of Dilenbeck. This claim of defense had been put forward by him to Dilenbeck before Dilenbeck claims to have acquired the note. Dilenbeck's attitude, in brief, is that, in view of the defense, he undertook to protect the bank by assuming the burden of the defense himself. This, of course, was also fair and advantageous to the defendant, in that it enabled him to interpose his defense without any barrier of the innocence of the payee in the transaction. The circumstances of the alleged transfer of the note, as they appear in the record, were very brief, and leave much to implication.

As a witness, the plaintiff testified, in general terms, that he purchased the note from the bank. The only individuals directly connected with the circumstances of the transfer were the plaintiff himself and McQuery, the assistant cashier. On cross-examination, the plaintiff testified to the following details:

"At this time, I told Mr. McQuery that I would take up the Lum Herrold note, and I wished he would figure the interest on it; and he proceeded to do it. I don't know that McQuery was ever given any authority to sell any of the assets of the bank. I don't know that I ever knew of his exercising any authority in selling notes or other assets of the bank. He had authority to accept payment on past-due paper. He did so right along. I do not know that the board of directors ever authorized him to sell any of the bank's notes or other bills receivable. I did not attend all of the directors' meetings."

He also testified that he paid therefor at that time the full amount of principal and interest, and that he received from McQuery the possession of the note, and placed the same with his own private papers. McQuery, however, had written upon the back of the note the following endorsement: "Paid by S. S. Dilenbeck and the stock as collateral forfeited to him." The plaintiff testified also, in substance, that it was not his intention at any time to discharge the note, but to purchase the same; that he did not know, at the time, of the endorsement put thereon by McQuery, and only discovered the same some months later; that there was, in fact, no stock held as collateral of said note; that it was the custom of the bank, in the cancellation of notes, to use the cancellation stamp, and that the same was not used upon the note in question.

Defendant's motion for a directed verdict, at the close of plaintiff's evidence, was based upon the two following grounds:



"First. Under all the evidence in the record in this case, the jury would not be warranted in finding that the plaintiff was the holder of the promissory note sued upon, or the owner thereof. Second. Under all the evidence in the record, it affirmatively appears that the plaintiff, on or about the 26th day of August, 1915, paid said note sued upon herein; that such payment was made voluntarily by the plaintiff, and not at the request of the defendant or for the defendant's benefit, and by such payment the note was satisfied and discharged."

The motion was sustained upon both grounds.

It will be noted that the first ground presented matter in abatement, and the second, matter in bar. It will be seen at a glance, also, that, if the first ground were good, the second could not be considered, for the reason that, if the plaintiff had not acquired the note, no adjudication against him could bar the true holder of the note, who was not a party. Again, if the first ground were overruled, the ruling would necessarily be fatal to the second ground. That is, if it should be found that the transaction between plaintiff and McQuery amounted to a transfer of the note, then it could not be deemed to have been a voluntary payment and discharge of the note. The pivot of the case, therefore, turns upon the first ground.

In support of the order of the trial court, the appellee presents three general propositions in argument. The first is that the plaintiff's own testimony shows that he dis-

charged the note, in that he told McQuery that he wanted to "take up" the note. It is urged that the expression "take up" has a well-defined meaning, which is "to pay or discharge." Undoubtedly, the language would bear such an interpretation. But we know of no hard and fast rule of definition which would forbid any other interpretation. We think it was clearly competent for the plaintiff to put the

2. EVIDENCE:  
parol as affect-  
ing writing:  
bills and notes:  
indorsement as  
to payment.

interpretation which he did upon the language used by him, and especially so in view of its consistency with all the circumstances surrounding the transaction. The second argument is that the instrument was endorsed "Paid" by McQuery, and that it was not competent for the plaintiff to contradict such endorsement by a statement of his own intention or purposes. The endorsement undoubtedly operates presumptively in favor of the defendant's contention. The contention, however, that the plaintiff could not contradict or explain this endorsement, as against the defendant, cannot be sustained. The contract of transfer of the note, if there was a transfer, was not one to which defendant was a party. He is in no position, therefore, to urge incompetency of oral evidence against the writing, because he himself was never bound by the writing. If the controversy were between Dilenbeck and the bank, a different question would be presented. Even then, the authorities are uniform that such a writing as is here considered is subject to explanation. *Jones v. General Construction Co.*, 150 Iowa 194.

Evidence of the intention of the plaintiff had peculiar pertinency. The payment of the amount of the loan being conceded, the issue between the parties is necessarily determined by the *purpose* of such payment.

3. EVIDENCE:  
relevancy,  
competency,  
and material-  
ity: intent and  
purpose.

The defendant averred in his answer, in substance, that the money was paid for the purpose of discharging the note, and that it was so done "voluntarily." The contention of the plaintiff, in substance, is that he paid the money for the purpose of acquiring the note. The evidence of the "purpose" of such payment was, therefore, proper to be considered.

The third argument is that the plaintiff, as an attempted purchaser of the note, could not act in that transaction as agent for his bank, and that McQuery, as assist-

ant cashier, had no authority to sell notes. If the bank had repudiated the transaction, and were the contending party with the plaintiff, this argument would be unassailable. On the other hand, if the bank was satisfied with the transaction such as it was, its right of complaint did not inure to the defendant. Even though McQuery had no direct authority to sell notes, yet if he assumed the authority, and thereby received a beneficial consideration to the bank, his act could be ratified, or acquiesced in. The question of excess of authority would thereby be wholly waived. The fact that the bank accepted the consideration and never repudiated the transaction would tend to show a ratification, or at least an acquiescence and waiver. Whenever the transaction became confirmed in any manner, as between the bank and Dilenbeck, it was not in the power of the defendant to declare it void.

We think it clear that the evidence was sufficient to sustain a finding that the plaintiff acquired a transfer of the note to himself, and that the court erred in sustaining the first ground of the defendant's motion to direct. As already indicated, this conclusion carries down the second ground with the first. The judgment below must, accordingly, be—*Reversed and remanded*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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GERMAN AMERICAN NATIONAL BANK, Appellant, v.  
O. L. KELLEY et al., Appellees.

**BILLS AND NOTES: Bona-fide Purchasers—Fraud in Inception of**  
1 **Note—Burden of Proof.** The *uncorroborated* denial, by the cashier of a bank, of notice of a defect in the original title to a negotiable instrument purchased by the bank through him, does not *conclusively* establish such want of notice. In such cases, material considerations are:

1. Whether other bank officers charged with duties pertaining to such matters might have had notice.

2. Whether the purchase was a departure from the ordinary business methods of the bank.

3. Whether the time, place, and circumstances of the purchase were *somewhat* unusual.

SALINGER, J., dissents as to the applicability of the principle to the facts of the case at bar.

**EVIDENCE:** Opinion Evidence—Conclusion—Knowledge of Another. An assertion by a witness that a bank had no notice of any infirmity in the original title to a note which the bank had purchased, is a pure conclusion.

*Appeal from Cedar Rapids Superior Court.*—C. B. ROBBINS, Judge.

APRIL 2, 1918.

ACTION to recover judgment on a promissory note. The defense was that there was fraud in its inception, and that plaintiff acquired it subject to such infirmity. The issues were submitted to the jury, and verdict returned for defendants, on which judgment was entered. The plaintiff appeals.—*Affirmed.*

*Blake & Porter*, for appellant.

*Barnes, Chamberlain & Randall*, for appellees.

LADD, J.—On August 4, 1913, the defendants, O. L. Kelley and C. O. Sprague, executed their promissory note for \$2,000 to the Western Implement and Motor Company.

Thereafter, the payee therein transferred said note to the Diamond Iron Works, and the latter to the German American Bank, plaintiff herein, all prior to the maturity of said note. The consideration for the execution of the note was \$2,000 par value in preferred stock, and \$1,000 par value in common stock, of the Western Im-

1. **BILLS AND NOTES:** bona-fide purchasers: fraud in inception of note: burden of proof.

plement and Motor Company. The record leaves little or no doubt that the sale and the execution of the note were induced by fraud. At any rate, that issue was for the jury.

Assuming, then, that the promissory note sued on was procured by fraud, title thereto was defective, within the meaning of Section 3060-a56, Code Supplement, 1913:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

A holder in due course would hold the instrument free from such defect, and in the hands of any other, it would be subject to the same defenses as though non-negotiable. A holder deriving his title through a holder in due course, not tainted with the fraud or illegality alleged, also is a holder in due course. Section 3060-a58, Code Supplement, 1913.

"When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." Section 3060-a59.

No evidence bearing on the issue as to whether the Diamond Iron Works acquired notice of the defect in the payee's title when or prior to obtaining the note was adduced, and the sole question here presented is whether the evidence showed conclusively that the plaintiff bank was without actual knowledge of the infirmity or defect, or of such facts that its action in taking over the note might not have amounted to bad faith. To ascertain this, the evidence must be resorted to. One Stegner testified that he, as cashier of the bank, purchased the note October 13, 1913, in the usual course of business, and caused to be entered to the

credit of the Diamond Iron Works the face value of the note, together with accrued interest; that the same was subsequently checked out; that the note was thereupon entered in the bank's register of discounts and notes; that the bank had a president, two vice-presidents, and an assistant cashier, besides himself as cashier; that there were fourteen directors, and the entire number composed the discount committee; that the bank had no "subcommittee to take care of discounts, no credit man other than the officers;" that he had no conversation with any of the officers of the bank with reference to this note before it was discounted; that he knew nothing of it until presented by the Diamond Iron Works; and that what he had stated was all that occurred that day; that the Diamond Iron Works had been a customer of the bank for eight or ten years, and permitted to overdraw their accounts, "from time to time without interest;" that the makers of the note were not customers of the bank; that he had not met either of them, "did not know where they lived, but felt they lived at Cedar Rapids, Iowa;" that he made no inquiry with reference to them, further than this:

"In taking a note for discount, we always made inquiry regarding what the responsibility of the makers, and while I have no recollection of any figure being given me as to their responsibility, nevertheless the Diamond Iron Works gave me to understand that both Kelley and Sprague were very responsible."

He testified further that he had some conversation with an officer of the Diamond Iron Works when the note was presented, and could not say who presented the note, and made no further inquiry with reference thereto; that the bank did "not make a practice of buying the paper of a man living several hundred miles away without inquiry;" that he made no inquiry about the Western Implement and Motor Company; and that the Diamond Iron Works had a spe-

cific line of credit at the bank, and "I relied on their endorsement."

One Bleecker testified to having been a director and attorney of the bank for many years; that he was familiar with the duties of the several officers; that the cashier had charge "of all discounts coming from customers, and the president devoted time more particularly to the purchase of commercial paper outside of the bank's customers," as the bank always had more funds on hand than its customers required, and "over a million dollars are kept invested in outside paper, which is bought of brokers and others, and the president gives his attention to real estate mortgage loans largely."

"Q. Then Mr. Gross, as president, is not superintendent of the discounting of the notes such as this Kelley and Sprague note? A. No, such customer as the Diamond Iron Works and their trade paper that comes in—the customers' trade—goes to Mr. Stegner, who makes those loans and accepts those discounts."

He testified further that the discount committee goes over the notes once a month, at the directors' monthly meeting.

"Q. Then the custom of the bank was that these matters should be left wholly to the cashier of the bank, Mr. Stegner? A. Yes, sir."

On cross-examination, the witness testified that the president was in daily attendance at the bank; that both he and the cashier were accessible to customers, and that the Diamond Iron Works "could have had access to him;" and that the president performed duties stated, and was the superior officer to the cashier and assistant cashier. In the absence of the president and cashier, especially during the noon hour, the assistant cashier was in charge of the bank, though not authorized to pass on discounts or purchase papers.

Such was the evidence, and it is first to be observed that the cashier was in no manner corroborated in what he testified in relation to want of knowledge concerning the infirmity inhering in the note.

It is equally clear that such knowledge might have reached the bank through the president or the assistant cashier, both of whom were dealing actively with the public in behalf of the bank, and no evidence negating the possession of such knowledge by these officers was adduced. No consideration is to be accorded Stegner's assertion that the bank was without notice; for, in the nature of things, that was a mere opinion. *Bennett State Bank v. Schloesser*, 101 Iowa 571.

2. EVIDENCE:  
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The cashier was unable to state from whom he obtained the note, otherwise than that he was a representative of the Diamond Iron Works, and was without acquaintance with defendants, who resided in a city in another state, as did the payee and endorser. Moreover, the bank did not follow its practice of not dealing in paper the makers of which lived a long ways off, save upon making inquiries. Is such a showing so conclusive that fair-minded men could have drawn no other inference than that the plaintiff bank acquired the promissory note without knowledge of the fraud practiced on defendants, and also without knowledge of such facts as that, if taken as true, it must have acted in bad faith? It must have been so in order to have warranted the court in directing a verdict for plaintiff.

The rule which obtains in such a case is well stated in *Arnd v. Aylesworth*, 145 Iowa 185:

"Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is, therefore, a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that



no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which, in many, if not in most, instances, cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place, and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase, \* \* \* constitute a showing which the court cannot properly pass on as a matter of law."

Previously, in *McNight v. Parsons*, 136 Iowa 390, this court had said:

"The testimony of the cashier of the bank that he or the bank purchased the note for value before maturity, even though he be not disputed by any other witnesses to the transaction, is not necessarily sufficient to enable the court to say, as a matter of law, that he received it in good faith. Such evidence does not negative notice or knowledge on part of other officers of the bank. Moreover, the bank being an interested party, the credibility of the testimony of the cashier was a matter for the jury to pass upon, in the light of all the facts and circumstances surrounding the matter under inquiry."

And as following these decisions, see *Bank of Bushnell v. Buck Bros.*, 161 Iowa 362; *Merchants Nat. Bank v. Grigsby*, 170 Iowa 675, and cases cited. See also *Farmers & Merchants State Bank v. Shaffer*, 172 Iowa 173.

Nothing to the contrary is to be found in *Des Moines Sav. Bank v. Arthur*, 163 Iowa 205, and *Robertson v. United States Live Stock Co.*, 164 Iowa 230. These last named causes were heard *de novo* in this court, and in each the purchaser of the negotiable instrument in question was found to have acquired it without notice of its infirmity.

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paper was ever sustained. Ordinarily, the testimony to want of notice and good faith must come from someone who has some managerial position in the bank. So if all that is needed to make cases of buying paper jury cases is that the cashier or buyer gave such testimony, then there was never any occasion to formulate rules as to when such cases were not for the jury. No such rules need be made, because no such case could exist. I think that, since it must be conceded that the testimony of the buyer *may* warrant a directed verdict in his favor, it cannot be the law that the case must always go to the jury because the testimony for the bank is given by its cashier.

II. The opinion discloses there was undisputed testimony that such discounts as are involved in the case we have were wholly for the cashier, and that the president of the bank did not deal with such discounts. It is shown without dispute that it was "the custom of the bank that these matters should be left wholly to the cashier." Though it is not disputed that, when a corporation leaves certain matters to a particular officer, other officers need not testify to want of notice and the presence of good faith, yet that rule is disregarded by the majority; and the opinion defeats the bank because its officers other than the cashier did not testify. The only attempt at explanation why this is done though the rule in question is adhered to, is, in effect, that the president of the bank and still others were active, constantly present, and that customers could have access to these other officers. It is further pointed out that an assistant cashier was in charge of the bank during the noon hour, though it is conceded he was not authorized to pass on discounts or to purchase paper. If the cashier was the officer who alone dealt with such discounts as the one in this case, I am at a loss to understand how it matters that others were his superior officers, and were active and present and accessible. The reasoning of the majority at this

interpretation which he did upon the language used by him, and especially so in view of its consistency with all the circumstances surrounding the transaction. The second argument is that the instrument was endorsed "Paid" by McQuery, and that it was not competent for the plaintiff to contradict such endorsement by a statement of his own intention or purposes. The endorsement undoubtedly operates presumptively in favor of the defendant's contention. The contention, however, that the plaintiff could not contradict or explain this endorsement, as against the defendant, cannot be sustained. The contract of transfer of the note, if there was a transfer, was not one to which defendant was a party. He is in no position, therefore, to urge incompetency of oral evidence against the writing, because he himself was never bound by the writing. If the controversy were between Dilenbeck and the bank, a different question would be presented. Even then, the authorities are uniform that such a writing as is here considered is subject to explanation. *Jones v. General Construction Co.*, 150 Iowa 194.

Evidence of the intention of the plaintiff had peculiar pertinency. The payment of the amount of the loan being conceded, the issue between the parties is necessarily determined by the *purpose* of such payment.

3. EVIDENCE:  
relevance,  
competency,  
and material-  
ity: intent and  
purpose.

The defendant averred in his answer, in substance, that the money was paid for the purpose of discharging the note, and that it was so done "voluntarily." The contention of the plaintiff, in substance, is that he paid the money for the purpose of acquiring the note. The evidence of the "purpose" of such payment was, therefore, proper to be considered.

The third argument is that the plaintiff, as an attempted purchaser of the note, could not act in that transaction as agent for his bank, and that McQuery, as assist-

ant cashier, had no authority to sell notes. If the bank had repudiated the transaction, and were the contending party with the plaintiff, this argument would be unassailable. On the other hand, if the bank was satisfied with the transaction such as it was, its right of complaint did not inure to the defendant. Even though McQuery had no direct authority to sell notes, yet if he assumed the authority and thereby received a beneficial consideration to the bank, his act could be ratified, or acquiesced in. The question of excess of authority would thereby be wholly waived. The fact that the bank accepted the consideration and never repudiated the transaction would tend to show a ratification, or at least an acquiescence and waiver. Whenever the transaction became confirmed in any manner, as between the bank and Dilenbeck, it was not in the power of the defendant to declare it void.

We think it clear that the evidence was sufficient to sustain a finding that the plaintiff acquired a transfer of the note to himself, and that the court erred in sustaining the first ground of the defendant's motion to direct. As already indicated, this conclusion carries down the second ground with the first. The judgment below must, accordingly, be—*Reversed and remanded*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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GERMAN AMERICAN NATIONAL BANK, Appellant, v.  
O. L. KELLEY et al., Appellees.

**BILLS AND NOTES:** Bona-fide Purchasers—Fraud in Inception of  
1 **Note—Burden of Proof.** The *uncorroborated* denial, by the cashier of a bank, of notice of a defect in the original title to a negotiable instrument purchased by the bank through him, does not *conclusively* establish such want of notice. In such cases, material considerations are:

faith is shown. *Voss v. Chamberlain*, 139 Iowa 569, 577. It would seem, then, that no case was made for the jury because the plaintiff bank did not inquire beyond what it did. Now, after having made a case for the jury because no inquiry was made, or because inquiry was not sufficiently pursued, we find it disregarded that inquiry was, in fact, made. When that is passed, the majority next bases its opinion on an imagined departure from a custom to inquire, the warrant being testimony that the bank did not make a practice of buying the paper of a man living several hundreds of miles away, without inquiry. At this point, it is again overlooked that inquiry was made. And the testimony is, further, that inquiry did not go as far as it might, because, the paper being a very small item in the relatively vast business of this bank, it was bought in reliance upon the endorsement of the seller, who lived in the town where the bank did business, and had a credit at that bank. I would reverse.

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F. H. HOLLINGSWORTH, Appellee, v. MIDWEST SERUM COMPANY et al., Appellants.

**NEGLIGENCE: Negligence Per Se—Violation of Statute—Unauthorized Requirement—Hog Cholera.** The Hog Cholera Serum Act, directing the director of the laboratory to establish the "standard degree of potency" of hog cholera serum, and prohibiting the sale of serum below such standard, authorizes a standard which calls for a "condition" of potency of the serum at the time it is offered for sale, and not a standard which calls for "results" after it is administered to the animal. Held, a standard which required a potency sufficient to prevent a hog from contracting hog cholera was unauthorized. (Sec. 2538-w et seq., Code Supp., 1913.) It follows that the sale of serum below such unauthorized standard does not constitute a violation of the statute, and bring the seller within the rule that the violation of the statute constitutes negligence per se.

**NEGLIGENCE: Acts Constituting—Manufacture of Hog Cholera Serum—Evidence.** Evidence reviewed, concerning the manufacture and sale of hog cholera serum, and held insufficient to establish negligence.

*Appeal from Pottawattamie District Court.*—A. B. THORNELL, Judge.

MAY 14, 1917.

REHEARING DENIED APRIL 2, 1918.

ACTION for damages for negligence in the manufacture and sale of certain serum known as hog cholera serum. The serum was manufactured and sold for the purpose of use as a preventive for hog cholera. There was a verdict for the plaintiff, and the defendants appeal.—*Reversed.*

*Tinley, Mitchell, Pryor & Ross, and Arthur F. Mullen,* for appellants.

*Hess & Hess and Kimball & Peterson,* for appellee.

EVANS, J.—I. The Midwest Serum Company is a Nebraska corporation, doing business at Omaha, and engaged in the manufacture and sale of certain products intended

to be used by inoculation as a preventative for hog cholera. The defendants Juckniess and Smylie are the president and secretary, respectively, of such corporation. The petition is in five counts, each count representing a separate and distinct cause of action against the defendants. These five causes of action accrued separately to five different persons. The first count represents a cause of action originally accruing to the plaintiff himself, whereas the other four causes of action were acquired by the plaintiff by assignments. The assignors are Koon, Benedix, Walden, and Preston. The plaintiff and Koon are practicing veterinary surgeons, who separately purchased the cer-

1. NEGLIGENCE: negligence *per se*: violation of statute: unauthorized requirement: hog cholera.

tain serum from the defendant company. Each of them used the serum so purchased upon his own hogs, and claims to have been damaged thereby. The other three assignors are farmers, who were owners of herds of hogs, and who employed Koon to vaccinate the same. For that purpose, Koon used the serum purchased from the defendants, with a resulting damage to each, as claimed. The claim of negligence is bottomed principally upon the theory that the defendant company put upon the market a serum which was not of a sufficient potency to counteract the virus of hog cholera, and that thereby it violated a statute of the state of Iowa, and was, therefore, *ex necessitate* negligent, and that such negligence was the proximate cause of great loss to the plaintiff and his assignors, by reason of the loss of their hogs by cholera. So far as this question is concerned, the answer of the defendants was a general denial. An understanding of the facts in the case requires the aid of expert testimony, as regards the state of the art and science of cause and prevention of hog cholera as the same was understood and practised on and prior to July, 1914, the date of the sales in question. The expert testimony on both sides is not greatly in dispute at any point material to our consideration. The next paragraph hereof will be devoted to excerpts from the testimony, and to a setting forth in some detail of the facts, expert and otherwise, which are necessary to an understanding of the later discussion. Preliminary thereto, it may be said that the art of dealing with hog cholera has been developed by experimentation to a very considerable degree of success. The method is one of inoculation. Two agencies are used, one being known as the *virus* and the other as the *serum*. The virus contains the poison or active principle of cholera. The serum contains the principle of immunity, or antidote to the poison. The theory is that, if a hog be exposed to the infection of cholera, the development of cholera from such infection will be neu-



tralized and prevented by immediate inoculation with the antidote serum. It is essential to the effectiveness of the antidote that it be administered immediately after the infection of the poison, and at least within two days. The method of treatment, therefore, is to inoculate the hog in different parts of his body with the virus and the serum at the same time. If the treatment works successfully, the hog passes through a period of reaction or fever and recovers, and is thereafter immune from cholera. Under the terminology of the art, the hog which has passed through such treatment is called an *immune* hog; whereas one which has never passed through such treatment, and which has never had the cholera, is known as a *susceptible* hog. The successful use of the serum is not necessarily dependent upon the *artificial* infection of the hog with the virus. If a hog were infected *naturally* by contact with cholera hogs, an immediate inoculation with serum would, theoretically, be sufficient to arrest and neutralize the cholera infection. The practical difficulty at this point is that it is impossible by any known method to discover the presence of cholera infection in its first stages. No symptoms appear until after several days of incubation. When the development has reached the stage of symptoms, it is too late to inoculate successfully. To inoculate in such case, therefore, is to work in ignorance, for the time being, without knowing when infection was had, or whether any was had. By introducing the poison and the antidote at the same time, this uncertainty is avoided. This is called the *simultaneous* treatment; whereas the use of the serum alone upon a naturally infected or sick hog is called the *single* treatment. For the purpose of the simultaneous treatment, it is desirable that the virus be virulent and the serum be as potent. The virus being administered upon a susceptible hog, he is sure to die, unless the serum be sufficiently potent to counteract the poison.

Neither the virus nor the serum is an artificial compound of ingredients. Each of them is simply the blood of a hog, defibrinated. That is to say, each of them is the serum of the blood, though the name "serum" is applied to only one. The virus is the blood of a cholera hog, and is taken from animals about to die from cholera. The serum is the blood of an *immune* hog. The processes for obtaining this latter are much more extensive than those for obtaining the virus. The immune hog may be rendered hyper-immune. The method of doing this is to inoculate the immune hog with very heavy doses of virus, and, after many days, if the hog continues well, to draw from him a quart or more of blood. In the record, this process is called *hypering*. The serum from the hyper-immunized hog is supposed to be more secure in its purity and potency than it would be if such process were not had. The serum thus obtained is complete. No medicinal ingredients are added to it. Before offering the same for sale, it is subjected to a test by experimentation. There is no known method of applying a test to the serum directly. Whether it is, in fact, potent in the particular case cannot be ascertained, chemically or microscopically. No constituent part has ever been discovered in it which is not found in the blood of any healthy hog. The theory is that this serum necessarily contains some organism termed "anti-body," which multiplies itself rapidly, and overcomes the virus. No such organism, however, has ever been found by any method of research. The term "anti-body" is a mere name for the conception. The only method of test, therefore, that is available, is to try the serum upon infected hogs and observe the results. The generally accepted test is known as the eight-pig test. A description of this test will appear in the testimony of some of the witnesses hereinafter quoted. Briefly stated, eight healthy pigs are selected, and are inoculated with the virus. Six of them are inoculated with the serum.

also, different quantities being used. The serum is not used upon the other two. They are called the "check" pigs. They are expected to die, as a result of infection. When the disease has about run its course, they are killed, and a post-mortem examination had, to determine whether they in fact had cholera. If the "check" pigs are found to have cholera and the other six pigs get well, the serum is deemed effective and ready for the market. If any of the six pigs die, the test is not satisfactory, and a subsequent test must be had before the serum can be put on sale. If a subsequent test proves successful, this is sufficient to justify the use of the serum. Under the law, a complete record must be made and kept of each test in all the details of its successive stages, and this record must be preserved and kept open at all times to the inspection of public officers.

The defendant's serum was produced in quantities of twenty gallons in one container. Each quantity so produced was identified by number, and known as a lot, or series, of which a complete record was kept. In July, 1914, the plaintiff and his assignor, Dr. Koon, received from the defendant company certain serum, and they used the same in the treatment of hogs. The mortality was very great. The plaintiff claims that, out of 52 hogs treated by him, 28 died. Similar results were had with other herds. A portion of the serum received by Dr. Koon was sent to the Agricultural College, and was there tested by Dr. Cole. The test applied was the eight-pig test, but was only approximately followed. Of the six hogs receiving serum, four died and two lived. Except as hereinafter indicated, it is undisputed that, before the serum was put upon the market by the defendant, it had been subjected to the eight-pig test, and a complete record of the test was preserved. The test was conducted in the generally accepted way, and was completely successful in result. Three days before the serum in question was received by the plaintiff, he had received

from the defendant a quantity of serum, and had used the same with undoubted success. It is the claim of the plaintiff, however, that such serum came from another lot, or series; whereas it is the claim of the defendant that it was a part of the same Lot No. 18, and this is indicated, also, by the records of the defendant, which were kept by it in conformity to the law. The plaintiff, however, is undoubtedly entitled to the benefit of his contention on any disputed fact in the evidence.

II. The following excerpts from the testimony of plaintiff's expert witnesses will be helpful to an understanding of the decisive facts of the case. All the experts were experienced veterinary surgeons. Dr. Rice testified:

"The method of producing hog serum: The first thing we have got to have is an immune hog: that is, a hog that has had the disease and recovered, or has been vaccinated with the simultaneous method,—that is, you inject the virus in one part of the body, and at least three or four inches from that point, inject the serum,—that hog develops an immunity. You could get your hog from either source. Then you take susceptible shoats and inject them with virus, and these pigs sicken usually about the seventh or eighth day. That is the usual rule. You then stick these pigs, and draw the blood of the sick pigs. That is known as the virus. They then hold a post mortem on the pig to see that he had cholera lesions and hasn't any other disease, like tuberculosis or something of that nature. They take this virus, break the clot, and strain it. They then take an immune hog and weigh it, and then pump 5 c. c. per pound of weight into the veins of the immune hog. That makes what we call a hyper-immune hog. There are some people that use 6 c. c. per pound weight, and I have known them to use 7; but as a general thing, they use 5. If they draw the serum from the tail, they wait 10 days, and make the first tail-bleeding. If they kill the hog outright, they usually

wait from 18 to 21 days. After they draw this blood from the hog, they defibrinate or break the clot and strain it and add one half of one per cent of carbolic acid. This was the method of developing anti-hog-cholera serum. The principle that it is based upon is that, if an animal has a disease and recovers, what makes him recover is that there are antibodies in his own body. In the case of hog cholera, they seem to be in the blood. The virus is gotten by taking the blood from a hog known to have the cholera. An animal can be given the cholera by taking a hypodermic syringe and injecting the virus into a susceptible hog. A 'susceptible' hog means healthy hogs. If you would put him in a pen where hogs had cholera, it would take cholera; or else, if you injected him with blood from a hog, he would take it. I wouldn't say what amount of virus is necessary to give the hog cholera. The Dorset-Niles-McBride method was used prior to July, 1914. It was customary to use from 2 to 5 c. c. of virus to inoculate a hog. The dose of virus is usually based upon the size of the hog. Different manufacturers recommend a different size dose. There was a time when they recommended  $\frac{1}{4}$  c. c. of virus for a pig under 50 pounds, but they raised that to  $\frac{1}{2}$  c. c.; and now, if the pig is from an immune sow, they recommend  $\frac{3}{4}$  of a c. c. As I stated before, 5 c. c. of virus per pound of live weight is used in producing hyper-immunized hogs: that is, a hog which would weigh one hundred pounds would have 500 c. c. of virus pumped into him to produce the serum. The production of serum is practically the pumping into the hog of virus which is allowed to remain for a certain length of time, and then his blood is drawn off and defibrinated, and the liquid taken from the blood is serum. They draw off the blood of hogs and defibrinate it and filter it, and that is what is known as hog cholera serum. \* \* \* Q. Now, Doctor, are there varying degrees of potency fixed by the various manufacturers of serum? A. The degree of potency

is not fixed, so far as anybody knows. That is what I referred to when I said there was nothing definite about the degree of potency. \* \* \* The usual method of using virus and serum before July, 1914,—they simply caught the hog and disinfected it, poured the serum into a sterilized container, took a syringe that had been sterilized, drew the serum up into the syringe, and injected it into the hog. They injected the serum either into the axillary region, inside of one of the forearms, or into the flank. It is customary to put virus on the opposite side, or at least three inches from the point where the serum is injected. It is usually customary to follow the doses as recommended on the label, and was customary over the state at that time. So far as I know, that was the method of administering virus and serum during the year 1914. They test it to find out the potency of the serum. I have been in plants where they were testing serum, and I saw them put on the test. They would take a batch of serum and number it, either by letters or by figures. They draw a sample of the serum. Then they take eight healthy pigs, and they usually try to get the history of these pigs, if they can. They give two pigs 2 c. c. of virus. What I mean by 'history' is, they trace back to find out whether they have ever had hog cholera or been connected with hog cholera. They then take the temperature and weigh the pigs. There should be eight pigs. They should weigh not less than 45 pounds nor more than 90 pounds. Two of these pigs should get 2 c. c. of virus each; two pigs to have 2 c. c. of virus and 15 c. c. of serum each; two pigs to have 2 c. c. of virus and 20 c. c. of serum each; two pigs to have 2 c. c. of virus and 25 c. c. of serum each. They take the temperatures of these pigs each day. The pigs that got the virus only should sicken between the seventh and eighth day, show physical symptoms, and have a rise in temperature; and the other pigs, the 20 c. c. pigs and the 25 c. c. pigs, should stay apparently healthy; dur-

ing that time, they might have a rise of temperature and stay up a short while. They sometimes do that in the reaction. If you take the temperature of a normal, healthy hog for 40 days, you will find that the temperature varies. It will be between 100 and 103 degrees Fahrenheit. A hog could be healthy and have a normal temperature at 104.8. If you took 500 or 1,000 hogs, you would find that their normal temperature runs around 102 to 103. 104.8 is higher than normal. You could take the temperature of a hog for 40 days, and sometimes the temperature might be up to 104. A hog with 104.8 temperature would be a suspicious hog, unless you had the history of the hog. These two pigs that got the virus only, my experience is that they would develop the disease known as hog cholera. If they didn't, I would attribute it to your virus, or else your hogs were immune. If the hogs which had the serum don't develop any disease, and the hogs that had the virus, after being posted, show cholera lesions, I would think the serum was potent. Q. Suppose that two of the hogs that took 15 c. c. of serum die and the other four would live; what would that be evidence of? A. I would not consider it potent serum. They would allow that serum to be retested a second time. I have known of a plant where they tested it three times. That was in a government laboratory, where the government had supervision. I have known the serum on the second test, when satisfactory, to be used. They are permitted to sell it,—allow it to be sent out. \* \* \* Q. This test that is taken is not an infallible test, is it? A. It is not. Q. There is no way that you can get an infallible test as to whether the serum is potent? A. So far as my knowledge, there is not. Q. Well, the test depends a lot on other things, don't it? It depends on whether or not the veterinarian administers it correctly, administers the dose that is recommended,—that is one of the things it depends on? A. Yes, sir. It depends also on whether or not the instru-

ments are sanitary, or sterilized. The amount of the serum might depend in a small way on what the hog had been fed on. \* \* \* The most virulent kind of hog cholera is septicemia. There is a very close relation between blood poisoning and different kinds of hog cholera, microscopically. Septicemia is more rapid than hog cholera. Sometimes the lesions are hard to distinguish between what is known as the very acute type of hog cholera and blood poisoning, without taking it through a regular laboratory method. If you take the blood from a sick hog and filter it through a filter and inject a susceptible hog with it, you can tell with reasonable certainty whether it is hog cholera or not. You can't tell for certain without finding lesion. There must be typical lesions of hog cholera. There are certain stages that it is hard to tell, on a post-mortem examination, whether it is hog cholera or septicemia. Q. Then there is no exact or definite way to know the effect, the exact potency of hog cholera serum either, is there? A. We have a fairly good test,—it isn't exact, but it is a fairly good test. It is the best method there has yet been devised, and this method I have outlined to you,—that is the Dorset-Niles-McBride method. So far as I know, prior to July 1, 1914, the Dorset-Niles-McBride method was the only legal test, and the only one that was recognized in the plants I have referred to."

Dr. Cole testified:

"Hogs which are treated with the immunizing process always show a reaction following the double vaccination,—not the single. When the virus is injected, there follows a period of incubation, in which there are no signs of disease in the hogs. You can inject the hog with virus today, and it will show no symptoms of disease for at least four or five days. That is called the period of incubation. When the symptoms do appear, or when they would appear with the serum not potent, that is called the reaction, and there



usually is some slight elevation of temperature. Sometimes the hog gets sick for a day or two, and gets back on feed and will be all right after the reaction, and a reaction of that kind indicates that they are close to the danger line.

\* \* \* All serums vary in strength, more or less. I refer to the strength of serum as potency, and I refer to the strength of virus as virulency. When we make serum, we use 80,000 cubic centimeters. That is 80 quarts, and that would be in one container. Different serial numbers are not always of the same potency. *I don't think it is possible to make them of the same potency. I would not consider testing an experiment. If I were to make a test, and one hog would die in the test and the other hogs would not die, I would say that the serum had potency. If it didn't have it, they would all die. In the test I made, I had one hog with a temperature of 104 to start with, and he lived. I certainly would say he was immunized after he recovered from the treatment.* \* \* \*

Q. Is it possible, under the circumstances that now exist, to make serum without having organisms in it? A. When the serum is fresh, *I will say that it is impossible to make serum without having organisms. I think, from a scientific standpoint, it might be possible to draw blood that is not contaminated; but it is not practical, by any means.* Q. It would not be practical

to manufacture serum for the market and keep it perfectly pure? A. No; it would cost more than the hogs are worth to make it that way. \* \* \*

We have used every precaution to make our serum. The serum we have sent out in every instance is up to the standard required by the laboratory at Ames, and has been potent serum. We have sent out no serum from the laboratory at Ames that has not been potent. Q. Do you say that you have always succeeded

in preventing hog cholera with it? A. No, sir. I will not say we have failed many times; we have had failures in different parts of the state; we have had a number of failures.

Q. *You would send out a bottle of serum from one series and that would fail and all the other parts of that series would be successful?* A. *We have had that happen,—yes, sir. I do not account for the failures based upon the fact of the lack of potency of the serum. We couldn't always convince the farmer of that, but I was sure in my own mind. We have had suspicions, sometimes, that the instruments were not properly sterilized, and we have had instances where we thought that the hogs were diseased. We have found cases where they were affected with pneumonia, with parasites. \* \* \** The only classification of hog cholera that I know of is acute and chronic,—perhaps sub-acute might be in there. There are cases of hog cholera where the lungs are but little affected. I will say that it is difficult to diagnose between septicemia and acute hog cholera; the lesions and symptoms are very similar in both. I don't mean to say that it is difficult before death, but it is difficult after death; what I mean to say is that the lesions are alike. \* \* \* *Pneumonia is very common among hogs. Pneumonia is very commonly found in connection with hog cholera. I don't know whether it is caused by hog cholera."*

Dr. Stange testified:

"The hog cholera agent or principle of virus is invisible with our present equipment. The virus is a filterable agent, which, according to our present knowledge, causes disease. Virus is the blood of a cholera hog; the defibrinated blood of a hog suffering from hog cholera. \* \* \* Hog cholera serum, prior to July, 1914, was produced as follows: A hog that is resistant, or is commonly called immune to hog cholera, is inoculated with a large quantity of defibrinated blood taken from a hog suffering from hog cholera. This operation is ordinarily called 'hyper-immunization.' In response to this introduction of virus, the serum-producing animal, according to our present ideas, throws off a large quantity of protective bodies which overcome this virus. These pro-

tective bodies are found in the blood of hogs treated with this virus, and when this blood is drawn and defibrinated, and a small quantity of preservative added to it, it is known as hog cholera serum. \* \* \* These bodies which I have referred to are known as anti-bodies. \* \* \* The theory, as I understand it, is simply that you inject a hog with cholera virus, and that the serum introduced contains sufficient of the so-called anti-bodies to protect this hog until the hog itself can produce anti-bodies overcoming the virus. \* \* \* The agency of diseases of swine are micro-organisms. I prefer to use the word 'cause,' instead of 'agency.' The ordinary bacteria are classified as vegetable. I am not sure that I ever saw the bug that causes hog cholera. The bug that causes hog cholera is ultra-microscopic, so far as established facts go. \* \* \* The name is—we call it virus,—that is the only name for it. I don't think there is any specific name. I do not think it is all theory. Q. Well, now, if you have never seen him, never heard him, never smelled him, never tasted him, how can you say that he is— A. Just the same as we know there is electricity. Q. Yes, by experiment? A. Yes, by its action, by phenomena. We do not know what electricity is, and we do not know what this bug is. I know there is a filterable agent. Q. If I hand you a cubic centimeter of virus, can you tell me how many bugs there are in it that are agents or cause of hog cholera? A. No, we don't. Nobody knows the number. Q. If I hand you a cubic centimeter with pneumococcus germs in it,—that agency that produces pneumonia,—you can tell me, can you not, how many germs there are in it, if you take a heavy magnifying glass? A. Approximately. Q. And if I hand you a cubic centimeter of fluid, or virus, the only way you can tell what is in it is by experimentation, isn't it? A. By animal inoculation. \* \* \* We are not sure that the agency or cause of hog cholera has ever been seen or identified or labeled by anybody. We are

not sure of the relation between this new body and the virus. I could not tell the court whether the cause or agency or fluid causing hog cholera is a vegetable: I have never seen it. Q. If I take a cubic centimeter out of one series of virus, and a cubic centimeter out of another series of virus, can you say, by any microscopical examination that can be made, that there are the same number of bugs in these two cubic centimeters of virus? A. No, sir. We can only say that the two cubic centimeters of virus are the same by animal inoculation. Q. Only by experiment and by testing it upon some animal? A. Yes, sir. Q. Now, that is the only way that you can tell, isn't it? A. Yes, sir. We cannot take an immune hog and look at it with our eyes and tell whether it is immune or not. We cannot take a hog and tell whether it is susceptible or not until we inoculate him. Before we can tell whether a hog is susceptible or not, that must be done by a test, by inoculation. Q. With all of the experience that you have had,—which is great, as I understand,—you cannot tell whether a pig is susceptible to this virus until after you have made your inoculation, can you? A. No, sir. Q. As I understand you, the only means in the world that you know anything about is this test,—to test it by inoculation? A. At the present time, that is true. That would be true in 1914. \* \* \* Q. Then whatever knowledge you have, Doctor, it comes from experiment, don't it,—from testing it on animals, on animal life? A. That is the way we get practically all of our information. In a cubic centimeter of serum, I could not tell you how many anti-bodies you would find. We have no way of measuring those, at the present time. The only way we can tell the strength is by testing it on hogs. Q. In vaccinating your checked pigs, or shooting into them virus, haven't you known, in your broad experience, instances of where one of them lived and the other died? A. Yes, sir. Q. You have known where one of the checked pigs died and one

got well, and some of the hogs that received virus and serum both died, and some got well, haven't you? A. I have known tests of that kind,—yes, sir. Q. So that the only way that you can tell exactly what the serum is going to do is to test it, isn't it? A. Yes, sir. Q. The only way that you can know what the serum and virus together is going to do is to test it, isn't it? A. It is all supposed to be tested. We recommend that all hogs that are apparently healthy receive serum and virus both. Those that are sick receive serum alone. \* \* \* We do not recommend any kind of vaccination unless it is necessary,—I mean, unless they are threatened with cholera. There are some risks in vaccination. Hogs have idiosyncrasies; they are more susceptible to disease than any other animals. I am not sure that I can name all of the diseases of hogs. The normal temperature of a hog varies from  $100\frac{1}{2}$  to  $102\frac{1}{2}$ . If a hog showed 104 in a test and there were no other symptoms, I would go on with the test. \* \* \* When the reaction comes, there is no definite temperature that can be said to be characteristic. It will vary from 106 to 107. There are a great many things about hog inoculation that are very indefinite. After an inoculation by the simultaneous method, if the hog's temperature does not rise about 103 to 104, I could not say whether there had been any reaction. I could not pass judgment on a serum test unless I know the amount of serum used in the test. The amount of the virus used in the test does have something to do with it, within certain limits. Q. Well, assuming now that the pigs had 2 c. c. of virus, the checked pigs, and the pigs weighed about 50 pounds, and the other six had 20 c. c., and one of the checked pigs died and the other didn't,—it manifested no trouble,—and the temperature of the other six pigs did not rise above 103 to 104, what would you say about the test? A. I would say it was uncertain. There are many reasons. In the first place, the pigs might

not all have been taken from the same lot. *One might have had exposure immediately prior to being put in the test. When I say 'exposure,' I mean exposed to hog cholera.* The virus used in testing might not be virulent. \* \* \* Q. So there is not any infallible method that you can arrive at the very results that you desire, is there? A. The test is the most accurate thing we have. My idea of a satisfactory test of hog cholera serum: Take uninfected, susceptible pigs; inject those with virus, 2 c. c., which will produce symptoms of cholera in a susceptible hog of the same weight inside of eight days, and the death of those hogs within fourteen days. Other susceptible pigs of the same weight should receive the same amount of virus taken from the same source, and in addition, an amount of serum graduated according to the weight of the animal. The hogs should weigh from 40 to 90 pounds,—that is, between those limits,—and those pigs should receive 15 c. c. of serum, 20 c. c., and 25 c. c. This would be the eight-pig test, so-called. A larger number would be preferable. The method that was recognized in 1914 was the eight-pig test. None of the hogs receiving the serum should die, and none of them should show physical symptoms of hog cholera. They might show a rise of temperature,—105 or 106, depending on conditions. A person would have to use his judgment as regards the temperature, but there should be no physical signs of hog cholera in the hogs receiving the serum. If none of the hogs having the serum showed a rise of temperature, I would regard the test as questionable. The temperature does cut some figure. If none of the hogs show any temperature in reaction, it cuts some figure. In a great many tests, we find hogs that run along with practically normal temperatures. In others, it runs rather high. The temperature is not the most accurate indication, and should never be regarded except in connection with clinical symptoms. Q. That is, when you say it should never be re-

garded, you are giving your opinion? A. Yes, that is all I give. All these factors must be considered, in order to pass judgment on the test. If the pig receiving the 25 c. c. of serum dies, I think the serum should be retested. If the two virus pigs die, and the pigs receiving the serum and virus show no physical symptoms, I would regard the test as satisfactory. \* \* \* With reference to the rise of temperature, to our observation, the earlier the serum can be given, the more effective it is, and as a matter of fact, after the hogs begin to show physical symptoms of the disease, it is questionable as to how much good the serum does. If the serum is given within a reasonable time after the rise begins, I would say the effect to counteract the disease would be uncertain. The serum should be given early in the rise of the temperature, at the beginning of the rise of temperature. My observation is that, if the virus is given when there is shown no rise in temperature, that in many cases it may check the disease. It depends on the length of time between the infection and the time the serum is given. My opinion is, if the infection had taken place not over two days before the treatment with serum, and serum was given in sufficient quantities and properly administered, in a very large per cent of cases you might save the hogs."

The plaintiff, Hollingsworth, who is a veterinary surgeon, testified:

"Q. So that this serum that you injected in the hogs has no effect whatever on what is known as swine plague? A. No, sir. If a hog had swine plague at the time that I injected this serum into the hog, I would expect the serum to have no effect whatever on swine plague. Q. Now, Doctor, does it make any difference, in vaccination and treatment of hogs after vaccination with the simultaneous method, as to what they are fed on? A. No, sir. Q. Perfectly clear about that? A. Yes, sir. \* \* \* Q. Now, I understood you to say, when you were examined by Mr.

Kimball, that serum was not all of the same potency or strength,—that it varied. That is right, isn't it, Doctor?

A. Yes, sir. I know this because of my experience, my long experience in these matters. And I know that serum is not all of the same potentiality. The potentiality of serum has nothing to do with the amount of virus used. The virus should always be of the same virulence, but it is not so. There is no kind of animal that has more idiosyncrasies and peculiarities than the hog. The only way that you can definitely determine the real condition of a hog is by post mortem. Our science recognizes that fact. It takes 5 or 6 days after inoculating a hog with cholera to have any visible symptoms of cholera. No veterinarian, however skillful, if a hog was inoculated with the agency of hog cholera today, could tell on tomorrow that the hog was so inoculated. And this might be true for 8 days,—as long as 8 days after inoculation. There is a varying situation. Some hogs are so eccentric that you might get the rise of temperature within 3 days, and some hogs are so eccentric and have such idiosyncrasies that you could not get a rise of temperature until 8 days. You couldn't tell that the hog was inoculated until the temperature manifests itself. Not so much if the hog was on feed and appeared healthy. The hog will stay on feed after there is a rise in temperature. The fact that they stay on feed don't help us any to detect latent cholera. Q. I bring you a hog, now; its temperature is normal, everything is normal about it that you can see from the outside; yet the day before it took into its system the principle that produces hog cholera—

A. Yes, sir. Q. Can you tell it? A. No, sir. It requires from 3 to 9 days to discover symptoms of hog cholera after inoculation. You could not detect hog cholera the next day after the hog had been inoculated. You might put serum into a hog infected with hog cholera, and the operator not know it. You could not discover it by post-



mortem examination made 2 or 3 days after inoculation. You could not tell anything about it until the symptoms became marked. Q. So that a hog might be inoculated with pneumonia, with the germ or agent of pneumonia, when you vaccinated it? A. Yes, sir."

III. The foregoing is perhaps a sufficient setting forth of the expert facts to enable us to go to the decisive questions of the case. The charge of negligence against the defendant, as made in the final substituted petition, is as follows:

"That the defendants did negligently and wrongfully make, produce, distribute, and put upon the market, and did offer for sale, keep for sale and sell the said hog cholera virus and an impotent serum in connection therewith, so that the same was put upon the market and obtained by various persons for use for said purpose of immunizing hogs; that the defendants did wrongfully, unlawfully, and negligently sell said hog cholera virus and said hog cholera serum, contrary to the laws made and provided by the state of Iowa; that the serum so sold by the defendants was impotent and impure; and that the same was not of the potency as required by law in the state of Iowa; and that same was below the standard of potency required by law, and below the standard potency established by the authorities of the state of Iowa."

There is considerable dispute in the argument as to whether the sales in question were made in Iowa or in Nebraska, and whether the rights of the parties are to be determined under the Federal statutes or under the Iowa law. It appears that there is a small part of the state of Iowa situated upon the west bank of the Missouri River, and practically included in the city of Omaha. The plant of the defendants was located within the Iowa boundary. All goods, however, were necessarily shipped to Omaha, in order to get into the state of Iowa proper. The defendant com-

pany had both a Federal license and an Iowa license. The conclusion we reach renders it unnecessary for us to consider the question of whether the sale was made in Iowa, and if so, whether the shipment was, nevertheless, an interstate shipment, or whether the rights of the parties are governed by the Federal or the Iowa statute. The plaintiff contends that the sale of the serum was in violation of Chapter 227 of the Acts of the Thirty-fifth General Assembly (Section 2538-w *et seq.*, Code Supplement, 1913). Sections 4 and 8 of such chapter are as follows:

"The director of said laboratory shall have the power and it is made his duty to *establish and declare the standard degree of potency of hog cholera serum for successfully treating*, curbing and controlling hog cholera or swine plague. \* \* \* At the time of issuing said permit, the said director shall deliver to said applicant a statement showing the standard or degree of potency of hog cholera serum as established by said director and said permit may at any time be revoked and canceled by said director when it becomes evident to him that the terms on which it was issued are being violated. No hog cholera serum shall be sold or offered or kept for sale or use, or be used in this state which is *below the standard test of potency established by the director*, except for experimental purposes at the place of manufacture of hog cholera serum and under the direction of the manager thereof."

"After the taking effect of this act, any person, firm, company or corporation offering or keeping for sale in this state any hog cholera serum or virus without securing a permit from the director, or selling or offering or keeping for sale after said permit has been canceled or has expired, any hog cholera serum, or while holding a permit, selling or offering or keeping for sale any hog cholera serum which is below the standard of potency as established and declared by said director, shall be fined in a sum not less than

one hundred dollars or more than five hundred dollars."

In the purported exercise of the authority conferred upon him by such statute, the director of the biological laboratory established and announced the following alleged standard of potency:

"The dose, which shall be stated on the label, *must be sufficient* to prevent a susceptible hog of the weight the dose is recommended for, from showing symptoms of hog cholera when injected hypodermically with two cubic centimeters of virulent blood which will produce hog cholera in susceptible hogs of the same weight within eight days after being inoculated with the same quantity of virulent blood."

The Federal statute on the subject is as follows:

"It shall be unlawful for any person, firm or corporation to prepare, sell, barter, or exchange \* \* \* or to ship or deliver for shipment from one state \* \* \* to any other state \* \* \* any worthless, contaminated, dangerous, or harmful virus, serum \* \* \* intended for use in the treatment of domestic animals, and no person, firm or corporation shall prepare, sell, barter, exchange, or ship as aforesaid any virus, serum, toxin, or analogous product manufactured within the United States and intended for use in the treatment of domestic animals, unless and until said virus, serum, \* \* \* shall have been prepared under and in compliance with regulations prescribed by the secretary of agriculture at an establishment holding an unsuspended and unrevoked license issued by the secretary of agriculture. \* \* \* The secretary of agriculture \* \* \* is authorized \* \* \* to issue \* \* \* licenses for the maintenance of establishments for the preparation of viruses, serum, \* \* \* in the treatment of domestic animals intended for sale, barter, exchange, or shipment as aforesaid." U. S. Comp. Stat. 1916, Section 8785.

The regulations prescribed by the secretary of agriculture, under the authority of said Federal statute, adopted,

in substance, the eight-pig test which has been above described. As to the result of the test, the following criterion is declared:

"One or both of the check pigs must become visibly sick within seven days, and should be ready to die within fifteen days. If all of the serum pigs remain well, the serum may be recommended for use in a dose of 20 c. c. for hogs weighing 100 lbs. or less. If the 15 c. c. pigs become sick, while the others remain well, a dose of not less than 30 c. c. should be recommended for hogs weighing 100 lbs. or less. If the hogs receiving 20 or 25 c. c. of serum become sick, the serum must not be marketed *unless subjected to a subsequent test in the same way, which results in showing that the serum does protect in 20 or 25 c. c. doses*, or unless the serum be mixed with other and more potent serum, thus increasing its potency as shown by test after mixing. If the check pigs do not respond as indicated above, *the test must be repeated.*"

In support of the claim of negligence, the emphasis of plaintiff's argument is that the defendant violated the Iowa statute above quoted, and was, therefore, necessarily negligent. It will be noted from such statute above quoted that the legislature purported to confer upon the director of the laboratory the authority and duty "to establish and declare the standard degree of potency of hog cholera serum for successfully treating," etc. Section 8 of the act (Section 2538-w7) makes it a misdemeanor to put serum upon the market "which is below the standard of potency as established and declared by such director." Has such director ever established or declared the standard degree of potency thus called for? The only alleged standard ever declared is that which we have above quoted, which states, in effect, that the dose stated on the label must be *sufficient* to prevent a susceptible hog of the weight that dose is recommended for, from showing symptoms of hog cholera. Is

this alleged standard responsive to the statute? Does it establish a standard *degree of potency*? Does it set forth any rule or standard which will serve as a guide to and a requirement of the producer of serum before he markets his product? Or does it fail to specify a standard? Does it simply call for *results*, and does it require the producer of serum to become a warrantor of such results? If this provision can be fairly read as requiring a *fair test* of a serum to be made in *advance* of marketing, and requiring that *such test* shall show the result here called for, it might be deemed sufficiently responsive to the statute. We doubt whether it can be so read; and if it could, it would avail nothing to the plaintiff in that form. There is no ground in the record to claim that this lot had not been tested, and that it had not fulfilled the conditions of the test before marketing. If we are to read this declaration as a call upon the serum for *successful results after* it is marketed, it is not responsive to the statute. It is a purported exercise of authority not conferred upon the director. The language of the statute itself, in calling for a "standard degree of potency," is somewhat unfortunate, in the light of the expert evidence that there is no standard degree known, and that, therefore, none is possible. In responding to powers of regulation conferred by the Federal statute, in somewhat different terms than we have herein, the secretary of agriculture declared the eight-pig test as a standard or criterion of potency. If the director of the laboratory had responded in a similar manner to the Iowa statute, by prescribing some definite test which should be conformed to by the producer before he should market his serum, it would doubtless have been fairly responsive to the statute, and perhaps the only compliance therewith possible. We are satisfied, however, that no power is conferred upon the director to declare that ultimate results in the use of the serum shall be conclusive upon the producer, or render him subject to prosecution, notwith-

standing that the serum met the legal test at and before its marketing. The statute does not make the producer a warrantor of results, nor does it authorize the director to make him such. This view is emphasized by the further consideration that the serum, when completed, is subject to rapid deterioration, and has need to be kept with great care, under seal and refrigeration. We are of the opinion, therefore, that the declaration of the director was not responsive to the statute and was not warranted thereby. The criterion which the director is authorized to declare must be applied as of the time at or before the marketing of the serum, and not after marketing. The result of this holding is that there was no violation of the Iowa statute.

IV. Independent of the question of violation of the statute, was there other sufficient evidence in the case to warrant its submission to the jury? The burden was on

the plaintiff, of course, both to show negligence and to show that such negligence was the proximate cause of the alleged losses. The plaintiff lays great stress upon the large

2. NEGLIGENCE:  
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percentage of loss in the herds of the plaintiff and his assignors, and this is the outstanding fact in the case. The trial court properly instructed that proof of the death of the hogs was not of itself proof that it was caused by any wrongdoing of the defendant. The proof contended for by the plaintiff is wholly circumstantial. In his brief, the plaintiff has specified as follows the circumstances relied on other than the losses sued for, as constituting the circumstantial evidence:

"1. The location of the plant was bad, and its nearness to the fly-hatching garbage plant made it impossible to produce pure serum, and the contamination of the serum weakened its potency.

"2. The virus was obtained from unknown hogs,

picked up on the market at the stockyards, and killed at Cudahy's packing plant.

"3. The method of taking the virus at the packing house and carrying it to the plant in Council Bluffs was dangerous and unscientific.

"4. The proper hogs, fed and cared for in the proper manner, were not used for hypering.

"5. The defendants evidently knew something was wrong with the Series 18, and were negligent in selling it, because it was sent only into Iowa, and they were very careful not to ship it into Nebraska.

"6. The admission of Dr. Juckniess that this serum was bad, at the time when there was a threatened prosecution by the director of the Iowa biological laboratory at Des Moines, was evidence of the defendant's negligence.

"7. The failure to properly collect Series 18 from a given number of known hypered hogs, and the gathering of this serum from January to June in 1914, was contrary to the general rule of manufacture.

"8. There was inefficiency of labor and lack of skill employed by the defendants to produce this important commodity.

"9. The testimony of Dr. Alcorn of the use of the serum on eight herds of hogs in which the serum itself proved impotent.

"10. The scientific test of the serum by the biological laboratory at Ames, which was in no way interested in the outcome of the result."

Of the foregoing specifications, Nos. 1, 3, 4, 5, 6, 7, and 8 have no support in the evidence. As to No. 2, the action is not predicated upon any complaint of the virus furnished. Furthermore, the testimony of the expert witnesses is undisputed that, up to July, 1914, it was the usual custom to use hogs naturally infected with cholera as a source of the virus. A post-mortem examination was had in every case to de-

termine whether cholera was present, and whether there was any other contamination. If any other contamination or disease were found, the blood of such specimen was not used. The appearance of the foot and mouth disease caused the later abandonment of this practice.

Referring to Specification 9, Dr. Alcorn was a veterinary surgeon of Adair, who had used the serum of the defendant in June, 1914, upon nine herds as follows:

Herd No. 1, 70 hogs, all died. Herd No. 2, 30 hogs, 2 died. Herd No. 3, 81 hogs, none died. Herd No. 4, 75 hogs, none died. Herd No. 5, 14 hogs, none died. Herd No. 6, 57 hogs, nearly all died. Herd No. 7, 120 hogs, 2 died. Herd No. 8, 17 hogs, 2 died. Herd No. 9, 129 hogs, 44 died.

The expert evidence which we have above set forth shows why, with the same treatment and the same serum, one herd could die and another could get well. There are several reasons which could account for the deaths. The cholera infection may have taken place, in fact, before treatment was had. Other diseases may have been present in the herd, upon which the serum could have no effect. The expert evidence on behalf of the plaintiff shows that pneumonia and septicemia and worm diseases are very often present with cholera. On the other hand, all these hogs save one herd were inoculated with virus which would have been concededly fatal to all of them if it had not been neutralized by the serum. The fact that so many of these hogs were thus artificially infected with the virus is of itself very suggestive evidence of the potency of the serum to withstand such virus. The fact that, out of herd No. 7, 118 out of 120 were saved, presented, of itself, a more severe and successful test than the recognized eight-pig test. We think the experience of Dr. Alcorn with these herds could not fairly be regarded as a circumstance tending to show negligence on the part of the defendant company. Its ten-



dency was the very reverse. Referring to the tenth specification, Dr. Cole, of the Agricultural College, made a test of the serum which he obtained in September, as hereinbefore indicated. He conceded that his test was defective, and would not have received the approval of the Federal government. As to one of the pigs tested, he gave a smaller dose than that called for by the label. As to all the pigs used, he omitted to take their temperature at the beginning of the test. Their temperature was taken on the second day—when it could not yet have been affected by the inoculation. The temperature of every hog used was above normal. The temperature of these pigs ranged, at that time, from 104 to 104.8. Concededly, the temperature was suspicious, though not necessarily decisive. Even if such test had been made strictly according to rule, the failure did not affirmatively condemn the serum. Under the Federal regulations, the rule is that, upon the failure of a test, subsequent tests may be made; and if a subsequent test is successful, it is deemed sufficient, notwithstanding previous failures. In such case, the previous failure is attributed to other causes than the serum. On this theory, the fact that a herd of 118 should be saved, like herd No. 7, in Dr. Alcorn's experience, is evidence that the loss of herd No. 1, of 70 pigs, was attributable to other causes. Under the rule of the eight-pig test, as recognized by all the experts, a failure of the test proves nothing affirmatively. It forbids the marketing of the product, however, until the conditions are met by a subsequent test. It is further to be noted that some of these herds, including some of the herds of plaintiff's assignors, were in close proximity to cholera-infected herds on neighboring farms.

We think, therefore, that the circumstances which we have here considered fall far short of sustaining a verdict either finding negligence of the defendant or that the al-

leged negligence was the proximate cause of the losses complained of.

The plaintiff introduced certain testimony in the nature of admissions on the part of the defendant Juckniess. The plaintiff, on direct examination, testified as follows:

"He said that I should not be losing so many pigs, and they should not be getting sick so fast; that he had not tested this serum *for some time*, and he wanted me to watch them every day, and if they continued on getting sick and continued on dying, he wanted to give me more serum to revaccinate with."

Later, on redirect examination, he testified to the same circumstance, as follows:

"Well, he says, we have *not tested that*, and it may be that you are going to have some bad luck. Now I would advise you to come down here every day and watch these pigs, watch them close, and in case more of them die, or they keep getting sick, you let me know, and I will come over and bring serum and revaccinate them. Q. Well, did you tell this right the first time or the last time? A. I told it right both times."

It is contended that this alleged admission was proof that the serum had not been tested. The evidence was permitted to stand against the defendant Juckniess alone. The witness did not purport to testify to different statements made by Juckniess, but he testified twice to the same statement, and did so contradictorily. As first testified to, the statement of Juckniess was not an admission that there had been no test, but clearly implied that there had been one. The statement as testified to the second time was an admission that there had been no test. In view, however, of the witness' testimony, when confronted with the variation of his testimony, that he had "told it right both times," we do not think he is in a position to claim anything from his contradiction of himself. The one statement is a con-

tradiction of the other, and the only explanation offered is that both are right. They could both be right only in the sense that the *first statement included the last*. The plaintiff, as a witness, testified also to the fact that certain abscesses had formed on some of his own pigs after the inoculation. It appears from his testimony, also, that, at the same time that he inoculated the pigs, he castrated the males, and that many of the abscesses complained of were scrotal. It also appears that the pigs inoculated were April pigs, which had been twice inoculated with serum previously. The theory put forward is that the abscesses indicated impurity either in the serum or virus or both. The testimony of plaintiff's own experts is that absolute purity of serum or virus is practically impossible. To attain it would incur prohibitive expense. Furthermore, Dr. Cole, in his test, found no abscesses. There is no claim that the impurity caused the loss of the hogs, but that it indicated a defective serum; but this theory is not supported by the plaintiff's own expert testimony. The plaintiff administered the serum to his pigs on July 14th. He testified that, by the night of July 28th, sixteen had died. He was confronted with a letter written by himself on the night of July 28th, wherein he reported *five* dead. His explanation of the contradiction was that he wrote the letter with a view of deceiving Juckniess. This testimony, such as it is, furnishes something of an illustration of the easy door which would be open for the recoupment of cholera losses if the liability of a producer of serum could be predicated upon the mere fact that the serum failed to save. The business is well hedged about by the safeguards of government, both state and national. Adventurers cannot engage in it. Only men of competent experience can obtain license therefor. The plants are subject to continual official inspection. The power of governmental departments over them is practically unlimited. It is greatly to the in-

terest of the public that effort and experimentation go on. A great degree of success has been attained. Continual discovery is being made. Even though the remedies have only partial success, they are well worth while.

The conclusion arrived at renders it unnecessary for us to pass on many legal questions which are ably argued in the briefs. The case presented occupies quite a new field. It is not a case of mistake in compounding medicine, nor of mistake in delivering a dangerous article in lieu of a harmless one, nor does it involve bad faith or fraud in putting the article into the channels of sale. Both purchaser and seller knew that, in the use of the article, uncertainty of result, to some degree, was inevitable. It was the duty of the producer to follow the approved methods of production and of testing, as generally recognized by those versed in the subject. Under the undisputed testimony, he could do no more, for general use. If further testing were deemed desirable for added security as to a particular herd, the purchaser had the opportunity to make it upon a few of the particular herd which he was about to inoculate. Before inoculating a herd of 210 pigs, as was done in one case, it might have been more prudent to have first selected eight pigs and experimented thereon. The prudence, if any, of such a course must have been as obvious to one veterinary surgeon as to another. What we hold, therefore, is: That the burden was upon the plaintiff to show that, in the production and testing of the serum, the defendant violated some duty owing to the public or to the vendees of the product; that no "standard degree of potency" of serum has been established in this state; that the published regulation of the director of the laboratory, calling for a dose sufficient to achieve successful results, if intended to refer to results attained after marketing, is not responsive to the statute, and was, therefore, not obligatory; that, if such published regulation may be read as a criterion for a test to be had be-

fore marketing, then it avails plaintiff nothing, because it does not appear that such prior test was not had; that, in either event, no violation of the statute was shown; that the circumstantial evidence relied upon is not sufficient to sustain a finding that the defendant violated the spirit of the statute, or that he failed to fully conform to the generally accepted methods of production and test.

Briefly stated, the finding of negligence is not sustained by the evidence. We have no occasion, therefore, to consider the question of proximate cause, nor whether something more than negligence must be proved in order to entitle recovery by subvendees. For the reasons indicated, the judgment below must be—*Reversed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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ELLA MOSSESTAD, Appellee, v. ANDREW O. MOSSESTAD-et al.,  
Appellants.

- TRUSTS: Resulting Trusts—Husband and Wife.** A presumption of
- 1 resulting trust does not prevail from the fact that a husband pays for property with his own money, and causes the title to be taken in the name of his wife. On the contrary, a presumption of gift or advancement to the wife does prevail.

GAYNOR and SALINGER, JJ., dissent as to the effect of the evidence to overcome the presumption.

- EVIDENCE: Parol as Affecting Writing—Engrafting Condition on**
- 2 Deed. Parol evidence is inadmissible to engraft upon an absolute deed to a wife of premises paid for by the husband, a condition to the effect that the wife was to have absolute title only in case she survived the husband.

*Appeal from Winnebago District Court.*—M. F. EDWARDS,  
Judge.

APRIL 2, 1918.

SUIT in partition of real estate. The real contest is

over the ownership of the property. The defendant Andrew O. Mossestad, appellant herein, claimed to be the sole and absolute owner thereof. The trial court confirmed his share at one third, and he appeals.—*Affirmed.*

*Jensen & Jensen*, for appellants.

*Burt J. Thompson and Alan Loth*, for appellee.

EVANS, J.—I. Andrew O. Mossestad is the surviving husband of Mary O. Mossestad, deceased. The appellees are the heirs of said deceased. At the time of her decease, Mary O. Mossestad held the legal title to the real estate in controversy, being a house and lot in Lake Mills, Iowa. The defendant appellant pleaded and introduced evidence to prove that he purchased and paid for the property in question, and took the deed in the name of his wife. He contends, therefore, that she held the title in resulting trust for him. Each of the parties to this marriage had children by a former marriage. The heirs of the deceased wife are the parties contending herein with the surviving husband. While it is true, ordinarily, that the payment of the purchase price and the taking of title in the name of another raises a presumption of resulting trust in favor of the party paying the price, this presumption does not obtain in favor of a husband who pays the price and takes title in the name of his wife. In such a case, a presumption of gift or advancement arises, and the deed is presumed to carry to the wife the full legal and equitable ownership. In other words, it is presumed that the wife was intended to be a beneficiary, and not a trustee. This general proposition is not contested by the appellant. In order to avoid it, however, certain oral evidence was introduced, with a view of showing the real intent of the husband at the time of the transaction. Such evidence was that of the appellant himself, and was as follows:

1. TRUSTS: resulting trusts: husband and wife.

"Well, I was a little bit older than she was, and I was married before, you understand; and I was older, and I had been married before, and I had children grown up, and, of course, I did not like for my kids to come and take this property away from her, from my wife, or anything like that, you understand. Q. In case you died, yes. Well, go on. A. Well, we was going on the same place, and, of course, I was a little bit older,—quite a little bit older,—eleven years older, and, of course, I had been married before, and, of course, I had grown-up kids, and if anything happened to me, I would like her to have—I would like her to have a home, in case anything happened to me—if I died or anything."

The argument at this point is that the real intention of the husband fixes the presumption which shall govern the case, and that it was competent to show such intention by the direct oral evidence of the husband himself. Without conceding the argument, and accepting as true the foregoing evidence, such as it is, can it be said that it shows an intention on the part of the husband at the time of such conveyance to his wife to make her a mere trustee? To put it in another way, does it show an intention on the part of the husband not to confer a beneficial right or interest in the property upon the wife? We think such evidence is clearly insufficient to that end. On the contrary, the only fair inference that can be drawn from it is that the intention of the husband was to benefit his wife and to protect her in the future against any possible assertion of right in the property by his heirs against her in the event of his death. Such is the fair purport of his evidence. If, as contended, she held the legal title merely in resulting trust for her husband, then it could afford her no protection whatever against his heirs after his death. The only way that the deed could operate to her protection would be to give it its full legal effect, and to presume that it carried not only the

legal title, but absolute ownership as well. The declared intention of the appellant to protect his wife is wholly consistent with this legal presumption. It is inconsistent with a claim of resulting trust. This evidence shows that the husband intended his wife to be a beneficiary. If she was a beneficiary, she was not a trustee. The fact that the wife died before the husband did not affect the nature of her title. If she held in resulting trust at all, she so held from the beginning. If she so held, then she had no beneficial interest at any time. If the husband may now establish a resulting trust, he could have done so during the lifetime of his wife. His right, if any, to do so has always existed since the deed was taken, and has become neither greater nor less by the intervening death of his wife. We think, therefore, that the trial court properly held that the deceased was the absolute owner of the property, and properly awarded partition accordingly.

II. It is contended, also, that the husband intended his wife to be a qualified beneficiary of the deed. The qualification thus engrafted upon the deed is that she was to become the beneficiary therein only in the event that she survived her husband. There is nothing in the terms of the deed to warrant such qualification. If the terms of the deed could be qualified by oral evidence to that effect, even that is wanting. We do not think that the terms of the deed could be thus qualified by oral evidence if it were offered. If there was a resulting trust, the appellant was, from the beginning, the equitable owner of the property. If he was not such from the beginning, then the wife was the absolute owner thereof. There is no warrant, in our judgment, either in the evidence or in legal presumption, for saying that the wife held a qualified title.

The decree entered below is—*Affirmed*.

PRESTON, C. J., LADD, WEAVER, and STEVENS, JJ., concur.

2. EVIDENCE:  
parol as affect-  
ing writing:  
engrafting  
condition on  
deed.



SALINGER, J. (dissenting). When a husband pays for property, and places the title in his wife, there is a presumption which operates as evidence that it was his intention to make a gift, advancement, or natural provision, rather than to create a trust. Appellant concedes this, and avoids with the claim that he has rebutted this presumption. Appellee replies that he must sustain this rebuttal with the same degree of proof that is required to establish a trust.

One who seeks to impress a trust upon a deed purporting to be one of absolute conveyance in fee simple must establish such trust by clear and satisfactory evidence. I will not stop, at this time, to inquire just what satisfies this requirement when it is sought to establish a trust, because there should first be considered whether such requirement, whatever it be, applies to rebutting said presumption of gift, etc. There must, of necessity, be a time at which the one who asserts a trust stands before the court, attempting to establish the trust, without yet having shown anything from which a trust is usually implied. So long as he remains in that position, his claim is under suspicion and all his evidence is closely scrutinized. The court is watchful to protect the legal title. But does he stand in such position after he has clearly established facts from which, if there were no more, the chancellor must declare there is a trust? If, after the claimant has clearly shown, *prima facie*, he has the equitable and beneficial title (and has, therefore, *prima facie*, destroyed the apparent legal title), his case is still viewed as it was before, then the court is now vigilant to aid in the destruction of the beneficial and equitable title, instead of the protection of the legal title. If proving payment of the consideration proves the fundamentals of the trust asserted, and the fact that the one who paid was a husband raises a presumption of gift or advancement, the judicial attitude inspired by desire to sustain the deed as written

must be abandoned, because both sides have shown that the deed is not to stand as written. One shows this by proof of who paid the price; the other, by evidence claiming that the apparently absolute deed was a gift, or advancement.

Whosoever shows that his money paid for property, and that the legal title was placed in another, has established that he is the true owner. In 3 Pomeroy on Equity Jurisprudence (3d Ed.), Section 1037, it is said that, "in pursuance of the ancient equitable principle that the beneficial estate follows consideration and attaches to the party from whom the consideration comes," the holder of the legal title becomes a trustee. And we held, in the case of *In re Estate of Mahin*, 161 Iowa 459, at 464, bottom, that the foundation of a resulting trust is the payment of the consideration or purchase price, and that a trust in the property purchased arises therefrom by operation of law. The authorities all agree that there is the said presumption of gift, etc., and that it is but a mere presumption, which may be rebutted, or, on the other hand, fortified. That the presumption, so-called, that the deed is a gift or advancement is evidence against the evidence of a trust is true, but the treatment of that counter-evidence is not settled because it is true. Suppose one who asserts the trust proved merely that he had paid the purchase price, and closed before there was any evidence that he sustained to the alleged trustee the relation of husband, or other relation within the rule that raises the so-called presumption of gift or advancement. If there were no counter-evidence, the trust would stand established. Suppose the defense then called a witness whose testimony was equivalent to saying that the claimant intended, by putting the legal title where he did, to make a mere advancement. Such testimony is the exact equivalent of what the presumption of advancement does. Now, when the claimant meets this witness, must he overcome him with the same degree of proof that is required to estab-

lish the facts which are the essential foundation of a trust? If so, should he deny marriage, he must make good his denial by more than a mere preponderance; must so meet what is a mere emergent or incidental issue. This inquiry cannot be affected by the fact that, in the case before us, the claimant showed the relationship from which such intent may *prima facie* be inferred. No matter who puts in the evidence of intent, it goes to an avoidance of a trust that would otherwise be held to be established. Therefore, I am of opinion that, when it once appears, clearly and satisfactorily, that a trust exists, meeting the avoidance does not require the same degree of proof that is required before the court has satisfactory evidence that there is a trust. In other words, when the claimant has once clearly proven that he paid the consideration, and it is claimed, that, notwithstanding, no trust should be decreed, the claimant may overcome the testimony in avoidance more easily than he can establish the essentials of the trust itself.

In the present case, it is most clearly established that appellant paid the consideration. Indeed, I do not understand that this is challenged. Wherefore, appellee makes the case turn on whether the evidence, as a whole, avoids the effect of proved payment of consideration by appellant, which, without such avoidance, operates to establish an equitable title. At this point, we are less concerned with what is due the legal, as with what is due the beneficial, title.

The testimony to meet the avoidance was this:

"Well, I was a little bit older than she was, and I was married before, you understand; and I was older, and I had been married before, and I had children grown up, and, of course, I did not like for my kids to come and take this property away from her, from my wife, or anything like that, you understand. Q. In case you died, yes. Well, go on. A. Well, we was going on the same place, and, of

course, I was a little bit older,—quite a little bit older,—eleven years older, and, of course, I had been married before, and, of course, I had grown-up kids—and if anything happened to me, I would like her to have—I would like her to have a home, in case anything happened to me—if I died or anything.”

In considering this, we should keep in mind, too, that it is the language of one whom the record shows not to be familiar with the use of English. We should further consider that appellant paid the taxes, moved into the property soon after it was bought, lived therein for years, and still does; that the grantee is not shown ever to have lived in it, or to have claimed it as a homestead. Nothing contradicts the testimony nor the claim of appellant except said presumption. Speaking now to these conditions only, I think that all of the evidence, reasonably construed, sufficiently shows that appellant had the deed run to his wife so that, if she survived him, his children by the former marriage could assert no claim upon the property as against his wife, and that the beneficial title was to be his if, by reason of her dying before him, the contingency for which the deed was made could not arise. I am not denying that two constructions are possible. But one of them seems to me to be more reasonable, and that is that his wife was to have the property as long as she lived, and that he who had paid for it should have it when she ceased to be his wife and no longer needed it. As worked out by the majority, the husband paid for property and then made deed, with intention that his own children should never have the property, but that the children of his wife should have two thirds, and he one third of it. I think he intended that no one should disturb the wife while both lived; that, if she became his widow, she should become full owner, because of her additional dependency; and if he outlived her, the deed should cease to be operative; that, after she was dead, and no

longer his wife, the "kids" could not "take this property from her."

As to the argument that there can be no halfway house in a constructive trust,—that the *cestui* owns all the time or not at all,—the greater includes the less. If there may be a trust which can be asserted at any time, there can be one in which such time depends upon conditions. I cannot see how it matters that one who is a *cestui* agrees to postpone the using of his rights. I would reverse.

GAYNOR, J., concurs in the dissent.

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STATE OF IOWA, Appellee, v. ADAM KIEFER, Appellant.

**INDICTMENT AND INFORMATION: Amendment—Proper Proce-**

1 **dure.** An authorized amendment of an indictment duly returned by the grand jury should not be accomplished by the filing by the county attorney of what amounts to an "Amended and Substituted Indictment." But where such was filed after the court had authorized certain amendments, and the accused was put on trial on the original indictment, and the court gave no heed to the "Amended and Substituted Indictment," except in so far as it embraced the amendments which the court had authorized, *held*, the accused might not complain. (Sec. 5289, Code Supp., 1913.)

**INDICTMENT AND INFORMATION: Amendment—Surplusage—**

2 **Effect.** Any unauthorized allegation or change inserted by a county attorney in a writing which is designed to effect an authorized amendment to an indictment returned by the grand jury is necessarily surplusage and without legal effect, and must be ignored by the court. So held where the county attorney, in order to effect an authorized amendment to such an indictment, assumed to redraw the indictment, and in addition omitted the names of two of the defendants, who were not on trial.

**INDICTMENT AND INFORMATION: Amendment—Service of**

3 **Copy on Accused—Waiver.** *Proposed* amendments to an indictment returned by the grand jury should be drafted in the pre-

cise language which is to be employed when the accused is placed on trial, and these, or a copy thereof, must, in the absence of waiver, be served on the accused, preliminary to a ruling thereon by the court, authorizing or rejecting the same. (Sec. 5289, Code Supp., 1913.) Where the accused was served simply with a notice that application would be made to the court for an order authorizing certain amendments, which were designated in a general way, without pretense of setting forth the precise language of each amendment sought, and later, and at the hearing on the application, said amendments in precise form were embodied in a writing filed by the county attorney, and the accused appeared, and had his attention called by the court to the amendments, and objected thereto, *held*, accused had waived his right to a copy of the precise amendments sought.

**INDICTMENT AND INFORMATION: Amendments—Scope—Names**

4 of Persons and Things. Names of persons and things appearing in an indictment may be changed by authorized amendments, so long as no new offense is charged. So held as to the name of a depositor in an insolvent bank, and as to the amounts of certificates of deposit given and received by him.

**NAMES: Initials—Identity of Persons.** In the substitution, by 5 proper amendment, in an indictment, of the name Eugene S. Burr for E. S. Burr, it will be presumed that reference is made to one and the same person.

**BANKS AND BANKING: Fraudulent Banking—"Renewals."**

6 issuance by a bank of a certificate of deposit for the amount of a formerly issued certificate and interest due thereon, constitutes a "renewal" of such latter certificate, within the meaning of the Fraudulent Banking Act, Sec. 1884, Code, 1897.

**EVIDENCE: Opinion Evidence—Impeaching Evidence.**

7 evidence on values may not be considered as impeaching evidence of former opinion evidence on values introduced by the same party.

**BANKS AND BANKING: Fraudulent Banking—Individual Insolv-**

8 ency of Members of Partnership. To establish the insolvency of a partnership banking company, it is not necessary to establish the insolvency of the individual members of the partnership.

WEAVER and SALINGER, JJ., dissent.

**APPEAL AND ERROR: Reservation of Grounds—Insufficiency.**

9 The general assertion in the trial court of the insufficiency of

the evidence to sustain a verdict is insufficient on appeal to raise the point that insolvency of the individual members of a partnership is necessary to sustain a verdict of guilt of fraudulent banking, there being no assignment of error on such point, and the same not being covered by a brief point.

WEAVER and SALINGER, JJ., dissent.

**BANKS AND BANKING:** Fraudulent Banking—Definition of Insol<sup>10</sup> solvency. Former holdings reaffirmed that a bank is insolvent, under the Fraudulent Banking Act, when its financial condition is such that it is unable to pay its debts as they mature, in the usual and ordinary course of business.

*Appeal from Buchanan District Court.*—H. B. BOIES,  
Judge.

JUNE 26, 1917.

REHEARING DENIED APRIL 2, 1918.

THE defendant, with W. H. and John Kiefer, was indicted September 24, 1913, for fraudulent banking, charging that:

"The said Adam Kiefer, W. H. Kiefer and John Kiefer on or about the 6th day of March, in the year of our Lord One Thousand Nine Hundred and Thirteen in the county aforesaid, did, being then and there engaged in the banking and deposit business under the name and style of Kiefer Brothers Banking Company, a copartnership, which copartnership then and there being insolvent, and well knowing said copartnership to be so insolvent, did knowingly accept and receive from one E. S. Burr a certain certificate of deposit issued by said Kiefer Brothers Banking Company for One Thousand Eight Hundred Dollars (\$1,800.00) the property of said E. S. Burr and did then and there deliver to said E. S. Burr a new certificate of deposit issued by said Kiefer Brothers Banking Company for One Thousand Eight Hundred Dollars (\$1,800.00) in return for the certificate of deposit delivered to them by said E. S. Burr, contrary to

and in violation of the form of the statute in such cases made and provided."

There was a plea of not guilty, and defendant alone was put on trial, September 22, 1915. E. S. Burr was called as a witness, and testified that his name was Eugene S. Burr; that Kiefer Bros. Banking Company operated a bank at Hazleton; that he had a certificate of deposit issued thereby; and that, in response to an inquiry as to whether he (defendant) wished the money longer, defendant said he did, and caused a certificate to issue therefor, in words following:

"KIEFER BROTHERS BANKING CO.

"Hazleton, Iowa, March 3, 1913. No. 1499.

"Eugene S. Burr has deposited in this bank, eighteen hundred, fifty-eight & 75-100 dollars, \$1,858.75, payable to the order of self or wife in current funds, on the return of this certificate properly endorsed.

"With interest at 4 per cent if left 3 months.

"With interest at X per cent if left X months.

"With interest at 5½ per cent if left 12 months.

"Interest to cease after 12 months.

"Adam Kiefer, Pt."

This was offered in evidence, but excluded, because not the certificate described in the indictment. Thereupon, the State moved for permission to amend the indictment:

"Comes now the state of Iowa, by R. W. Hasner, county attorney of Buchanan County, state of Iowa, and asks permission of the court to amend the indictment in the above entitled cause in the following particulars, to wit:

"First. That the name 'Eugene S. Burr' be substituted in all places in said indictment where the name 'E. S. Burr' now appears.

"Second. That the description of the certificate of deposit alleged to have been received and accepted by said Adam Kiefer from E. S. Burr be changed and corrected so



as to be for the amount when written of seventeen hundred sixty-one dollars and eighty-five cents (\$1,761.85).

"Third. That the description of the certificate of deposit alleged in said indictment to have been issued to E. S. Burr on March 6, 1913, be changed and corrected so as to be for the amount of eighteen hundred fifty-eight dollars and seventy-five cents. And further, that said certificate of deposit was in the words and figures following, to wit:

" 'KIEFER BROTHERS' BANKING Co.

" 'Hazleton, Iowa, March 3, 1913.

" 'No. 1499.

" 'Eugene S. Burr has deposited in this bank, Eighteen Hundred Fifty-eight 75-100 Dollars (\$1,858 75-100) payable to the order of self or wife in current funds, on the return of this certificate properly endorsed.

" 'With interest at 4 per cent if left 3 months.

" 'With interest at X per cent if left X months.

" 'With interest at 5½ per cent if left 12 months.

" 'Interest to cease after 12 months.

" 'Adam Kiefer, Pt.'

"Fourth. That said indictment be amended so that the words 'a more particular description of which is to the grand jury unknown' be inserted following the words 'the property of said E. S. Burr.' "

Notice in words following was served on defendant:

"To Adam Kiefer:

"You are hereby notified that on September 27, 1915, at 4:30 o'clock P. M., the state of Iowa will present to the district court of Iowa, in and for Buchanan County, at the courthouse in the city of Independence, Buchanan County, Iowa, its application for permission to amend the indictment in the case of State of Iowa, Plaintiff, vs. Adam Kiefer, Defendant, it being case No. 13807 in said district court of Buchanan County, State of Iowa.

"You are hereby notified that you are required to appear

at said time and place and show cause, if any there is, why said permission to amend the said indictment should not be granted.

"You are further notified that a copy of the said motion or application to amend said indictment, setting forth the particular amendments asked for as herein stated, is hereto attached and marked 'Exhibit A.' [Signed by the county attorney.]"

Resistance was interposed by counsel for defendant on the grounds:

"1. That the name Eugene S. Burr requested to be substituted for the name E. S. Burr is the name of a separate and distinct individual and relates to a separate and distinct offense and goes to the substance of the indictment to such an extent as to prejudice the substantial rights of the defendant, charging him with a different crime from that charged in the original indictment returned by the grand jury.

"2. That the description of the certificate of deposit alleged to have been received and accepted by the said Adam Kiefer from one E. S. Burr is in the original indictment set forth as \$1,800. That to change said description of the certificate of deposit upon which the indictment is based to the amount of \$1,761.85 as suggested by the amendment to the indictment is to offer to introduce evidence of another and distinct offense prejudicial to the rights of the defendant and charging him with an entirely different crime from the one set forth in the original indictment, the original indictment indicating that the Kiefer Brothers Banking Company, a copartnership, received the sum of \$1,800 from one E. S. Burr, while the amendment set forth charged the fact to be that one Adam Kiefer received from one Eugene S. Burr the sum of \$1,761.85 as represented by the certificate of deposit, thus conclusively showing that the crime sought to be charged by the amendment has not any re-

lation to the state case that was passed upon by the grand jury in the original indictment.

"3. That the description of the certificate of deposit alleged in the indictment to have been issued to E. S. Burr on March 6, 1913, was for the sum of \$1,800, whereas, the certificate of deposit set forth in the amendment to the indictment is of the date of March 3, 1913, and issued to one Eugene S. Burr for \$1,858.75, said last named certificate of deposit being payable to the order of said Eugene S. Burr and wife, the said new certificate of deposit mentioned in the notice to amend the indictment bearing no resemblance either in date, name of the person to whom issued, amount, or person to whom payable, to the one charged in the original indictment, such amendment being prejudicial to the substantial rights of the defendant and charging him with an entirely separate and distinct crime from that charged in the original indictment, returned by the grand jury.

"4. That the so-called amendment to the indictment is in no respect an amendment to the original indictment but that the facts set forth therein constitute a separate and distinct crime entirely different from that charged by the grand jury in the original indictment. That the names in the certificate of deposit alleged to have been received and accepted by the Kiefer Brothers Banking Company in the original indictment fail to correspond with the certificate of deposit alleged to have been received and accepted by one Adam Kiefer; that the description of the certificate of deposit alleged in the original indictment to have been issued to E. S. Burr corresponds neither in date, amount, name of the person to whom issued or name of the persons to whom the same would be paid with the original indictment as returned by the grand jury. That the grand jury of Buchanan County never passed on any such case as is now sought to be charged by the proposed amendment to the

original indictment and that to permit the same to be filed at this time would be to substitute the county attorney for the grand jury and would be to permit and allow the county attorney to substitute an entirely new indictment charging an entirely different crime from that charged in the original indictment returned by the grand jury.

"5. That the proposed amendment does not correct errors or omissions in the indictment as to matters of form or correct errors in the name of any person or in the description of any person or thing or in the allegations concerning the ownership of property described in the indictment, but that such proposed amendment substitutes an entirely new indictment for the original indictment as returned by the grand jury.

"6. That no copy of the proposed amendment has been served on the defendant.

"7. The amendment to the indictment is made and signed by a different county attorney from that named in the original indictment, conclusively showing that the county attorney who drew the amendment could have had no actual knowledge of the case presented to the grand jury and of the facts on which the original indictment signed a true bill by its foreman was based, and in presenting an entirely new case at this time, he usurps the functions of the grand jury and prejudices the rights of the defendant contrary to and in violation of law."

The resistance was overruled, and leave granted to amend the indictment. Thereupon, defendant moved for a continuance. This motion was overruled. The State then tendered the "amendment to the indictment," in words following:

"In the District Court of the State of Iowa, in and for Buchanan County, September Term, 1915. State of Iowa, Plaintiff, v. Adam Kiefer, Defendant. Amendment to Indictment.

"Comes now the State of Iowa by R. W. Hasner, county attorney of Buchanan County, Iowa, and having first had and obtained permission of the court, hereby amends the indictment in the above entitled case in accordance with the motion to amend said indictment heretofore filed in said case and the ruling of the court thereon, and hereto sets forth the amended indictment as follows, to wit:

"In the District Court of Iowa, in and for Buchanan County. The State of Iowa against Adam Kiefer. Indictment.

"The Grand Jury of the county of Buchanan, in the name and by the authority of the state of Iowa, accuses Adam Kiefer of the crime of fraudulent banking committed as follows: The said Adam Kiefer on or about the 6th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirteen, in the county aforesaid did being then and there engaged in the banking and deposit business under the name and style of Kiefer Brothers' Banking Company, a copartnership, which copartnership then and there being insolvent and well knowing said copartnership to be so insolvent did knowingly accept and receive from one Eugene S. Burr a certain certificate of deposit issued by said Kiefer Brothers' Banking Company for Seventeen Hundred Sixty-one Dollars and Eighty-five Cents (\$1,761.85) the property of said Eugene S. Burr, a more particular description of which is to the grand jury unknown, and did then and there deliver to said Eugene S. Burr a new certificate of deposit issued by said Kiefer Brothers' Banking Company for Eighteen Hundred Fifty-eight Dollars and Seventy-five Cents (\$1,858.75) and in the words and figures, to wit:

"Kiefer Brothers' Banking Co., Hazleton, Iowa, March 3, 1913. No. 1499.

"Eugene S. Burr has deposited in this bank Eighteen Hundred Fifty-eight and 75-100 Dollars (\$1,858.75), payable to the order of self or wife in current funds, on return of

this certificate properly endorsed. With interest at 4 per cent if left 3 months. With interest at X per cent if left X months. With interest at  $5\frac{1}{2}$  per cent if left 12 months.

““Adam Kiefer, Pt.

““In return for the certificate of deposit delivered to them by said Eugene S. Burr, contrary to and in violation of the form of the statute in such cases made and provided.””

“R. W. Hasner,

“County Attorney of Buchanan County, Iowa.”

Counsel for defendant interposed the same objections included in his resistance, and that “the proposed amendment to the indictment does not correspond in any respect with the notice served on the defendant, that the allegations contained in the notice that was served on the defendant and that it is proposed to substitute an entirely separate and distinct indictment in place of the original indictment and no copy of which was ever served upon defendant in this case.” Objection was overruled, and the amendment allowed. The trial then proceeded, and resulted in the conviction of defendant. He appeals.—*Affirmed*.

*M. A. Smith and Chappell & Todd*, for appellant.

*George Cossion*, Attorney General, *John Fletcher*, Assistant Attorney General, *R. W. Hasner*, County Attorney, and *E. E. Hasner*, for appellee.

LADD, J.—I. The defendant, with his two brothers, W. H. and John Kiefer, is alleged in the indictment to have engaged in the banking business as a copartnership, under the name of Kiefer Brothers Banking Company.

1. INDICTMENT  
AND INFORMATION:  
amendment:  
proper procedure.

It is also alleged that the company became insolvent, and, while so insolvent, said defendant “did knowingly accept and receive from one E. S. Burr” a certificate of deposit, previously by

it issued, for \$1,800, and issued to said Burr another certificate in its stead for \$1,800. No copy of either instrument was attached thereto. It developed on the examination of E. S. Burr that his name was Eugene S. Burr; that the certificate issued was for \$1,858.75, "payable to the order of self or wife," and was made to Eugene S. Burr. When offered in evidence, it was excluded, on the objection that it was not the certificate described in the indictment. Thereupon, the State applied for leave to amend that instrument, under Paragraphs 7 and 8, Section 5289, Code Supplement, 1913, which provides that:

"7. The county attorney may, at any time before or during the trial of defendant upon indictment, amend the indictment so as to correct errors or omissions therein as to matters of form, or to correct errors in the name of any person or in the description of any person or thing, or in the allegations concerning the ownership of property that may be described in the indictment; but such amendment shall not prejudice the substantial rights of the defendant, or charge him with a different crime or different degree of crime from that charged in the original indictment returned by the grand jury;

"8. A notice of the time the State will ask permission to file such amendment, together with a copy of such amendment, shall be served upon the defendant or his attorney and an opportunity be given the defendant to resist the filing of such amendment. No continuance or delay in trial shall be granted because of such amendment, except upon the defendant's application, it appearing to the court that defendant should have additional time to prepare for trial because of the new allegations contained in the indictment."

The application to amend proposed: (1) To "substitute" the name "Eugene S. Burr" in all places therein for E. S. Burr; (2) to "change and correct" the amount

2. INDICTMENT  
AND INFOR-  
MATION:  
amendment:  
surplusage:  
effect.

in the certificate surrendered by inserting \$1,761.85, instead of \$1,800, therein; and (3) to change and correct the certificate issued, by inserting \$1,858.75 instead of \$1,800; and (4) to insert, after the words "the property of the said E. S. Burr," the words, "a more particular description of which is to the grand jury unknown." Neither the proposed amendment nor a copy thereof was attached, nor was a copy of the alleged amendment ever served on the defendant, but the application was duly served. Such amendment was, in form and substance, a new and complete indictment, without endorsements as having been returned by the grand jury; and the State, while denominating it in the title, "amendment to indictment," states that it "amends" in pursuance of permission of the court, and "hereto sets forth the amended indictment." Then follows the amendment, in the form of an indictment, containing not only the changes sought, but enough else to make it apparently complete in itself. But the State was without authority to amend in any respect save that authorized by this statute. There is no provision permitting the filing of an amended and substituted indictment. Such an instrument can only be returned by the grand jury upon resubmission to that body. The State is limited by the order of the court, on application, to precisely the changes or corrections therein permitted, and anything in excess thereof must be regarded as surplusage. Had the amendment been served on the accused, as exacted by statute, and the same ruled on by the court, it might cover every correction or change permissible thereunder. But only the motion was served and ruled on by the court; and therefore the State, in drawing the amendment, might not make other changes or corrections than authorized by the ruling thereon. Of course, it is not often material how an amendment is denominated: the important consideration is, what it really is. This



amendment in form is something more than a mere amendment; but, as said, anything other than within the order of the court was utterly without authority of law, and especially is this true of that part specifically charging the offense against him only. Doubtless the omission of the names of the other brothers from the amendment was due to oversight, owing to the fact that Adam Kiefer alone was on trial. The indictment was without defect in these respects. The law did not authorize an amendment in either respect, nor was it permitted by the court. Any matter included in the amendment by the county attorney other than permissible by statutes and authorized by court must be regarded as surplusage, as not being returned by the grand jury; and, as the trial court proceeded on this theory, and the cause was tried on the original indictment as corrected by the amendment only in the respects proposed, there was no error.

II. In serving notice of the application to amend, a copy thereof also was served, but no copy of the amendment was ever served on the defendant. He specifically objected

3. INDICTMENT  
AND INFOR-  
MATION:  
amendment:  
service of copy  
on accused:  
waiver.

to the application on this ground: "(6) That no copy of the proposed amendment has been served on the defendant." In overruling this objection, the court denied the defendant the benefit of Paragraph 8 of Section 5289 of the Code Supplement, 1913. The right to amend an indictment returned by the grand jury, accorded the county attorney, was on certain specified conditions, among which was the service of a copy thereof on the accused. This was to advise him both of the substance and form of the proposed amendment, to the end that "an opportunity be given the defendant to resist the filing of such amendment." Undoubtedly, the court erred in overruling the objection that a copy of the amendment had not been served, but the error was waived by the fact that counsel

for the defendant interposed objections to the amendment itself, when filed, and that his attention was directed thereto by the court, and he resisted the filing thereof. He could have done no more had the copy been served. Every purpose of such service had been accomplished, and we are of opinion that the error in the ruling of the court and the failure to serve a copy of the amendment on defendant were waived. In any event, he was in no wise prejudiced. We are required to "examine the record without regard to technical errors or defects which do not affect the substantial rights of the parties" (Section 5462, Code), and it is plain that this could have had no influence on the course of the trial.

III. Appellant contends that the amendment, in effect, substitutes different certificates from those described in the indictment, in that the application asks to "substitute" the

4. INDICTMENT  
AND INFOR-  
MATION:  
amendments:  
scope: names  
of persons  
and things.

name "Eugene S. Burr" for "E. S. Burr," and to change and correct the amounts of said certificates. If the amendment charged the defendant with a different crime from that alleged in the indictment, leave to file it ought not to have been granted. We do not so construe the amendment. The statute quoted authorizes an amendment correcting (1) "errors or omissions therein as to matters of form," (2) "errors in the name of any person," (3) "in the description of any person or (4) thing, or (5) in the allegations concerning the ownership of property that may be described in the indictment." All this may be done provided the accused is not prejudiced in his substantial rights, and a different crime is not charged. The propriety of amendments in these respects, as well as the power of the general assembly to authorize them, was fully vindicated in *State v. Mullen*, 151 Iowa 392, and the granting of leave to amend was approved in *State v. Foxton*, 166 Iowa 181, and *State v. Kiefer*, 172 Iowa 306. It will be observed that the

matters enumerated relate to form, rather than to the substance of the charge; and whether the general assembly might authorize an amendment affecting the substance of the charge is not and could not well be involved in construing this statute. But see *State v. Mullen*, supra; *Jones v. McClaughry*, 169 Iowa 281.

(a) It is first objected that the amendment sought to "substitute" the name "Eugene S. Burr" instead of "E. S. Burr," and it is argued that this did not have the effect of

correcting the name of the person to whom the certificates were issued, but of inserting the name of a different person. In the absence of any showing to the contrary, letters preceding the surname are to be treated as the Christian or given name; but this is not often so, for such letters ordinarily stand for full names. *Riley v. Litchfield*, 168 Iowa 187. And where the latter are substituted in the description of a particular instrument, it is not to be inferred that a different person was intended, but that the names for which the letters stood were intended to be stated. Such clearly was the design of the amendment, and it ought not to be construed as alleging a different person than named in the indictment. Especially should this be the rule where the evidence previously adduced conclusively proved, as here, that E. S. Burr and Eugene S. Burr was one and the same person.

(b) The amendment changed the amount in both the certificate surrendered and that issued in lieu thereof. This was merely a correction of the description of these certificates. These were things described in the indictment, and the statute expressly authorizes correction of any error in the description of any "thing." The application to correct the description indicated that the amendment would relate to the same instrument as the indictment, and both, in fact, related to the same certificates. The corrections were permissible.

IV. Section 1884 of the Code declares that:

"No bank, banking house, \* \* \* deposit office, firm, \* \* \* or person engaged in the banking \* \* \* or deposit business, shall, when insolvent, accept or receive on deposit, with or without interest, \* \* \* United States treasury notes or currency \* \* \* or renew any certificate of deposit."

6. BANKS AND  
BANKING:  
fraudulent  
banking: "re-  
newals."

Code Section 1885 fixes the penalty. The charge is that defendant, in behalf of the copartnership, when insolvent, renewed a certificate of deposit; and it is argued that neither the indictment alleged nor the evidence proved the commission of such offense. This is on the theory that the issuance of a new certificate of deposit for the amount of a former certificate, including interest, upon the surrender of the former certificate, was not a renewal thereof, but an extension. Such is not the meaning ordinarily accorded to "renewal," when applied to such certificate or a promissory note. Anderson's Dictionary of Law defines "renewal" as the "substitution of a new right or obligation for another of the same nature," and says further that it "is not a word of art; it has no legal or technical signification." Bouvier defines it to be "A change of something old for something new." See *Sponhaur v. Malloy*, 21 Ind. App. 287 (52 N. E. 245), where a note given in taking up another was held to be a renewal; *Kollock v. Scribner*, 98 Wis. 104 (73 N. W. 776), where, in discussing what was required in the renewal of a lease, the court, speaking through Marshall, J., says:

"There is much respectable authority to the effect that the words 'renew' and 'extend' should be construed in accordance with their ordinary meaning. Obviously, one means to prolong, or to lengthen out; the other, to make over, to re-establish, or to rebuild; and those courts and writers that have construed them accordingly certainly have the best of the argument, if the judicial construction is to follow the true definitions of the words. We apprehend

that no one would seriously contend that an agreement to renew a note would be satisfied otherwise than by making a new note in place of the old one. It would seem that the construction adhered to in some jurisdictions, that to renew is equivalent to extend, violates the rules of language to reach a judicial construction out of harmony with the universally accepted meaning of the words, as defined by lexicographers. That was discussed in *Orton v. Noonan*, 27 Wis. 272, where the renewal covenant used the words 'extend the lease.' A careful reading of the two opinions filed in that case, one by Dixon, C. J., and one by Mr. Justice Cole, leaves no room for controversy but that, while they differed as to the meaning of the term 'to extend,' as applied to the lease then under consideration, they both held that an agreement to renew a lease called for a new one. Said the chief justice: "The verb 'to extend' implies far less than the verb 'to renew.' The one means to draw forth, to stretch, to prolong, to protract, to continue; the other, to make over, to make anew, to give new life to, to restore, re-create or rebuild.'"

See also *Gault v. McGrath*, 32 Pa. (8 Casey) 392, 397; *Carter v. Brooklyn Life Ins. Co.*, 110 N. Y. 15 (17 N. E. 396); *Kedey v. Petty*, 153 Ind. 179 (54 N. E. 798). We entertain no doubt that, in issuing the last certificate of deposit, defendant did *renew* the first certificate, in violation of the statute quoted.

V. The firm went into involuntary bankruptcy, shortly after the transaction in question, and, as required by law, filed schedules of its assets and liabilities. From these it appeared that the former were considerably in excess of the latter. Thereupon, the State called the

7. EVIDENCE:  
opinion evi-  
dence: im-  
peaching evi-  
dence.

trustee in bankruptcy, and, over objection, elicited from him what the market value of a large amount of the assets was, showing

that the value of the whole was much less than the total

amount of the liabilities. Counsel for appellant argue that this testimony tended to impeach the schedules, and that the State might not impeach evidence introduced by it. But the evidence was not impeaching. The schedules were introduced as tending to prove the assets owned by the co-partnership and the amount of its indebtedness, as bearing on its financial condition and defendant's knowledge thereof. Though values of the assets were estimated therein, these are mere matters of opinion; and that other witnesses might estimate differently does not render their testimony impeaching in character. Otherwise, a party, in proving value, might be precluded from proving a value different from that estimated by the first witness called. The objection was rightly overruled.

8. BANKS AND  
BANKING:  
fraudulent  
banking: in-  
dividual in-  
solvency of  
members of  
partnership.

VI. The evidence was such that the firm, as such, might have been found insolvent; but appellant says, in argument, that the individual members of the firm were not so shown, and that this was essential. Nei-

ther of these matters is involved in any of the errors assigned and said by appellant to be those relied on, nor is it covered by the brief points. Doubtless this accounts for no attention's being given to the subject by the State in its brief, for the rules exact that no point or proposition not found in the brief points shall be considered. Moreover,

9. APPEAL AND  
ERROR: reser-  
vation of  
grounds: in-  
sufficiency.

what is said is under the heading assailing the indictment, and seems to be in criticism of the failure of the amendment to allege who were members of the firm. Moreover,

the point was not raised in the district court, save in the general assertion of the insufficiency of the evidence to sustain the verdict, and, not having been presented here as exacted, ordinarily would not be considered. That the point is not well taken probably accounts for its not being raised by appellant. Section 1884 of the Code, heretofore quoted,

prohibits a firm, when insolvent, from renewing a certificate of deposit, and thereby inferentially asserting its solvency. The next section declares that "any owner, officer, director, cashier, manager, member or person \* \* \* who shall knowingly \* \* \* renew any certificate of deposit, as aforesaid, shall be guilty of a felony." Section 1885, Code.

The evidence warranted a finding that the accused was a member of the banking firm, and that he issued the renewal certificate with knowledge that the copartnership was

insolvent. To prove the firm insolvent, it was not necessary to show that its entire property was insufficient to meet its obligations, but that the said firm, in the operation of its bank, was not in a condition financially to pay its debts as these matured, in the usual and ordinary course of business. *State v. Cadwell*, 79 Iowa 432; *State v. Boomer*, 103 Iowa 106; *Toovey v. Ayrhart*, 136 Iowa 694.

In *Ellis v. State*, 138 Wis. 513 (119 N. W. 1110, 20 L. R. A. [N. S.] 444), the above definition, as found in *State v. Cadwell*, supra, is criticised, and a bank is said to be insolvent "when the fair cash value of its assets, realizable within a reasonable time, in case of liquidation by the proprietors, as ordinarily prudent persons would ordinarily close up their business, is not equivalent to its liabilities, exclusive of stock liabilities." The reasoning of the opinion seems to treat the banker as merely a debtor of the depositor, overlooking the implied representation to depositors, upon receiving deposits, that these may be withdrawn at any time, and the deceit involved in receiving money under these circumstances, with knowledge that it will be impossible to pay back the same in the ordinary course of business. Such an act is a palpable fraud, and the design of the statute is to punish anyone participating in the perpetration thereof. This view seems to have been entertained in *State v. Myers*, 54 Kan. 206. See also *State v. Darrah*, 152

Mo. 522 (54 S. W. 226) ; and *State v. Stevens*, 16 S. D. 309 (92 N. W. 420). In *State v. Clements*, 82 Minn. 434 (85 N. W. 229), cited in *Ellis v. State*, supra, both definitions of insolvency seem to have been included in an instruction, and it was approved without saying which was correct, on the theory that no prejudice could have resulted. We are not inclined to regard the reasoning of *Ellis v. State*, supra, with reference to the character of the offense, as persuasive. The rule of the Wisconsin court is that a deposit of money merely creates the relation of debtor and creditor. *Klauber v. Biggerstaff*, 47 Wis. 551 (3 N. W. 357). If making a deposit merely creates an indebtedness, it could not well be said that a different rule should be applied to the banker who becomes insolvent than to one engaged in any other occupation. The transaction of depositing money, is held, in this state, to differ essentially from a mere loan. A loan is for the benefit of the borrower, while a deposit is for the benefit of the depositor. The depositary may obtain an incidental advantage, but that is seldom the original object contemplated. In a loan, the borrower ordinarily promises to return the money at a future time; in a deposit, whenever the money is demanded. Although the technical relation of creditor and debtor arises from the making of deposits of money, people who daily leave money with the banks for safe-keeping, and exact the return of an equivalent amount, seldom, if ever, think of the transaction as a loan, or speak of it as such. In other words, the relation between banker and depositor partakes largely of confidence and trust. *Hunt v. Hopley*, 120 Iowa 695. See also *State v. McFetridge*, 84 Wis. 473 (20 L. R. A. 223) ; *Elliott v. Capital City State Bank*, 128 Iowa 275. If the debt of a bank, created by deposit, were that only, there would be ground for saying that the banker commits no greater wrong than other debtors in failing to repay, and the offense is no more than that of known inadequacy of the assets, on final distribution, to



pay the depositors in full, as seems to be the thought of *Ellis v. State*. But, as the deposit is received primarily for the benefit of the depositor, and this for safe-keeping, and with the understanding that the same or any part thereof will be repaid on demand, in the ordinary course of business, or will be paid as checked out or withdrawn at short intervals, as needed to meet the current demands of business, or individual or family expenses, the banker, if he is aware, in so receiving money, that he will be unable to repay the same, as demanded or checked out in the ordinary course of business, is not only practicing a deception in taking the money, but is embarrassing the depositor, often seriously, in his own affairs, by thus fraudulently appropriating his ready means and compelling him to await, therefore, final liquidation of the bank's assets. The statute is so construed in *State v. Cadwell*, supra, as to punish the wrong thus perpetrated, and we are inclined to adhere to that decision as sound in law, as well as in public policy. The conclusion necessarily follows, then, that whether the individual members of the firm were or were not insolvent would have no bearing upon the issue of whether the firm, as such, was financially able to pay its debts as they matured, in the ordinary course of business. A partnership, under our statute, is a legal entity, known to and recognized by law. It may sue and be sued, and it must have a residence. *Fitzgerald v. Grimmell*, 64 Iowa 261; *Ruthven v. Beckwith & De Groat*, 84 Iowa 715; *Argus v. Ware & Leland*, 155 Iowa 583.

And such residence may be other than that of either partner. A judgment against a partnership, as such, is not a judgment against an individual member thereof. *Ander-son v. Wilson*, 142 Iowa 158. Nor is it a lien on his property. *Weaver v. Carpenter*, 42 Iowa 343. At page 422 of 30 Cyc., the law is thus stated:

"While it has been stated broadly that a partnership

is but a relation, and is not a legal being, distinct from the members who compose it, still the law does take note, on a wide scale, of partnership as a legal entity, and regards it as a unit of rights and obligations, and there is a general tendency at this day to complete the recognition of a partnership as a body of itself, with its own means appointed to its own debts."

The authorities cited sustain the text. The statute itself, Section 1884, Code, plainly segregates the partnership as a unit, as distinguished from individuals. If a legal entity, such as may sue and be sued, have a residence, and own property, to the exclusion of creditors of the members composing the firm until its own obligations are met, manifestly it may be insolvent, irrespective of whether its members are solvent or not. This rule prevailed in *Ransom v. Wardlaw & Co.*, 99 Ga. 540 (27 S. E. 158), where a partner tendered evidence that he was solvent and amply able to pay his own debts and those of the partnership against which there was a creditor's petition, alleging its insolvency; and the rejection of such evidence by the trial court was approved, and the court, after noticing the insistence "that a firm is not insolvent as long as either of its members is solvent, and that no creditor's petition will lie unless the firm is insolvent by reason of the insolvency of its members," ruled that "the court did not err in refusing to admit such evidence. Although the partners, as individuals, may be perfectly solvent, the firm as such, may be insolvent." *Drucker & Bro. v. Wellhouse & Sons*, 82 Ga. 135 (2 L. R. A. 328), was followed. A like holding will be found in *Menagh v. Whitwell*, 52 N. Y. 146 (11 Am. R. 683).

To establish the insolvency of Kiefer Brothers Banking Company, then, it was not necessary to prove the insolvency of its individual members. We are not saying that evidence of the financial condition of the several partners individually, and of the information of the accused with

respect thereto, might not have been shown, as bearing on the issue of whether any of those enumerated in Section 1885 of the Code knowingly received a deposit, or knowingly renewed a certificate of deposit, when the firm was insolvent. No evidence of this kind was adduced or tendered at the trial, and what we do hold is that the circumstance that the firm was insolvent, and that defendant, with this knowledge, renewed the certificate of deposit, warranted his conviction, even though no affirmative proof of the financial condition of the individual members of the firm was adduced by either party. The judgment is—*Affirmed*.

GAYNOR, C. J., EVANS, PRESTON, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). I. The statute, Paragraphs 7 and 8 of Section 5289, Code Supplement, 1913, permits amendment "as to matters of form \* \* \* in the name of any person or in the description of any person or thing, or in the allegations concerning the ownership \* \* \*". But it still prohibits charging "a different crime or different degree of crime." Without this statute permission, no change could be made. It follows none but such as are expressly permitted can be made. The amendment here changes the allegation of the original that Adam Kiefer, W. H. Kiefer, and John Kiefer committed the crime charged, to one that Adam Kiefer alone did. The statute does not authorize such changes. It is no answer that such change was not authorized by statute nor by the court, and is, therefore, surplusage. This reasoning would make it immaterial that the act was unauthorized. Indeed, under it, the more the change lacked authority, the less effective would complaint of the change be. As to lack of permission by the court, it suffices to say that the State was permitted to try defendant on the changed indictment.

II. The statute intends to punish, and the indictment charges, fraudulent banking. It is proved that whatever

was done was by a partnership composed of named individuals. There is evidence which tends to show the partnership received this deposit when it was insolvent. There is no evidence that either of the members were or are insolvent. It is presumed they were and are solvent. I am of opinion that, therefore, Adam Kiefer, one partner, may not rightfully be convicted. The failure to show the insolvency of the partners makes the same situation as if it were proved that they were solvent. If that be so, how was the depositor defrauded, even if the artificial entity, the partnership, was insolvent? The partners are liable for the deposit. If the liability differ at all, it is that possibly the partners cannot be made to pay unless the partnership fails to. I doubt whether this much is so, and think the partners and the partnership could have been sued jointly, or the partners sued and collected from first. Code Section 3468 provides that actions may be brought by and against a partnership as such, or against it and all or any of the members thereof, and a judgment against the firm as such may be enforced against the partnership property or that of such members as have appeared or been served with notice. A new action may be brought against the members not made parties, on the original cause of action. We held in *Hamsmith v. Espy*, 13 Iowa 439, that, where a judgment on a partnership debt is recovered against individual members of a firm, the sale of individual property thereunder will not be invalid, although an individual creditor might, by proceedings in equity, in a proper case, compel a resort to partnership property. According to *Schoonover v. Osborne*, 108 Iowa 453, at 454, one partner who buys out the other is thereafter to be dealt with as having all the rights and obligations of the partnership.

It is no answer that the statute contemplates prompt payment of the depositor, and that recourse to solvent partners might mean delay. A solvent partnership might delay

payment by neglect, arbitrary refusal to pay, or by captious litigation. But thus to delay would not constitute the crime here charged. To me it seems inconceivable that one partner can be guilty of violating the statute involved, when reimbursement of the deposit can surely be obtained. The argument that, on receipt of a deposit, there is an implied representation that it will be repaid on demand, does not impress me. One who gives a demand note for money received makes like representation. It would hardly be claimed that, on a charge that said note was accepted on a representation that the payor partnership was able to pay it, a conviction might be had, without evidence that the partners were unable to pay. I think the majority overlooks that a fraudulent intent is essential, and that, though the receiver does not draw nice distinctions between insolvency and bank insolvency, he would have no fraudulent intent if he believed, and it was the fact, that the depositor could not lose. Since this was written, the majority has made a change, in effect that evidence tending to show that the partners were solvent might be received, if offered in defense. This impels me to add: First, that this is inconsistent with what remains,—i. e., that such evidence is irrelevant and immaterial; and second, and as said already, there was such proffered here. For it is an inference of fact that the partners were solvent. This is the equal of testimony that they are solvent.

III. While it is not done scientifically, the point is raised. It is assigned to be error to overrule defendant's motion for a directed verdict, his motion for a new trial, and his motion in arrest of judgment. The motion to direct verdict asserts there is insufficient competent evidence to warrant conviction; that the record as a whole is insufficient to base conviction; and that, if verdict of guilty be rendered, the court would be compelled to set same aside, as without support in the competent evidence. The motion

for a new trial claims the competent evidence offered was insufficient to convict defendant of any crime. The motion in arrest declares the defendant is charged with a crime unknown to the laws of the state, and that, upon the whole record, no legal judgment can be pronounced. The argument squarely makes the point that the partners also must be proven to be bankrupts.

For the reasons stated, it is my opinion that the judgment of conviction should be set aside, and the case remanded for a new trial.

I am authorized to say that Mr. Justice Weaver joins in this dissent.

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STATE OF IOWA, Appellee, v. EDWARD LAWSON, Appellant.

**WITNESSES: Cross-Examination—Corrupt Conduct.** A witness may, on cross-examination, be impeached by a showing that he has been guilty of corrupt conduct,—for instance, attempted subornation of perjury,—in connection with the litigation on trial.

*Appeal from Polk District Court.*—CHAS. HUTCHINSON,  
Judge.

APRIL 2, 1918.

THIS is a prosecution for adultery, the prosecuting witness being the injured husband. There was a verdict of guilty, and the defendant appeals.—*Reversed and remanded.*

*J. D. Laws*, for appellant.

*H. M. Havner*, Attorney General, *F. C. Davidson*, Assistant Attorney General, and *Ward C. Henry*, County Attorney, for appellee.

EVANS, J.—I. The defendant is an unmarried man. The indictment charged him with adultery committed with

Susan Ruby, the wife of Jacob Ruby. His plea was "not guilty." The principal witness for the State was Susan Ruby. It is earnestly contended that there was no corroboration, and that, therefore, the verdict is without support in the evidence. The circumstances which surrounded the parties, as they appear in evidence, furnish sufficient corroboration to satisfy the requirements of the statute. That being so, we cannot hold that the verdict is without support in the evidence.

II. The State examined the prosecuting witness, Jacob Ruby. On cross-examination, the following occurred:

"Q. I will put this question: 'Did you not state to John Monday, in the middle of October last, at his house in Highland Park, in this city, that you would give \$50 if he would swear that he caught your wife, Susan Ruby, and Edward Lawson at what is known as the old Nigger House up there in Highland Park?' (Objected to as not cross-examination. Sustained and excepted to. State further objects to this line of questioning. 'Counsel knows it is absolutely improper.') Court: Yes, Mr. Laws, we do not want any more along that line. If you have evidence to that effect, you have a right to show it when your turn comes, and they can deny it when they want to by this man. But you have no right to bring it in now, Mr. Laws. Mr. Laws: The object, if the court please— The Court: I do not care for any reason. If you have any further questions, ask them. Mr. Laws: It is on the ground of impeachment. Court: That is not ground for impeachment. He has not made any statement along that line. You cannot impeach a man for something he has not said. Mr. Laws: It is to lay the foundation and prove he did say it, when the time comes, is the object. Court: You cannot lay it on cross-examination."

The foregoing is the basis of one of the errors relied on for reversal. It is urged that the court erred in refusing

to allow the proposed cross-examination, it being intended thereby to impeach the witness, by showing an attempt by him to suborn a witness. The ruling of the court appears to have been made under an impression that the witness could be impeached only by a showing of inconsistent statements on his part. This was an erroneous impression. It was proper cross-examination of the witness to show corrupt conduct on his part pertaining to the prosecution, and this would include an attempt to suborn a witness. It goes without saying that such a showing would affect the credibility of the witness, and in that sense tend to impeach him. In the light of the whole record, the exclusion of this cross-examination does not appear to us non-prejudicial. The judgment of conviction must, therefore, be reversed, and it is so ordered.—*Reversed and remanded.*

PRESTON, C. J., LADD, GAYNOR, SALINGER, and STEVENS, JJ., concur.

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MARY C. WATT et al., Appellees, v. GERMAN SAVINGS BANK et al., Appellants.

**NOVATION: Substitution of New Debtor—Surrender of Old Notes,**

- 1 Etc. The act of a creditor in surrendering the notes of his debtor for a pre-existing indebtedness, and accepting the notes of a third party in lieu thereof, and placing said latter notes in judgment, and collecting thereon, as far as possible, works an irrevocable novation of the debt against said original debtor.

**PRINCIPLE APPLIED:** A savings bank, under mortgage foreclosure, became the owner of a brick plant. Immediately thereafter, Watt, who was a director of the bank, and its cashier, with four associates not connected with the bank, organized, for the purpose of carrying on said brick business, an Iowa corporation, with 250 shares of \$100 each. Each organizer received 50 shares, but paid nothing therefor. The bank immediately conveyed the brick plant to the Iowa company, and the latter gave the bank its two notes: one for \$7,000, secured by first mortgage on the plant, and one for some \$500, unsecured. This



\$7,500 represented the amount the bank had, to date, loaned on account of said brick concern.

The new Iowa company commenced to borrow of the bank. In four years, this new borrowing totaled \$13,000, and the bank took a second mortgage therefor, on the plant. Watt was still cashier of the bank. Six years after the Iowa company was organized, its indebtedness to the bank totaled \$40,000. At this time, Watt was president of the Iowa company, and also president of the bank. At a meeting of the stockholders of the Iowa company, Watt, its president, proposed that, if the stockholders would absolutely assign all their stock to him, he would do three things, to wit:

1. *Personally pay all the debts of the Iowa company.*
2. Reorganize said Iowa company and increase its capital stock to \$50,000.
3. Deliver ten shares of the reorganized company to each of the six old stockholders of the Iowa company, he (Watt) to own absolutely the remaining 440 shares.

The stockholders accepted Watt's proposition, and assigned their stock to Watt. Watt did not reorganize the Iowa company. Evidently he discovered that to add \$25,000 of capital stock would necessitate, under Iowa law, the actual paying in of \$25,000 cash or its equivalent. To avoid this, Watt organized an Arizona corporation, with \$50,000 capital stock, and with a name identical with that of the Iowa corporation. Watt was president of this corporation. This stock was distributed by Watt as he had agreed, though, for reasons not appearing, he divided his 440 shares (plus 10 shares voluntarily waived by one of the old stockholders) among himself and four other persons. Watt and his associate stockholders caused the Iowa company to convey all its property to the Arizona company, *subject to the debts of the Iowa company*. This conveyance constituted the only "payment" by the stockholders for their stock.

Watt did not *individually* pay the debts of the Iowa company. What was done was this, viz.: The Arizona company executed its notes to the savings bank for some \$22,000, for a like amount of the notes of the old, denuded Iowa company to the bank, *and said old notes of the Iowa company were then surrendered by the bank*. The Arizona company later renewed some of its said notes to the bank, and still later, and while Watt was still president of the bank, the bank placed them in judgment. After Watt died (he being president of the bank until his death), the bank sold the Arizona plant under these judgments, and realized \$4,500. All meetings of the directors and stockholders of

both the Iowa and Arizona corporations were at all times held at and in the directors' rooms of the bank.

After the bank received the notes of the Arizona company in lieu of the notes of the Iowa company, it never made any claim, either in the reports of its examining committees or in its official reports to the state or in any other manner, that Watt, its president, was owing the bank on his said promise to pay the debts of the Iowa company, until after the death of Watt, when it filed against his estate a claim of some \$23,000, based upon old notes of the Iowa company accruing prior to the time Watt made his agreement to pay said debts.

*Held*, the act of the bank (1) in accepting the notes of the Arizona company in lieu of the notes of the Iowa company, (2) in surrendering the notes of the Iowa company, and (3) in placing the same in judgment and selling the plant of the Arizona company thereunder, worked a complete novation,—irrevocably cancelled the debt of the Iowa company to the bank on said notes so surrendered.

**CONTRACTS: Validity—Non-Literal Performance—Effect.** One

2 who performs his contract undertaking in a manner acceptable to those to whom performance is due, may not later assail the validity of his undertaking, on the ground that he, himself, did not literally perform his said undertaking as he had agreed.

**CONTRACTS: Performance—Substantial Performance.** *Substantial*

3 performance of a contract is, ordinarily, all that is required.

**PRINCIPLE APPLIED:** See No. 1. *Held*, the act of Watt, in organizing a new and foreign corporation, with the increased capital stock, and his action with reference thereto, were a substantial performance of his agreement to reorganize the Iowa corporation and to increase the capital stock thereof, etc.

**CONTRACTS: Construction—Subject-Matter—Scope and Extent of**

4 **Obligation.** An enforceable agreement to pay the debts of a financially embarrassed corporation does not embrace the *personal* notes of the officers of said corporation given for money borrowed by said officers for the sole use and benefit of the corporation.

**GUARANTY: Discharge of Guarantors—Guaranty of Debt—Nova-**

5 **tion of Debt—Effect.** Liability upon the guaranty of a debt ceases upon the subsequent novation of the guaranteed debt.

**PRINCIPLE APPLIED:** A bank was a heavy holder of the obligations of a financially embarrassed corporation. Certain parties were induced to give the bank their personal guaranty of the payment, to a stated amount, of the obligations of the

corporation. A few days later, a new corporation was organized, which took over all the property of the old and embarrassed corporation, and which new corporation executed to the bank its notes for and in lieu of the debts of the old corporation, *which notes* the bank accepted, and surrendered the obligations held by it against the old corporation. *Held*, the conduct of the bank worked a novation of the guaranteed debt, and released the guarantors.

**CONTRACTS: Consideration—Guaranty in Consideration of Indefinite Extension of Debt.** A guaranty of a debt, in consideration of *such extension of time as the holder of the debt might elect to give the debtor*, is not supported by a sufficient consideration, even though the said holder did forbear collection for a time.

**CORPORATIONS: Corporate Debts—Liability on Unpaid Stock.** Extending credit to a corporation, *with knowledge that the corporate stock has been issued without payment therefor*, precludes the one so extending credit from pursuing the stockholders on their unpaid stock subscriptions.

**CORPORATIONS: Stock—Issuance—Consideration.** If consideration for an issuance of corporate stock would exist if the stock were issued to one person, such consideration equally exists for its issuance to another, to whom the first party caused the corporation to issue it.

**BANKS AND BANKING: Imputing Knowledge of Director to Bank.** It may not be *presumed*, that a bank director conveyed to his bank knowledge acquired by him

(a) In professional confidence as attorney for a client other than the bank, or

(b) In transacting, as director of another corporation, business in conflict with that of the bank.

**PRINCIPLE APPLIED:** A bank was a large creditor of an embarrassed corporation. Several directors of the bank were directors of the corporation. The stockholders and directors of the corporation conceived the plan of organizing a *new* corporation, to take over and merge the old corporation, and the plan of having the new corporation issue its stock to them for no consideration other than the receipt by the new corporation of the assets of the old corporation. The plan was carried out. The attorney who drew the necessary papers to effectuate the plan was a director of the bank. The new corporation became insolvent, and the bank lost heavily. The bank then sought to hold the stockholders of the new corporation, on the plea that

they never paid for their stock. On the issue whether the bank extended credit to the new corporation *with knowledge that the stockholders had not paid for their stock*, held that such knowledge might not be imputed to the bank (a) from the knowledge of said attorney, nor (b) from the knowledge of those who were directors both of the bank and of the said corporation.

**BANKS AND BANKING: Knowledge of Director Knowledge of**  
10 **Bank.** Principle recognized that a bank is held to know and remember what its directors learn while acting as such.

**FRAUDS, STATUTE OF: Debt of Another—Oral Promise.** An  
11 *oral promise to pay a written obligation which is, in form, the sole obligation of another*, is not within the statute of frauds, when it is made to appear that said obligation is, in fact, the personal obligation of the oral promisor, and for his sole benefit.

**BANKS AND BANKING: Officers—Misapplication of Funds.** The  
12 president of a banking partnership who, *to further his own personal interests*, causes loans to be made by the bank to a known insolvent concern, is liable to the partnership for the resulting loss.

**BANKS AND BANKING: Officers—Liability.** A bank president  
13 who, at a time when his bank had no money with which to make a loan, caused his bank to issue, without consideration, its certificate of deposit to another bank, which thereupon actually furnished the money for the loan, may not defend an action against him by the bank for recoupment of the loss, on the ground that his bank *has not yet paid said certificate*.

**EVIDENCE: Conclusions—Understanding of Witness.** The "under-  
14 standing" of witnesses that a savings bank was the owner of and carrying on a business prohibited to such bank is an inadmissible conclusion.

**EVIDENCE: Declarations of One Having Conflicting Interests.** Dec-  
15 larations of the deceased officers of a savings bank that the bank was owner of and carrying on a business prohibited by law to the bank are inadmissible, when such declarations are distinctly hostile to the interests of the bank.

**BILLS AND NOTES: Execution and Delivery—Failure to Read—**  
16 **Effect.** One who can read, and has an opportunity to read, and does not read, may not assert lack of knowledge of the contents of a note signed by him.

**BANKS AND BANKING: Directors—Scope of Authority.** Individual directors of state and savings banks, *unless specially authorized by the board of directors*, have no power to bind their bank to the discharge of obligations not connected (a) with the management of the bank's ordinary business, or (b) with the receipt and payment of deposits; and this is especially true when the director has interests adverse to those of the bank.

*Appeal from Polk District Court.*—W. H. McHENRY, Judge.

DECEMBER 21, 1917.

REHEARING DENIED APRIL 2, 1918.

THE facts are stated in the opinion. All parties appeal.—*Affirmed.*

*Parker, Parrish & Miller, Halloran & Starkey, O. M. Brockett, and C. L. Nourse, for appellants.*

*Sullivan & Sullivan, D. M. Kelleher, J. G. Myerly, Parsons & Mills, A. A. McGarry, and Carr, Carr & Evans, for appellees.*

LADD, J.—Many cases pending in the district court were consolidated for the purposes of trial. As the pleadings cover 164 pages of the otherwise voluminous abstracts, the issues will be better understood if separately

1. **NOVATION:** substitution of new debtor: surrender of old notes, etc.

ly stated in disposing of specific claims. A brief history of the enterprises involved seems essential by way of introduction. The German Savings Bank was organized as such, with a capital of \$50,000, in 1892. A partnership known as Newman Bros., or Newman Brick Company, became indebted to the bank, and, on October 3, 1896, executed a mortgage covering its brick plant, including brick on hand and any additions thereto, to E. C. Kelly, as trustee for the bank, to secure the payment of \$5,432.51 then owing said bank. A receiver was appointed for the bank in January, 1897, but it

was reorganized in June following. A perusal of the opinion in *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737, in connection with the record in this case, discloses the fact that the officers of this bank could not be made to understand Section 1869 of the Code. James Watt succeeded J. W. Geneser as cashier, March 27, 1899, and was elected a director in June of the same year. He continued as cashier until elected president of the bank, in November, 1906, and held this office until his departure from this life, in April, 1911. He had been a retail and wholesale grocer, prior to his connection with the bank, and had never been engaged in or connected in any manner with the manufacture of brick or other building material. The business of the bank was prosperous under his management, its capital stock doubling, deposits steadily increasing from about \$100,000 to over \$1,000,000, with remunerative dividends; and, upon its consolidation with the Des Moines National Bank, in December, 1914, the value of its stock was computed at \$125 per share, with the prospect of a dividend on bills receivable retained by it. This much is said in explanation of loans made in the promotion of the brick plant, which it seemed impossible for it to let go of, and on which over \$40,000 were lost. The mortgage to Kelly, as trustee, was assigned to the bank, by it foreclosed, and the brick plant sold under special execution, the bank acquiring title under sheriff's deed in April, 1902. On May 24th following, a corporation known as the Granite Brick Company was organized under the laws of this state, with capital stock of \$25,000, divided into 250 shares. Of these, 50 shares were issued to each of the organizers, who became the directors of the company, to wit: A. Newman, C. Newman, B. M. Newman, John Keefner, and James Watt. A. Newman became president of the company, Keefner, secretary, and Watt, treasurer. The latter only was connected with the bank. Nothing was paid for these shares. The bank conveyed the real estate and machin-

ery of the brick plant by deed, and the personal property by bill of sale, to the new company; and the latter, in consideration therefor, executed two notes, one for \$513.47, and another for \$7,000, to the bank, and gave a mortgage on said property to secure the payment of the last-named note. On January 19, 1906, a second mortgage was executed to the bank, securing "\$13,000, as evidenced by the several notes of the Granite Brick Company and owned by the said German Savings Bank." The first of these mortgages was promptly recorded, but the last was not filed for record until May 24, 1912. The indebtedness of the Granite Brick Company to the bank gradually increased, as it had under partnership management, and, on December 9, 1908, amounted to about \$34,000, besides the current bills owed to others, aggregating \$6,000. Difficulties appear to have been experienced in obtaining the approval of the state bank inspector of so large an amount loaned to one debtor, and, early in March, 1909, another corporation, bearing the same name, was organized under the laws of Arizona, with a capital stock of \$50,000. It was to begin business when its articles were filed, which was on the 8th of the same month. Thereafter, the Granite Brick Company, organized under the laws of Iowa, which will hereafter be referred to as the Iowa Company, transferred all its property to the company of the same name, organized under the laws of Arizona, hereafter to be designated the Arizona Company. The latter took over the property of the Iowa Company, subject to its debts. The Arizona Company was no more successful than its predecessor, and its property was sold, on foreclosure of the two mortgages mentioned, after Watt's death—the company's realty for \$1,500, and its personalty for \$534. Through redemption under another of the bank's judgments against the Arizona Company, a further credit of \$2,500 was entered for the property. The design of the German Savings Bank in these suits, consolidated, is to recoup, from others than the two

insolvent companies, the losses consequent upon credits extended to them, and to ascertain who, other than the Arizona Company, is liable for the repayment of money borrowed from the Des Moines National and the Bevington Bank.

I. On May 21, 1912, the German Savings Bank filed its claim, duly verified, against the estate of James Watt, deceased, for \$27,712.03, based on six promissory notes, said to have been executed by, or evidencing debts of, the Iowa Company to said bank, prior to December 9, 1908, and a proposition of Watt's and a resolution of acceptance by the stockholders of said company. Four of these notes were signed by the Iowa Company. Of these, one for \$3,048.97 was proven to have been paid. Another was for \$14,068, dated May 31, 1907; still another, for \$7,000, bearing the same date; and the fourth one for \$2,105.68, dated May 28, 1908. All were payable on demand. Two of the notes were signed by John Keefner, August Newman, and A. H. Newman, but not by the Iowa Company, one being for \$2,800 dated December 22, 1906, and the other, for \$2,500, dated December 22, 1907. Both are payable on demand. The alleged liability of Watt's estate is based on a proposition made by him on December 9, 1908, to the stockholders of the Iowa Company, he then being president, and the owner of 10 shares of stock, in words following:

"It appearing that the company was badly involved, and unable to dispose of its property at a price sufficient to pay all the indebtedness, Mr. Watt, president of the company, submitted the following proposition, which was adopted by a unanimous vote of all present:

"Whereas it appears from an investigation of the affairs of the Granite Brick Company that it is indebted to the German Savings Bank in the sum of \$34,000, and in addition thereto on current bills, to the amount of about \$6,000,

"Now, therefore, at this special meeting of the stock-



holders of the said Granite Brick Company, in which all the stockholders are personally present, it was resolved that there be a reorganization of said Granite Brick Company; that the capital stock thereof be increased to fifty thousand dollars; that James Watt agrees to pay off all the indebtedness of said Granite Brick Company, if each of the stockholders will transfer to him all their stock in said Granite Brick Company, and it being deemed advisable so to do, each of the stockholders do transfer to James Watt their stock in the Granite Brick Company, the same to be his absolute property. In consideration therefor, the said James Watt agrees to pay all the indebtedness of said Granite Brick Company of all kinds and character; to increase the capital stock of said Granite Brick Company to fifty thousand dollars (\$50,000.00), and deliver to each of the stockholders herein named the following shares in the reorganized company:

“To August Newman .....10 shares  
 To Miss Rose Newman and brother.....10 shares  
 To Arthur Newman.....10 shares  
 To H. B. Hawley.....10 shares  
 To Benson & Marxer .....10 shares  
 To John Keefner.....10 shares  
 To James Watt.....440 shares

“Said stock to be fully paid up when issued. James Watt further agrees, with reference to the 440 shares owned by him in the reorganized company, that he will sell any portion of said 440 shares to any of the foregoing stockholders at the actual value of said shares. The said above-named stockholders to have ten days' option whether or not they will purchase any portion of said 440 shares, on the above condition, from the ninth day of December, 1908.”

The executors of the estate, among others, interposed the defenses: (1) That the proposition and resolution were abandoned and never carried out; and (2) that the Arizona

Company executed its notes to the German Savings Bank, which accepted same in satisfaction of the Iowa Company's notes, and cancelled and surrendered the latter. The president and the secretary (Keefner) were appointed a committee to carry out this arrangement, but the secretary did not act. The president proceeded so to do, and

2. CONTRACTS :  
validity : non-  
literal per-  
formance : ef-  
fect.

neither he nor the executors of his estate is in a situation to plead the invalidity of the resolution on the ground that Mrs. Keefner, part owner of ten shares in the Iowa Compa-

ny, was not present at the stockholders' meeting, especially in view of the circumstance that neither she nor any other ever raised objection on that ground. Nor

3. CONTRACTS :  
performance :  
substantial  
perform-  
ance.

was there any substantial variance from his undertaking in organizing a new company, rather than increasing the capital stock of

that existing. The same result was accomplished, and accepted as compliance with the terms of the resolution by all those interested except the Keefners; and, having availed himself of all the advantages of the resolution, neither he nor his representatives should be permitted to assail its validity, on the ground that he did not perform his part precisely as he had promised. Substantial performance was all that was required; and, as those adversely interested are content with what he did, neither he nor his representatives may evade his further obligations, if any there are. On March 4, 1909, he, with others, organized the Arizona Company, with capital as stipulated, caused the conveyance by the Iowa Company of all its property to the Arizona Company, subject to the Iowa Company's debts, and also caused the shares of stock therein to issue as follows: August Newman, 10 shares; Rose Newman and brother, 10 shares; John and Jessie Keefner, 10 shares; Arthur Newman, 10 shares; Benson & Marxer, 10 shares; James Watt, 88 shares; J. C.

O'Donnell, 88 shares; L. J. Klemm, 88 shares; H. N. Hawley, 98 shares; J. O. Wells, 88 shares.

Each of the shareholders in the Iowa Company, except Mr. and Mrs. Keefner, received the number of shares stipulated in the resolution. Keefner concluded to have nothing further to do with the concern, and therefore did not receive the certificate of 10 shares prepared for himself and wife. The shares reserved to Watt were issued to himself and the four others last named. That which was done was a substantial compliance with Watt's undertaking, though he appears to have been compelled to organize a new company outside of the state, probably in order to avoid a recent statute exacting the full payment of all stock issued by any corporation organized for pecuniary profit within the state. The evidence, however, is conclusive in sustaining the other defense. The Arizona Company, on May 31, 1910, executed its promissory note for \$13,000, for and instead of the \$14,068 note heretofore mentioned, and this latter note was renewed on October 31, 1911. The Arizona Company executed its promissory note for \$7,000 on May 3, 1910, for and instead of the note of like amount of the Iowa Company, and renewed it on October 31, 1911. Said Arizona Company executed its note of \$2,105.68 for and instead of the note of like amount of the Iowa Company. Upon receipt thereof, the notes of the Iowa Company were surrendered, and subsequently the bank brought suit against the Arizona Company on its notes so taken, and obtained judgment thereon. That this amounted to a complete novation of the indebtedness cannot well be questioned. *Michigan Stove Co. v. A. H. Walker & Co.*, 150 Iowa 363; *Foster v. Paine*, 63 Iowa 85.

"Where the note of a third person is taken for a pre-existing debt, which is surrendered up, and the holder of the note thus taken elects to sue, and merge the note into a judgment, he will be estopped to say that he did not take

the new note in substitution for, and in extinguishment of, the old debt, especially while the judgment so taken remains, so far as appears, a valid, enforceable security. After one has taken a second or substituted note, and surrendered up the original, and has cut off all defenses to the note so taken, either by transferring it to an innocent holder, or by himself putting it into a judgment, he will be estopped from taking another judgment against the original debtor on the obligation theretofore surrendered up." *Dick v. Flanagan*, 122 Ind. 277 (23 N. E. 765).

See *Hooker v. Hubbard*, 97 Mass. 175; *Tysen v. Somerville*, 35 Fla. 219 (17 So. 567); *In re Petition of Becken*, 93 Mich. 342; 29 Cyc. 1137.

Neither in the reports of its examining committee to the state auditor nor otherwise did the bank assert any claim against Watt on these notes based on the resolution (though required to state liability of directors as borrowers and as endorsers), or otherwise. There was a complete novation of the indebtedness, and the claim, in so far as based on the four notes, was rightly denied. According to Keefner, the notes signed by him and August and A. H.

4. CONTRACTS :  
construction :  
subject-mat-  
ter : scope and  
extent of ob-  
ligation.

Newman were given for money loaned by the bank to the Iowa Company, and were carried on the books of the latter as bills payable. But this did not constitute these notes obligations of that company. It did not sign the notes. There is no evidence in the record that the bank ever looked to it for payment. They were charged off the books of the bank as of doubtful value. Though, upon satisfaction of the notes, the makers might fix liability for repayment on the company, surely the bank is not in a situation to establish a claim based solely on these notes on the mere showing that the money was loaned on the credit of the officers of this company individually, though for the use of the company. The claim was rightly rejected.

5. GUARANTY:  
discharge of  
guarantors:  
guaranty of  
debt: nova-  
tion of debt:  
effect.

II. On March 4, 1909, Watt, Hawley, Klemm, O'Donnell, and Wells each executed to the German Savings Bank a separate instrument in words following:

"This agreement made and entered into this 4th day of March, A. D. 1909, by and between Jesse O. Wells, party of the first part, of Des Moines, Iowa, and German Savings Bank, party of the second part, of Des Moines, Iowa, witnesseth:

"Whereas the party of the first part is a stockholder in a corporation known as Granite Brick Company, located and doing business in the city of Des Moines; and

"Whereas said Granite Brick Company is indebted to the German Savings Bank, party of the second part, and is desirous of obtaining an extension of time on said indebtedness;

"Now, therefore, in consideration of such extension of time as may be given to said Granite Brick Company by the German Savings Bank, and for the purpose of obtaining such extension, and in consideration of one dollar in hand paid, the party of the first part does hereby guarantee the payment to the German Savings Bank by the Granite Brick Company of the sum of \$4,000 of the said indebtedness owing by the Granite Brick Company to the German Savings Bank, with interest thereon at such rate as may be agreed upon between said brick company and said bank. This guarantee is intended as a guarantee of \$4,000, other than the like sums the payment of which is guaranteed to said bank by the other stockholders of said brick company.

"The party of the first part does further agree to waive demand, notice and protest, and does ratify and consent to any extension or extensions of time which may be given by said party of the second part to said Granite Brick Company, upon any of its indebtedness, and does further agree to endorse the notes of said Granite Brick Company and any

renewals thereof, if requested by said bank to do so, for the amount above guaranteed. Witness my hand the day and year above written."

Claim based thereon for \$4,000 was filed against the estate of Watt on May 13, 1912; and on December 12, 1913, actions were begun on like instruments against the other parties executing the same. Two of the defenses interposed are common to the five suits, to wit: That (1) this guaranty was of the indebtedness of the Iowa Company, and all of such indebtedness has been discharged by the execution of notes of the Arizona Company, or otherwise satisfied; and (2) the consideration for the execution of the guaranty was never performed. Taking up these defenses in the order stated, it is to be said that, at the time these papers are presumed to have been signed, i. e., their date, March 4, 1909, the Arizona Company had not been organized. Though it may have been contemplated, it was not indebted to anyone, nor had it begun to do business. It could not lawfully do so until its articles of incorporation were recorded in Arizona, and this did not happen until four days later, and it acquired no property until conveyed to it by the Iowa Company. Certificates of stock were not issued until the 20th of that month. That the indebtedness of the Iowa Company was contemplated finds confirmation in the testimony of Wells and Klemm. The former testified that Watt stated that the paper of the Granite Brick Company had been or might be criticised, and asked him to sign it, and said that he would have some stock issued to him as collateral security, which would be ample. Wells had not been a stockholder in the Iowa Company, and was not then advised concerning the organization of a new corporation. Surely he had no reason to suppose, then, that he was undertaking to guarantee indebtedness of a corporation to be organized thereafter, and to be by it created, but rather, one in existence, of which he knew, and an existing debt of the latter's. Klemm testi-

fied that Watt and O'Donnell requested him to sign the guaranty, and that O'Donnell said that there was "some comment on the Granite Brick Company's paper there, and they wanted to make a good showing in regard to the committee on examination." Both witnesses swore that they were told that, if they signed the paper, the bank would take care of it. Hawley was not called as a witness, and Watt and O'Donnell are dead. This evidence indicates that a temporary purpose only was to be subserved, i. e., securing the indebtedness of the Iowa Company until it might be cared for or taken over by the Arizona Company, rather than that the obligations were to secure the debts of a corporation thereafter to be organized. More-

6. CONTRACTS :  
consideration :  
guaranty in  
consideration  
of indefinite ex-  
tension of  
debt.

over, the consideration recited in the guaranty is "such extension of time as may be given to said Granite Brick Company by the German Savings Bank, and for the purpose of obtaining such extension." No extension was ever applied for or granted, for the reason, manifest in the record, that the Arizona Company discharged the obligations of the Iowa Company by executing its notes instead, or procuring money elsewhere to satisfy the same. No other consideration was shown. True, the bank forebore from enforcing collections for a while, and took the Arizona Company's notes in lieu of those of the Iowa Company; but this was not in pursuance of a promise other than may be inferred for such time as it might elect, and this would not constitute valuable consideration, as it imposed no obligation on the bank to forbear for any specified length of time. *Strong v. Sheffield*, 144 N. Y. 392; *Gates v. Hackethal*, 57 Ill. 534; 9 Cyc. 345. For these reasons, the court did not err in dismissing the claim on the guarantee against the estate of Watts, or the suits against the other signers thereof.

III. Shares in the Arizona corporation were issued to the persons signing the guaranty considered in the preceding

paragraph. These shares were not paid for, otherwise than by surrendering stock in the Iowa corporation. As part of the claim against the estate of Watt, and as a separate count in each petition filed in the actions on the guaranties, face value of the shares, alleged not to have been paid for, is sought by the German Savings Bank. The latter appears to have been a judgment creditor of the Arizona Company, which is without property, and, as is contended, 88 shares of stock each were issued to Wells, Klemm, O'Donnell, and Watt, and 98 shares to Hawley. The face value of this stock was \$100 per share. Several defenses are interposed, which may be separately considered.

(a) Each of said stockholders contends that there was a consideration, in that stock in the Arizona Company was issued in payment of the property of the Iowa corporation, and that this was in accordance with the arrangement between the stockholders, for shares were issued by the Arizona Company as per the requirement of the resolution of the stockholders of the Iowa Company, save that, of the 440 shares to be issued to Watt, 88 were issued to him, and 352 shares distributed to the other four defendants. Surely, the assumption by Watt of all the indebtedness of the Iowa Company was consideration for the issuance of the 440 shares of stock; and if these were by his consent issued to others, it is not perceived wherein there is room for complaint by the German Savings Bank. If Watt was entitled to the 440 shares, he might dispose of them as he pleased, and the circumstance that they were issued direct to his associates, instead of to him and then assigned to them, can make no difference. Moreover, the new company, according to a resolution of the stockholders, issued all its stock, as stated, in payment of the property and assets of the Iowa Company, "subject to the debts of the Iowa corporation." Sure-

7. CORPORATIONS: corporate debts: liability on unpaid stock.

8. CORPORATIONS: stock: issuance: consideration.



ly, these shares of the capital stock were not issued without consideration.

(b) In any event, the German Savings Bank is not in a situation to assert the claim for unpaid portions of the face value of this stock, if not fully paid for; for that credit was extended to the Arizona Company with knowledge that the stock was issued without other consideration than stated.

Recovery of a creditor from a stockholder for unpaid subscription for stock, or, in event of payment in property, for the undervaluation, is allowed on the theory that a fraud has been practiced on the creditor, who has the right, in dealing with the corporation, to assume that its stock is fully paid; and, of course, there can be no recovery where the creditor deals with full knowledge that payment therefor has not been made. *State Trust Co. v. Turner*, 111 Iowa 664.

As early as October 30, 1908, the directors of the bank were informed in a report made by Watt to them that a change would be made in the management of the Granite Brick Company, and that its prospects were very bright. A director of the bank, Jerry B. Sullivan, prepared the resolution heretofore set out, in pursuance of which the Arizona Company was organized, and which recited that shares of stock were to be issued without other consideration than therein recited. It does not appear that he was acting as attorney for the Iowa Company in preparing the resolution. Certainly, he did not represent the bank in connection with what he did; and, for this reason, the latter is not presumed to have been informed by him of what he ascertained in that transaction. What he learned was not acquired in the course of his employment, or in the performance of some duty owed to the bank, as agent or director, and therefore he was under no obligation to communicate to it anything he ascertained. *Hum-*

9. BANKS AND  
BANKING:  
imputing  
knowledge of  
director to  
bank.

*mel v. Bank of Monroe*, 75 Iowa 689; *Caffee v. Berkley*, 141 Iowa 344; *Anderson v. Kinley*, 90 Iowa 554; *Findley v. Cowles*, 93 Iowa 389; *Goodbar, White & Co. v. Daniel*, 88 Ala. 583 (16 Am. St. 76). The general rule is that the principal is bound by the knowledge of the agent, and that rule is based on the duty of the agent to communicate to the principal his knowledge with reference to the subject of the negotiation, and the presumption that he has performed that duty.

There are exceptions to this rule, however, as where to disclose information to a principal would violate professional confidence, or be inimical to the agent's interest, or where the circumstances are such that, in all reasonable probability, the principal was not informed by the agent. Sometimes notice is constructive, as when the principal is unconnected with a previous transaction in which the information is obtained, and "where the transaction in question closely follows and is intimately connected with a prior transaction, in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, then the foregoing requisite (general rule) becomes inapplicable." 2 Pomeroy on Equity Jurisprudence (3d Ed.), Section 672.

See *Findley v. Cowles*, 93 Iowa 389; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; 2 Thompson on Corporations (2d Ed.), section 1626; *Hummel v. Bank*, supra; *Lea v. Iron Belt Merc. Co.*, 147 Ala. 421 (119 Am. St. 93); Mechem on Agency (1st Ed.), Sections 721, 770, Note 2.

Knowledge of the method pursued in the organization of the Arizona Company, then, may not have reached the bank through Sullivan, who prepared the resolution of the

directors of the Iowa Company on which the organization of the Arizona Company was based, nor, owing to conflicting interests, through the directors of the latter company, even though directors of the bank at the same time. But the headquarters of the two companies, throughout their active existence, were at the bank. All meetings of their directors were held in the directors' room of the bank. Much of their business was there transacted. The stockholders of the Iowa Company were met there when Sullivan prepared the resolution on which the incorporation of the Arizona Company was based, and when it was adopted. The incorporators met there to adopt the articles of incorporation of the Arizona Company and elect its officers; and in the same month, March 30th, what had been done was reported to the board of directors of the bank at its regular meeting, as in the minutes thereof appears the following:

"President Watt reported regarding the reorganization of the Granite Brick Company. After a thorough discussion of same, Mr. Wilcoxon congratulated the officers and directors for their part in the reorganization of the Granite Brick Company, stating that, in his opinion, the paper of the company is first class, and is as good as any paper in the bank. Mr. Wilcoxon presented and moved the adoption, and seconded by Mr. Wells, the following resolution:

"Whereas the president and cashier of this bank have been instrumental in the reorganization of the Granite Brick Company, with a view of securing its indebtedness to the German Savings Bank, by accepting from five different individuals the guaranty of each for the sum of four thousand dollars, in all amounting to twenty thousand dollars, we commend and approve their action. Unanimously adopted.'"

These circumstances leave no doubt as to the bank's knowledge. If Watt reported truthfully, as, in the absence of anything to the contrary, he must be presumed to have

done, and if the organization of the company was thoroughly discussed, as stated, it is hardly conceivable that the basis on which stock was issued could have been overlooked, especially since Sullivan, who was as well informed on this subject as Watt, was present, and, so far as any professional obligation as attorney was concerned, was entirely free to discuss the matter. Had the board of directors not been aware that the funds of the company had not been increased, probably sole emphasis would not have been placed on the guarantees, as rendering the credits of the bank sound. Nothing to the contrary appears in the record, and we find that the bank was informed, long before extending credit to the Arizona Company, of the consideration, such as it was,

for the issuance of the several blocks of its stock. The directors of a bank constitute its governing body. As such, they superintend and control all its affairs, and in the fullest sense represent the bank; and notice

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knowledge of  
director  
knowledge of  
bank.

to the board was notice to the principal, regardless of having agencies through which to transact its business. *Bank of Pittsburg v. Whitehead, Sproul & Co.*, 10 Watts (Pa.) 397 (36 Am. Dec. 186), and valuable note.

As said in *Toll Bridge Co. v. Betsworth*, 30 Conn. 380, "what the directors know regarding matters affecting its interests, the corporation knows." The bank, once informed, will not be permitted to forget, upon some change in its directorate. *Mechanics' Bank v. Setons*, 1 Pet. (U. S.) 298.

Our conclusion is that recovery for alleged unpaid subscriptions for stock was rightly denied.

IV. The Bevington Bank, a partnership, composed of Watt, O'Donnell, Klemm, T. F. Kelleher, and J. B. Sullivan, filed its claim against the estate of Watt on May 9, 1912,

based on two promissory notes: one for \$5,000, dated December 21, 1908, executed by the Granite Brick Company, payable to said bank, and endorsed by James Watt; and the

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STATUTE  
OF: debt of  
another: oral  
promise.

other for \$10,000, dated May 21, 1909, executed by the Granite Brick Company, and payable to said bank. The alleged liability of Watt on this last note is predicated: (1) On Watt's alleged promise to endorse the note; (2) on the fact that the loan was for his benefit, and he promised to pay the note as an individual undertaking; (3) on the fact that he is liable to pay same, under the arrangement of December 9, 1908, being his proposition and the resolution of acceptance of the stockholders of the Granite Brick Company; and (4) on the fact that Watt knew, at the time, that said Granite Brick Company was insolvent, and, notwithstanding this, caused the loan to be made to it for his own use and benefit, and without the knowledge or consent of other partners in the Bevington Bank. The executors, for answer, pleaded that the German Savings Bank was, in fact, owner of and operating the brick plant; that the incorporation of the companies and operation of the brick plant in their names was a mere subterfuge, to evade the statute forbidding a savings bank from engaging in any other business; and that the loans were really those of the said bank, and it only was liable thereon; and otherwise denying liability on the \$10,000 note. The parties to this partnership, known as the Bevington Bank, entered into written articles whereby the capital was to be \$3,000; Watt to act as president; Klemm, vice-president; O'Donnell as cashier; and Joseph A. Stamen, assistant cashier.

Business was begun July 1st following. The testimony in connection with the correspondence of Watt and O'Donnell with the assistant cashier in charge of the bank leaves no doubt that they exercised a minute control of all matters connected with the bank, and that the assistant cashier merely followed their directions in carrying on its business. Neither Sullivan nor Kelleher ever had any interest in either the Iowa or the Arizona Company, and did not take an ac-

tive part in the management of the Bevington Bank, and were never consulted about its loans. Indeed, the bank, located in the village of Bevington, which contained a population of about 150 people, and was situated 35 or 40 miles from Des Moines, made no loans, except these two to the Brick Company, elsewhere than in Bevington and its immediate vicinity. No account was kept with other than the German Savings Bank. On December 21, 1908, when the \$5,000 note was taken, it had on hand \$1,885.99, and with the German Savings Bank, \$2,348.82, or \$700 less than the loan made. Nevertheless, O'Donnell sent the note of \$5,000, signed by the Iowa Company and endorsed by Watt, with instructions as follows:

"In lieu of this note, please send us your draft for this amount. Carry the note in your bills receivable, and if you have not sufficient money on hand at this bank to take care of it, you send us your time certificate, as you have heretofore, and with notes endorsed, and attach to this certificate as collateral security."

A certificate for \$5,000 was issued accordingly, and the note was accepted in that amount, and credit to the Brick Company was entered by the German Savings Bank, check having been issued to it and endorsed over. On May 21, 1909, when the Arizona Company executed its note for \$10,000 to the Bevington Bank, said bank had on hand \$1,754.27, and had overdrawn its account with the German Savings Bank \$396.91, and it was already indebted to that bank, exclusive of the overdraft, in the sum of \$24,200.

The assistant cashier was in Des Moines on the 19th or 20th of May previous, and testified that Watt then said to him:

"I want to borrow \$10,000, and I want to borrow it from the Bevington Bank.' I told him I thought, if we had \$10,000 to loan, we could make better use of it by loaning the money around Bevington, to people that might become pros-

pective customers, etc., and he said, 'Well, that is all right too,' but he says, 'I want to make the loan.' And I told him then that it might—that he would not have any trouble getting the money in Des Moines at some of the other banks; but he said he didn't want to do that, and said he wanted to use the money for the Granite Brick Company. He said that, 'Of course,' he said, 'you know I own the Granite Brick Company, and of course I have with me Mr. O'Donnell, Mr. Klemm,' and he mentioned a few more people; but he said 'They are just there,' he says, 'to fill the offices.' He said, 'They don't have any particular interest in the matter, but the note will be signed by Mr. O'Donnell and Mr. Klemm for the Granite Brick Company.' And so we let the matter go; and a day or two later, Mr. O'Donnell came down with a \$10,000 note, and we gave the German Savings Bank—

"Mr. Kelleher: Was there anything in the talk had between you and Mr. Watt in reference to whether you had the money at Bevington to loan—\$10,000?

"A. Yes, I told him that we didn't have the money. 'Well, now,' he says, 'that is all right,' he says, 'we will fix that,' he says, 'all the money you loan me, the German Savings Bank will loan you back, just as much money as what you loan me.' He said the note would be made out on demand, and that he expected that, in a week or two, at the highest in about three weeks, to pay this note, as he was on a deal then to turn some property, and as soon as he had the deal closed, he would have money enough to pay this \$10,000 back. A day or two later, Mr. O'Donnell came down to Bevington with a \$10,000 note, and that is the note the reporter has identified as Exhibit 19."

He had no information other than that derived from Watt that such a note was being drawn, until O'Donnell brought the \$10,000 note, signed by the Arizona Company, and payable on demand to the Bevington Bank on May 22d. The transaction, however, had been entered on the books

of the German Savings Bank the day previous. A deposit was made to the credit of the "Pressed Brick Company" in that amount in the form of a check, and a charge of \$10,000 to the Bevington Bank was entered on its books. However, the note was accepted by the assistant cashier the following day, and the certificate of the Bevington Bank to the amount of \$10,000 issued to the German Savings Bank. If a check for that amount was issued, the record does not so indicate, but rather that the transaction was a mere matter of book-keeping. The loan would not have been made by the assistant cashier but for the circumstances recited. At that time, there was an overdraft of the Iowa Company on the German Savings Bank of \$6,150.97. This, of course, was extinguished, leaving a balance of \$3,856.53, \$1,708.38 of which was applied in satisfaction of the accrued interest on various notes of the Iowa Company to the bank. In December, 1908, Watt had directed the manager of the Iowa Company not to draw any more checks on the German Savings Bank, and shortly thereafter sent for and obtained all the books of that company; and on December 22d, the day after the \$5,000 note was given, an account was opened with the "Granite Pressed Brick Co.," with a deposit of the proceeds of that note; and on the same day, \$2,000 was checked out to pay a note of Watt's of that amount, owed to the bank, probably for money advanced for the use of the Iowa Company, and more than what remained was applied on its debts. The overdraft increased, as said, until it reached over \$6,000, when the \$10,000 note was given, all in paying debts of the Iowa Company. The record leaves little, if any, doubt that all, or substantially all, of the proceeds of these notes were made use of in discharging the indebtedness of the Iowa Company, which, as seen, Watt agreed, at the meeting of the stockholders of the Iowa Company to pay; and this may account for his speaking in the first person, and for what he undertook to do, as evidenced by his con-



versation with the vice-president of the Bevington Bank, as testified by the latter's son, John Klemm, who was in the employment of the German Savings Bank:

"I was in the German Savings Bank when the name of my father was attached to the note, Exhibit 19. That was in the afternoon of May 21, 1909. At that time, I was working down at the plant of the Granite Brick Company, and Mr. O'Donnell and my father had been down there, and we had come in that afternoon in an automobile, and had come to the bank, and Mr. Watt called my father in to sign that note. I was present. It took place at Mr. Watt's desk, in the front end of the bank. I didn't take any part in the transaction or conversation, but I heard what was said. Mr. Watt called my father up to the desk and handed him the note, Exhibit 19, which was already filled out. Mr. O'Donnell was sitting in his chair opposite where I was standing, and Mr. Watt asked my father to sign the note. He says, 'I want to get this money at the Bevington Bank;' and papa said, 'If it is to become a loan for us to make down there, I object to making it.' Mr. Watt says, 'You know I have already made arrangements, and I have told you before that I would loan the Bevington Bank as much money as they would loan to the Granite Brick Company.' Papa says, 'I object to signing that down there.' Mr. Watt wanted to know if he would sign it if he endorsed, and my father said 'Yes,' and papa then signed it, and says, 'You will endorse that note,' and he says, 'Yes,' and he says, 'I will pay it when it comes due.'"

This leaves no doubt that the loan was made on the credit of Watt, in so far as others than he and O'Donnell participated therein; and the record indicates not only that, but also that the proceeds were applied largely in discharging debts which Watt, in the resolution heretofore quoted, had undertaken to pay. Though there was no such concern as the Granite Pressed Brick Company, Watt must

have had this in mind as the name of the company to be organized. At any rate, the account was evidently opened through which to care for the obligations of the Iowa Company, precisely as the guarantees were obtained to cover its obligations, pending the organization of the Arizona Company and its assumption of the outstanding indebtedness of the Iowa Company. The fair inference from the record as recited is that he recognized his obligation to pay the note of May 21, 1909, and that it was executed on his express oral promise to endorse and pay; and he became quite as liable thereon as though he had endorsed it, as agreed. It was not a case of promising to pay the indebtedness of another, but an undertaking to accomplish a purpose of his own: i. e., obtain the \$10,000 out of which to discharge, in whole or in part, the debts of the Iowa Company. The loan was not made on the credit of that company, but that of Watt, and what he did was to subserve a purpose of his own, and the promise was not within the statute of frauds. *Tarbell v. Stevens*, 7 Iowa 163; *Johnson v. Knapp*, 36 Iowa 616; *Blake v. Robinson*, 129 Iowa 196; *McDonald v. General Construction Co.*, 152 Iowa 273. The statute of frauds does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, and plainly enough, the trial court did not err in holding that Watt was bound by his promises. What we have said is strongly confirmed by Watt's relation as partner in the Bevington Bank. In negotiating the loan for the Arizona Company, of which he was president, from this bank, of which he also was president, and obtaining from the German Savings Bank the money for it to loan to said company, the president of which he had been for many years, he knew that the company was without assets exceeding its obligations,—for it had merely taken over the Iowa Company's property, subject to its indebtedness, which the resolution of December 9, 1908, recited, exceeded what might be realized from its

assets; that the Bevington Bank was without funds to loan; and that the directors of the German Savings Bank were loath to allow more of its moneys to be turned into the brick manufacturing experiment. At the time of this resolution, the indebtedness of the Iowa Company was shown to have exceeded \$40,000, the stock on hand to have been less than \$10,000 in value, and its bills receivable little more than \$2,000; and the value of the plant was estimated by one witness not to have been \$10,000, and by another, to have had an actual value of \$50,000, though he admitted that he subsequently stated that it was not worth more than \$15,000 or \$20,000. A dividend was never declared by either company, and each seems to have exacted the expenditure of an average of \$2,000 or \$3,000 per year, to continue the enterprise as a going concern. Watt was fully

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officers : mis-  
application  
of funds.

advised of the financial condition of the Arizona Company, and that it was without any property or assets above the indebtedness of the Iowa Company subject to which it had acquired title; and, in view of these and other circumstances alluded to, and especially of the fact that the loan was made to subserve his own purposes, the conclusion that what was done amounted to a misapplication of the partnership funds is not without foundation. Fair dealing between partners exacted the exclusion by him of all arrangements which were likely to impair the capital or profits of the firm. He might not sink the interests of the firm into those of himself alone, or of a corporation in which he was interested. Whatever he may have obtained out of the partnership in disregard of his obligation to the firm, equity will lay hold of and restore, as far as may be, to the partnership. Neither by open fraud nor concealed deception, nor by any contrivance masking his actual relations to the firm, can he be permitted to hold to his own use or in the use of a company in which he was

interested, acquisitions made in disregard of his relation as partner.

"The relation of partners with each other is one of trust and confidence. Each is general agent of the firm and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustee and agents; and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself." *Mitchell v. Reed*, 61 N. Y. 123.

See *Kimberly v. Arms*, 129 U. S. 512 (32 L. Ed. 764) ; 30 Cyc. 446; *United States v. Heinze*, 218 U. S. 532 (21 Ann. Cas. 884), and note in which cases are collected.

A partner is not chargeable individually for losses attributable to mere errors of judgment, as distinguished from carelessness or bad faith. He is liable for such as result from any breach of his duty under the partnership articles, or which are not within the scope of the partnership business and which result from a willful disregard of duty on his part. *Exchange Bank of Leon v. Gardner*, 104 Iowa 176; *Charlton v. Sloan*, 76 Iowa 288; *Snell v. De Land*, 136 Ill. 533 (27 N. E. 183) ; 30 Cyc. 453; *Burson v. Stone & Co.*, 135 Ga. 115 (68 S. E. 1038) ; *Currier v. Bates*, 62 Iowa 527.

The misapplication or misappropriation by Watt does not necessarily mean that he is guilty of embezzlement. See *United States v. Heinze*, 218 U. S. 532 (21 Ann. Cas. 884) ; *Walsh v. United States*, 98 C. C. A. 461 (174 Fed. 615). As remarked in *Lear v. United States*, 77 C. C. A. 527, 537:

"A reckless act, moreover, is always regarded as the equivalent of a willful one. \* \* \* The possibility of injury was apparent on the face of the transaction, notwithstanding which the interests of the institution of which he was the trusted head were put aside, and his own made paramount, in utter disregard of the outcome."

The circumstance that Watt undertook to endorse and pay the note plainly indicates that he had no intention of embezzling the partnership funds. On the other hand, it quite as plainly evidences a purpose on his part to so appropriate them as to render him personally liable therefor. What O'Donnell did in taking the note to the Bank of Bevington was merely in carrying out Watt's purpose, and can be given no other significance than that he had personal knowledge of what was being done, and interposed no objection thereto. Klemm also knew of the circumstances, and acquiesced in the transaction on condition that Watt should endorse and pay the note; but the mere assent of these parties to the appropriation of the funds of the bank by Watt would not relieve him from liability therefor.

Counsel for the executors suggest that the certificates of deposit issued by the Bevington Bank to the German Savings Bank had never been paid. This does not obviate the fact that these were valid and binding obligations of the Bevington Bank, and enforceable against that partnership, as well as the individual members thereof. Its business was so transacted as not only not to have yielded profits, but so that the original capital was entirely lost; and undoubtedly, the amount recovered from the estate of Watt will be absorbed in the liquidation of these certificates.

As the money of the German Savings Bank was made use of indirectly in making the loan, there is no want of equity involved in the restoration of its funds, unless it shall appear that the Arizona Company was one of its instrumentalities in acquiring property and conducting a business which the law prohibited. A thorough examination of the record has convinced us that such was not the case, and that both companies were independent corporations, and not mere agencies of the bank to carry on a business enterprise which it might not lawfully do, under the statutes of

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BANKING:  
officers: liability.

this state. Prior to April 26, 1902, the only interest of the bank in the brick plant was that of creditor. It had loaned to Newman Bros., or Newman Brick Company, a copartnership, something over \$7,000, payment of which was secured by a mortgage on the brick manufacturing plant. That the board of directors of the bank exacted a statement from the firm concerning its financial condition on January 6, 1900, and appointed a committee to examine its books, and even took over its plant, to protect its security, did not indicate that it had undertaken to carry on a business which it was not authorized to engage in. What the bank then did was

14. EVIDENCE:  
conclusions:  
understand-  
ing of wit-  
ness.

not inconsistent with the carrying on of its own business of loaning money and guarding the security for its repayment. Subsequently, it acquired the plant under foreclosure of this mortgage; but, in the same year (1902), conveyed it to the Iowa Company, which had been organized by those previously interested in the plant, in consideration of the execution of a mortgage back on the property to secure the payment of the indebtedness. The latter company was organized May 24, 1902, with August and Carl Newman, Keefner, Watt, and B. M. Newman, as directors and officers, the first four being president, vice-president, secretary, and treasurer, in the order named. One fifth of the capital stock was issued to each of the above-named persons. Watt only was interested in the German Savings Bank. At that time, L. J. Wells, Charles Weitz, W. M. Wilcoxon, John R. Rollins, and W. G. Harrison were directors of the bank. At a meeting of the board of directors, held June 3, 1902, Wilcoxon moved that the president (Weitz) and the cashier (Watt) be authorized to execute a deed to the Granite Brick Company, and the motion was carried. The directors of the company adopted a resolution accepting the deed and bill of sale. Of the stockholders therein, Watt only was interested in the bank. Wilcoxon, who was then a director of

the bank, and continued such until shortly before the hearing in the district court, and who, as attorney, attended to the foreclosure proceedings for the bank, and prepared the conveyances mentioned, testified, in substance, that the transfers mentioned were bona fide, and further, that he had never heard that the brick manufacturing plant belonged to the bank, or that it was operating such plant through these companies. L. H. Kurts served as director throughout the same period, but, according to his testimony, had never heard that the bank had any interest in or claim to the brick manufacturing plant, other than as creditor. August Newman, who was one of the organizers of the Iowa Company and its first president and a director throughout its existence, swore that he "didn't know that the German Savings Bank had any interest in the plant," and had never heard that the bank had any interest in it, or that the Iowa Company did not own it. Not a word is to be found in the minutes of the meetings of the board of directors of the Iowa or the Arizona Company or of the bank, inconsistent with full ownership on the part of these companies, and the bank's attitude is entirely consistent with the relation thereto of an over-indulgent creditor. On and after July 30, 1906, others of the officers of the bank than Watt acquired stock of directors of the bank, in the brick companies, nor is there any evidence of the bank's ownership of the brick plant other than the testimony of some witnesses in substance that they had so understood, and that Watt and O'Donnell had so declared. That the

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declaration of  
one having  
conflicting  
interests.

former is a mere conclusion and not admissible as evidence is manifest. Even if received without objection, such testimony is not at all persuasive. As to evidence of declarations by Watt and O'Donnell, we are of opinion that it may not be considered. Both had departed this life, and their interests in this respect were distinctly hostile to

those of the bank. This being so, in whatever they may have said, they cannot be regarded as representing the bank. *Love v. Anchor Raisin Vineyard Co.*, (Cal.) 45 Pac. 1044; *State Sav. Bank v. Montgomery*, 126 Mich. 327 (85 N. W. 879); *Wheeler v. Home Sav. & St. Bank*, 188 Ill. 34 (58 N. E. 598); 2 Thompson on Corporations (2d Ed.) 1262. Even the officers of a bank cannot be permitted to serve two masters having conflicting interests at the same time, themselves and the bank; and when speaking in their own interests, when antagonistic to those of the bank, what they may say cannot be treated as declarations binding their principal, the bank. This is for the reason, among others, that such declarations cannot be said to have been made in the course of their employment by, or in the performance of their official duties in behalf of, the bank. Those interested in the bank who became stockholders in the companies operating the brick plant may well have had in mind the protection of the bank's claims against them, and probably this was Watt's motive in participating in the organization of the Iowa Company, and possibly the Arizona Company also; but whatever the purpose, the evidence does not warrant the conclusion that the officers and directors of this bank persistently, for a period of over 10 years, violated the banking laws of this state by operating a manufacturing plant clandestinely, through the instrumentalities of apparently independent corporations.

V. On May 21, 1912, the Des Moines National Bank filed its claim against the estate of Watt, based on a promissory note of \$10,000, dated December 14, 1910, payable on demand to said bank, and executed by the Granite Brick Company, and endorsed by Watt, O'Donnell, Klemm, and Wells. Action was brought against the last three on December 26, 1913. The defense of the executors of the estate of Watt is that the indebtedness was

16. **BILLS AND NOTES:** execution and delivery: failure to read: effect.



that of the German Savings Bank, and it had consolidated with the Des Moines National Bank, the latter taking over all its assets, and, as these exceeded its liabilities, there cannot be any recovery.

Klemm and Wells each interposed the defense that the German Savings Bank really borrowed the money to reduce the indebtedness of the Granite Brick Company to it, and, to induce them to endorse the note, promised to keep them harmless, and further as alleged by the executors. The note was in renewal of one for like amount, and signed by the same parties, October 26, 1909. The defense based on the alleged ownership and operation of the brick plant by the German Savings Bank has been disposed of, but Wells and Klemm insist that the loan was procured for the benefit of said bank, and that they endorsed the note for that purpose, and that, if they are held liable thereon, judgment should be entered over against the German Savings Bank. It appears, however, that a check for the amount of the loan ran from the Des Moines National Bank to the Arizona Company, and it was turned over to the German Savings Bank by the Arizona Company, and by it entered to the credit of said company, and applied on its indebtedness. Wells testified that, at the time the first note was given, Watt said to him at the bank, in substance, that their cash was running short, and he would like to have him and some others endorse a note; and that, when Watt produced the note, he added his name to those of the other three; that, in signing, he supposed Watt was the principal; and that Watt remarked that the bank would take care of the note. That he thought Watt the maker is not persuasive; for Watt was one of the endorsers whose names he observed, and he does not claim that anything was said to deceive him, and nothing prevented him from reading the note, if he were so disposed. He is not in a situation to assert lack of knowledge as to its contents. *Bonnot Co*

*v. Newman Bros.*, 108 Iowa 158; *Mower H. C. & D. S. Co. v. Hill*, 135 Iowa 600. Klemm understood that the maker of the note was the Arizona Company, but in other respects the talk to him was the same as to Wells. Neither was told that the borrowed money would go directly to the bank, and, in view of the maker's being the Arizona Company, they might well have inferred that funds were to be obtained by the bank through payment by that company to it. Such payment was for the benefit of the borrower, and the bank thereby obtained no more than was its due. According to the evidence, Watt said to each of them that the German Savings Bank would take care of the note. Counsel for Wells concedes that the bank would not be bound by the promise, for that such a promise by the bank would be *ultra vires*. Section 1855-a, Code Supplement, 1913, provides that:

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directors:  
scope of au-  
thority.

"State and savings banks may contract indebtedness or liability for the following purposes only: for necessary expenses in managing and transacting their business, for deposits, and to pay depositors; provided, that in pursuance to an order of the board of directors previously adopted, other liabilities not in excess of amount equal to the capital stock may be incurred."

Wells and Klemm were quite as well aware as Watt that no such order had been entered by the board of directors, and that the bank might not obligate itself for the indebtedness of another, for they were directors of the bank. They were also directors of the Arizona Company, and will be assumed to have known the law, and therefore that, through the machinations of themselves, O'Donnell, and Watt, directors of the Brick Company, they might not lawfully saddle indebtedness of that company onto the bank, of which they were directors. Moreover, if Watt did, in the interest of the Arizona Company, undertake to obligate

the German Savings Bank to pay that company's debt, the bank was not bound thereby; for in so doing, he was interested adversely to the bank, and might not speak for it in a transaction wherein he was acting for himself also, and for another whom he represented, adversely interested. See *State Sav. Bank v. Montgomery*, supra; *Love v. Anchor Raisin Vineyard Co.*, (Cal.) 45 Pac. 1044.

But it is argued that, even though the undertaking be regarded as *ultra vires*, the bank will be liable for the money received. There are two sufficient answers to this: one, that the money was received from the Arizona Company, rather than the Des Moines National Bank; and the other is that to permit such relief in the interest of some of the directors of the bank would defeat the very object of the statute quoted. To prohibit incurring a debt without an order of the board of directors, and then to allow recovery of money so obtained by or in the interest of the director violating the prohibitory statute, would not only render the statute nugatory, but put a premium on want of fidelity in the relation of director to the bank. Our conclusion throughout is in accord with the findings and decree of the district court.

Cost of printing briefs will be taxed against party filing same, and one third of cost of printing abstracts taxed against executors of the Watt estate, one third thereof and the filing fee against the German Savings Bank and Des Moines National Bank, and the remaining third against the other appellants.—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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FRANK G. BOOZ et al., Appellants, v. TILGHMAN J. BOOZ et al., Appellees.

**INSURANCE:** Mutual Benefit—Bastard as Heir and Beneficiary.

1 Written recognition of the paternity of an illegitimate child

constitutes the child an *heir* of the one so recognizing, and consequently renders the child a proper beneficiary in a fraternal certificate of insurance on the life of the father, within the meaning of Sec. 1824, Code, 1897. (See also Sec. 1789, Code, 1897.)

**INSURANCE: Mutual Benefit—Construction—What Law Governs.**

- 2 A mutual benefit certificate of insurance issued by an Iowa corporation, with proviso for performance in Iowa, is an Iowa contract, and must be construed and applied in accordance with the laws of Iowa.

*Appeal from Linn District Court.*—JOHN T. MOFFIT, Judge.

APRIL 4, 1918.

SUIT in equity to set aside an alleged change of beneficiary in a fraternal benefit insurance certificate, and to declare the original beneficiaries entitled to the proceeds of the policy. Judgment for defendant. Plaintiff appeals.—*Affirmed.*

*Rickel, Dennis & Thompson*, for appellants.

*H. R. Trewin, J. M. Grimm, J. H. Trewin, and C. E. Richmann*, for appellees.

STEVENS, J.—Thomas S. Booz, a resident of Pennsylvania, died in that state on the 15th day of October, 1915. At the time of his death, he was a member of the Order of Railway Conductors of America, an organization formed and existing under the laws of the state of Iowa, with its principal place of business at Cedar Rapids, and held a certificate of membership therein for the sum of \$2,000. This certificate was issued on or about the 18th day of November, 1904, naming Frank G. and Ethel M. Booz, appellants herein, as beneficiaries. On the 3d day of June, 1913, the insured, in writing, requested that the beneficiary be changed to Tilghman J. Booz, and this was done by the Order, by erasing the names of the original beneficiaries

1. **INSURANCE:**  
mutual benefit:  
bastard  
as heir and  
beneficiary.

in the certificate and substituting that of Tilghman J. Booz.

Section 1824 of the Code of Iowa requires that the beneficiary named in a certificate of membership issued by any fraternal association or organization, under the laws of Iowa, shall be the husband, wife, relative, legal representative, heir, or legatee of such member.

It is the contention of counsel for appellant that Tilghman J. Booz was an illegitimate child, and not within any of the classes designated. This action is brought by Frank G. and Ethel M. Booz, who claim they are the legal heirs at law of Thomas S. Booz, and entitled, as such, as well as beneficiaries, to the benefits of said certificate. Tilghman J. Booz, the Royesford Trust Company of West Chester, Pennsylvania, as his guardian, and the Mutual Benefit Department of the Order of Railway Conductors of America are made defendants herein.

The Order of Railway Conductors admits, in its answer, that it issued the certificate in question; that there was a change of beneficiary, as claimed; that it consented thereto; and that Tilghman J. Booz is the beneficiary therein designated; and avers its willingness and ability to pay the insurance to the proper beneficiary, when the same has been ascertained by the court.

It is contended by counsel for appellant: First, that Tilghman J. Booz is not an heir or relative of Thomas S. Booz; and, second, that the insured, at the time of his death, was a resident of Pennsylvania; that he died intestate; and that his legal heirs are to be determined according to the laws of Pennsylvania; that an illegitimate child could not inherit at common law; and that, in the absence of proof to the contrary, it must be presumed that the common law is still in force in that state, and therefore that Tilghman J. Booz is not an heir of his putative father's.

I. The application for a change of beneficiary was in writing, signed and sworn to by Thomas S. Booz. In it,

Tilghman J. Booz is designated as his son. It is not contended by counsel for appellant that the recognition thus made does not meet the requirements of Section 3385 of the Code, but that an illegitimate child does not, by such recognition, become an heir, within the meaning of that term as used in Section 1824 of the Code; that his status is not changed by such recognition, the statute only providing that, in case thereof, he shall take the same share as a legitimate child. The distinction sought to be made is without merit. *McGuire v. Brown*, 41 Iowa 650; *Alston v. Alston*, 114 Iowa 29; *Johnson v. Bodine*, 108 Iowa 594; *Milburn v. Milburn*, 60 Iowa 411; Section 3385, Code, 1897.

II. The defendant order was organized and is doing business at Cedar Rapids, under the laws of this state. The certificate of membership was issued at its office in Cedar Rapids; the premiums were payable there;

2. INSURANCE: mutual benefit: construction: what law governs. and the contract, by its terms, is to be performed in the state of Iowa. It is, therefore, an Iowa contract, and must be interpreted, construed, and applied according to the laws of Iowa. *Savary v. Savary*, 3 Iowa 271; *Boyd v. Ellis*, 11 Iowa 97; *Arnold v. Potter*, 22 Iowa 194; *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa 412; *Burrows v. Stryker*, 47 Iowa 477; *Bigelow v. Burnham*, 83 Iowa 120; *Bigelow v. Burnham*, 90 Iowa 300; *Butters v. Olds*, 11 Iowa 1; Story on Conflict of Laws (8th Ed.), Sections 242, 280, and 281; *Andrews v. Pond*, 13 Peters (U. S.) 65; *Brown & Brammer v. Pearson Co.*, 169 Iowa 50.

The defendant order makes no contention that Tilghman J. Booz does not come within the class designated by the statute as proper beneficiaries in a certificate of the character in question. The right of the beneficiary named in said certificate must be determined according to the law of Iowa, and not according to the law of Pennsylvania. The proceeds of the certificate do not pass to Tilghman J.

Booz as heir at law, but as the beneficiary named in, and according to the terms of, the contract, and the by-laws of the association. Whether or not he is a legal heir of deceased's is material only on the question whether or not he comes within one of the classes designated by statute as a proper beneficiary in a certificate of the character in suit.

It is true that appellants were originally designated as beneficiaries in the certificate; but the insured exercised his right, under the terms of the certificate, to change the beneficiary, and caused the name of Tilghman J. Booz to be substituted for that of appellants. If the proceeds of the certificate passed to the estate of Thomas S. Booz, a different question might be presented; but the rights of the parties herein rest upon contract, and must be determined according to the laws of this state. The contract was, in all respects, legal in this state, and must be carried out according to its terms.

Other questions discussed by counsel are not controlling or material to appellants. It therefore follows that the judgment of the lower court must be and is—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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RUTH BRIGHTMAN, Appellee, v. F. G. HETZEL et al.,  
Appellants.

**HIGHWAYS: Construction, Etc.—Caring for Diverted Drainage.**

- 1 One who materially diverts the natural course of drainage acquires no rights against the *public*, howsoever long the diversion may be continued. In other words, one may not divert the natural course of drainage and thereby cast the waters into a public highway, and then compel the public authorities to so take care of such diverted waters that the one diverting will not be injured.

**PRINCIPLE APPLIED:** A landowner owned a quarter section of land, and also an 80 immediately to the east of the quarter. A fringe of hills bordered his land on the west and north.

Natural drainage would carry the surface waters across the northeast corner of his quarter, and thence east and south across his 80 and other lands to a river, something like a mile to the east. At the point where the natural drainage reached his east 80, he threw up a bank, in order to deflect the water to the south. He then dug a ditch straight south, to an east and west highway which ran along the south side of his said quarter, which road had been established many years previously. The water, from the point where it reached this highway, spread out promiscuously over the highway and the land to the south. For at least 16 years he enjoyed this artificial drainage. The road was not graded, and some small culverts were placed therein, and the waters were thus divided between the north and south sides of the highway. After some 16 years, the public authorities graded the highway, and placed therein, about opposite the mouth of the artificial ditch, a two-foot tile. The landowner claimed that this tile was too small, and that the grade and inadequate tile backed the water upon his land. He sought to enjoin the maintenance of the grade, or, as alternative relief, to compel the installation of larger tile in the grade.

*Held*, the artificial ditch had not ripened into a *natural* watercourse, as far as the *public* was concerned, and that he had acquired no right therein against the *public*.

**WATERS AND WATERCOURSES:** Surface Waters—Artificial  
2 Courses—Rights of Public. *Artificial* ditches which materially divert the course of natural drainage do not, by any lapse of time, become *natural* watercourses, as far as the *public* is concerned.

PRINCIPLE APPLIED: See No. 1.

**LIMITATION OF ACTIONS:** Nature, Etc.—Public Rights. Prin-  
3 ciple recognized that the statute of limitations does not run, nor may prescriptive rights be claimed, against the *public*.

PRINCIPLE APPLIED: See No. 1.

*Appeal from Pottawattamie District Court.*—THOMAS AR-  
THUR, Judge.

APRIL 4, 1918.

ACTION to enjoin the defendants, board of supervisors and other public officials, from constructing a grade upon a highway obstructing the flow of surface water gathered



into a ditch and discharged upon the public highway. Decree for the plaintiff in the court below.—*Reversed and remanded.*

*Preston & Dillinger*, for appellants.

*Turner & Cullison*, appellee.

GAYNOR, J.—The plaintiff is the owner of the northwest quarter and the south half of the northeast quarter of Section 31. Intervenor Swartfagger owns the southwest quarter and the west half of the southeast quarter of Section 31. Intervenor Emmert owns the east half of the southeast quarter of Section 31. One Christianson owns the north half of the northeast quarter of Section 31. Intervenor Barton owns the west half of the southwest quarter of Section 32, and other lands east of this. A highway runs east and west along the south line of plaintiff's land. Another highway intersects this east and west highway at the center of Section 31, and runs thence southward. There is also a highway running along the east side of Section 31. A river known as the Nishnabotna runs through Section 32, a little to the west of the center line of that section. All the land involved in this suit lies in or adjacent to the river bottom, except the westerly part of Section 31, where the ground rises quite abruptly towards the north and west. The lands north, west, and northwest of plaintiff's west quarter are high and somewhat broken, and the same is true of the land west of the Swartfagger west 40. The natural slope of this land is towards the south and east from plaintiff's west quarter, and from the northeast corner of the east 80. It appears that, at the time of the trial, a ditch ran from the hills north of plaintiff's quarter section southeast across the northeast corner of the quarter to a point near the northwest corner of plaintiff's east 80. There the ditch

1. HIGHWAYS:  
construction,  
etc.: caring for  
diverted drain-  
age.

makes a bend, and runs thence south near the west line of the east 80, and empties the water so gathered in the ditch upon the public highway heretofore mentioned, near the center of the section. At the point where the ditch turns, near the northwest corner of plaintiff's east 80, a dike or bank of dirt had been thrown up, about two feet high above the surface of the ground, and willows had been planted there to force the water south along the west line of this 80. This ditch varies in width and depth as it courses through plaintiff's land. North of the north line of plaintiff's quarter, this ditch was very large, in some places 35 feet wide at the top and about 12 feet deep, and drains the surface water from a large tract of land. The highway heretofore mentioned, running through the center of Section 31 and just south of plaintiff's land, was established somewhere about 1870. This ditch, from the northwest corner of plaintiff's east 80 to the highway, runs reasonably straight, and reaches the highway at the center of the section. The building of the dike at the northwest corner of plaintiff's east 80 forced the water to the south, and, with the aid of slight excavations, the water wore the ditch south to a point where it reaches the highway by natural processes. Until the water was forced by the building of the dike at the northwest corner of plaintiff's east 80, and the putting in of willows there to force the surface water southward, there was no ditch along the west line of plaintiff's east 80. For some years after this ditch had been formed, and the surface water from the land to the north and northwest had worked its way through to the highway, there was an opening in the highway, a bridge or something of that sort, or a culvert, to allow the water to pass through the highway. Later, the highway became impassable, and the highway east and west along the south line of plaintiff's land was graded up, and a culvert put in—a 24-inch culvert. This culvert was intended to aid in carrying the water to the

south side of this highway, thus equalizing the burden of the water between the ditch on the north and a ditch on the south of the highway. It appears that the county had constructed ditches both on the north and the south of the highway, for the purpose of carrying the waters eastward that came from the lands north of the highway, and, as we take it, to the Nishnabotna River, or to some natural receptacle for water to the east. The ditch in question had been there for 20 or 25 years prior to 1911. In 1911, the county, through its board of supervisors or proper officers of the county, graded this highway at this point, and cut large ditches on the north and south side of it for the purpose of conducting the water eastward that came from the north, and so made this culvert in the highway, after it had been graded up. This culvert is a 24-inch culvert.

The claim of the plaintiff is that this culvert is insufficient to carry the water that comes through her ditch to the grade, and the grade tends to cast it back upon plaintiff's land, to her injury. She claims that this ditch has become a natural watercourse; that she has acquired the right to discharge, and the board has no right to obstruct the flow of the water in this natural watercourse to her prejudice.

This action was brought originally against the trustees and road supervisor of Knox Township. Such proceedings were had thereafter that the board of supervisors of Pottawattamie County were made defendants, together with the original defendant.

The claim of the plaintiff in this suit is that she has acquired a right to discharge the surface water accumulating in the ditch upon the public highway at this point; that the ditch has become a natural watercourse; and that the board of supervisors has no right to obstruct the flow of water in this watercourse to her prejudice.

The allegation of her pleading is that this is a natural

watercourse, with well-defined banks from 8 to 12 feet wide, and from 3 to 5 feet deep, running through and across plaintiff's land, and crossing said highway at or near the center of the section; that the stream drains about 2,000 acres of land north and west of said highway; that the defendants have removed a culvert or bridge in said highway at a point where the aforesaid stream crosses said highway, about 12 or 14 feet long, which was ample and sufficient to permit the water from said stream to flow unobstructedly across the highway in said culvert or bridge; that said defendants filled up the channel of said stream under the grade, except a circular opening of about 24 inches in diameter; and that said opening is wholly insufficient to carry the water in said stream across said highway, and by reason thereof, the water in said stream is obstructed, and the water prevented from flowing over and across the highway, and caused to accumulate and stand upon plaintiff's land, to her great and irreparable injury.

The prayer of the petition is that, unless the grade of said highway be lowered sufficiently to allow the surface water flowing over said land to pass unobstructed over said highway, and unless the filling up of the watercourse, as above alleged, be removed from said stream of water at the point where it crosses the highway, or unless a sufficient number of bridges and culverts be placed in said highway to permit the surface waters and the water of said stream to pass over and across said highway, this plaintiff will suffer irreparable injury, as aforesaid. Wherefore, she prays that the defendants be required to lower the grade of the highway so as to permit such water to flow over and across the highway unobstructed, or that they be required to remove the obstruction placed in said stream where the same crosses the highway, so as to permit the water to flow freely over the highway, or that it be required to place culverts in the highway in such a number and of sufficient size

to permit the surface water flowing off said plaintiff's land and the water in said stream to pass unobstructed over and across the highway.

On the hearing in the district court, a mandatory injunction was issued, requiring the board of supervisors to construct an opening in the highway at the point where the ditch comes from plaintiff's land near the center of Section 31, the opening to be not less than four feet in diameter. Denied all other relief. The defendant board of supervisors and intervenors appeal.

The history of this ditch along the west line of plaintiff's east 80 in question seems to be about this: In the early days, there was a ditch coming from the north of plaintiff's land running through the northeast corner of plaintiff's quarter, continuing its course southeast until it struck the east line of the quarter. The owner of the northeast quarter threw up a dike across the swale at that point, driving in willows and throwing up dirt to make an embankment there, and dug another ditch from this original ditch or swale south to the northwest corner of plaintiff's east 80, and continued the ditch from that point due east along what is now the Christianson 80 and the plaintiff's east 80 to the east road. This ditch was dug with a spade. This ditch was kept open for a number of years. During this time, there was no ditch such as is now in existence along the west line of plaintiff's east 80. Between 1893 and 1895, this ditch was dug from the northwest corner of the plaintiff's east 80 to the south line, or to a point at the center of Section 31 on the highway. This ditch was started by plowing and scraping. The work continued on it for three or four years. A dike along the east bank of the ditch was thrown up when the ditch was dug, and was piled higher as the years went on. By the action of the water, the ditch in question became deeper and wider, until a large ditch, carrying a considerable volume of water

and discharging it at the center of Section 31 onto the highway, was made. The highway on the south side of plaintiff's land was located in 1870. It was never graded until 1911. Prior to its grading, the water spread all over the road near the center of Section 31. When the road was first opened, there was no bridge or culvert in the road. Subsequently, however, and before 1911, there were passageways for water made in the road by the use of culverts. These were placed there to cover the low ground and permit the discharge of surface water. There was no ditch in this road, as we take it, or across this road, until after the ditches were constructed along the west line of plaintiff's 80, throwing surface water onto the highway at that point. Since then, however, ditches have been constructed on the north and south sides of this east and west highway along the south line of plaintiff's land from the center of Section 31, east. These ditches were constructed by the proper authorities, we assume, for the purposes of carrying water that came from the north of this highway eastward to some point where it could be discharged into a natural depression, or natural watercourse. After the grade was made in the road, it was found that it was necessary, in order to carry the water from the north of the road properly to the discharging point, that some opening be made in the road, so that the ditches on each side of the road could be utilized for this purpose, and this 24-inch culvert was put in just below the discharge point of the ditch in question. It was put in a little higher than the bottom of the ditch, so that, when the water in the north ditch rose to a certain point, it could be discharged under the grade to the ditch on the south side of the road. Plaintiff's complaint is that this culvert is insufficient for that purpose.

We are not favored with any argument for the plaintiff in this case, and it is somewhat difficult to understand exactly the point upon which plaintiff relies to sustain the ac-

tion of the court. It is apparent from this record that the natural flow of the surface water from a large area north of this road had been diverted from its natural course, and brought, by the action of the plaintiff, through this ditch to the center of Section 31, and there discharged upon the public highway. There is no evidence in this record to show that this ditch had any well-defined banks or natural channel south of the point where it reached this road; and, so far as we can gather from the record, after it passed out of this ditch and over the road, it was cast upon the lands to the south at this point. It appears, however, that Swartfagger dug a ditch on the north side of his east 80 east ward for the purpose of receiving this water and carrying it to the east, and this is the ditch, or one of the ditches, to which we refer, on the south side of the highway that runs south of plaintiff's land.

It seems to be the claim of plaintiff that, having procured this ditch, in the manner hereinbefore indicated, along the west line of her east 80, she had become entitled to have the flow of the surface water that accumulated therein discharged without obstruction from her land over the highway and onto the land south. Swartfagger is one of the intervenors herein, and is resisting plaintiff's claim. There was no showing in this record that this grade in the highway would interfere with the flow of the surface water from plaintiff's land, if that surface water were permitted to gather and flow over the surface of the land in its natural channels. Plaintiff has, by means of this ditch, not only discharged the water from her lands at this point upon the public highway, but has collected the surface water from a large area both north and west of her land, and discharged it at this point in a different manner and in larger quantities than it could come in the course of nature. Her purpose in this suit is to compel the county to care for the water so gathered by her and so discharged upon the pub-

lic highway. This is not a natural watercourse. It amounts to no more than an open drain upon her land, in which she has gathered surface waters from her land and discharged them at a point other than the one at which they would have been discharged in the natural course of drainage. All the drainage south of this ditch is artificial. The ditches dug by the defendants along the north and south sides of the road, and by Swartfagger on his own land, are defensive ditches, dug and placed there for the purpose of protecting the servient estate from great damage from the manner pursued by the plaintiff in the accumulation and discharge of her surface water.

Upon the fact issue, the equities are not with the plaintiff. Two propositions are involved in the determination of this suit:

1. Is the ditch a natural watercourse, in which the flow of water must not be obstructed by the servient owner to the prejudice of the dominant owner?
2. **WATERS AND WATERCOURSES:** surface waters: artificial courses: rights of public.

2. Has the plaintiff, by long user and lapse of time acquired a right to discharge the water at this point, to the prejudice of the lower estates?

These two questions may be answered together. The servient estates below the highway, to the south of the highway, have, up to this point, without complaint, managed to divert the water from their lands by ditches running to the east to the Nishnabotna River. The board of supervisors, acting for the public, has endeavored to protect their property, the highway, by the same means. No complaint has been made by the servient estates up to the commencement of this trial. The efforts made to protect the servient estate against the surface waters gathered in this ditch and discharged upon the lower lands, seem to have been fairly successful. No complaint was made until this trial was begun. The water through these ditches was carried along



the north and the south side of the highway to this river.

We had occasion to review this question somewhat in *Falcon v. Boyer*, 157 Iowa 745, and from a review of the authorities,—many of which are cited in that case,—we have reached the conclusion that plaintiff has no rights here based upon the claim that this is a natural watercourse. The rule that an artificial ditch may, under some circumstances, become a natural watercourse by the lapse of time, as between private individuals, does not apply when the rights of the public are involved; for neither the statute of limitations nor prescriptive right can be urged or claimed against the public.

In *City of Waterloo v. Union Mill Co.*, 72 Iowa 437, the doctrine was recognized that the statute of limitations will not run to defeat the exercise of governmental powers.

It rests upon the doctrine that individuals may be held to a time limit in the enforcement of their rights against adverse claimants. This is because they have sufficient interest to make them vigilant. But in public rights, each individual feels but slight interest, and would rather tolerate even a manifest encroachment than to seek a dispute to set it right. The people do not act in a body. The agents of the government, experience shows, do not manifest the same degree of diligence in detecting and protecting public rights that individuals evince in the protection of their own rights. Some courts hold that the statute of limitations cannot be invoked to deprive the people of their right in public easements. A public easement belongs to the public, and all individuals are charged with knowledge of this fact. Any encroachment upon the public right is a wrong at the very beginning, and continues a wrong, and can form no basis for an estoppel against the public. See *Taraldson v. Town of Lime Springs*, 92 Iowa 187; *Chicago, R. I. & P. R. Co. v. City of Council Bluffs*, 109 Iowa 425;

3. LIMITATION OF  
ACTIONS: na-  
ture, etc.;  
public rights.

*Dickinson County v. Fouse*, 112 Iowa 21; *Biglow v. Ritter*, 131 Iowa 213; *Quinn v. Baage*, 138 Iowa 426. In this last case, it is said:

"Though the authorities are in conflict on the question (to wit, the statute of limitations), this court is committed to the doctrine that, in establishing and maintaining a highway, a municipality exercises governmental functions, and for this reason the statute of limitations does not run against it with respect to encroachment therein."

It follows that, if title to a highway cannot be acquired by adverse possession against the people, the right to destroy or interfere with the free use of the easement cannot be acquired by prescription. Manifestly, then, the plaintiff, by collecting the surface water on her land into a ditch, and discharging it at one point in a different manner and in greater volume upon the public highway than it would come in the course of nature, does not acquire such right by the lapse of time. The right of the plaintiff to insist that the board of supervisors take some action to protect her against the evil consequences that flow from her own act, must rest upon the thought that she has acquired a right to discharge the surface waters from her land in this way upon the public highway, against which the public has no right now to protect itself.

As we have said before, the statute of limitations does not run against the exercise of governmental powers. That the improving, draining, and grading of public highways constitute the exercise of that power, see *Elliott on Roads and Streets* (2d Ed.), Section 883, where it is said:

"The doctrine that highways cannot be lost by adverse possession is supported by other well-settled principles of the law. There can be no rightful permanent private possession of a public street. \* \* \* It would be a grave reproach to the law to permit a wrongdoer \* \* \* to take advantage of his own wrong and that of the municipality.

and by such indirect and wrongful means obtain a right to the street which the corporation is prohibited from directly granting or destroying. \* \* \* 'Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have interest sufficient to make them vigilant. But in public rights of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right.' The rule best supported by reason and by the weight of authority is that the 'common right of highway' cannot be lost by the attempted adverse possession of a private individual."

The evidence shows, without any serious conflict, that, in the early days, great volumes of water, covering a large territory northwest of plaintiff's land, passed through a natural swale, and spread out over a large territory of land, and flowed to the east, finally finding its way to the river. To prevent this water from flowing in its natural course, this ditch was constructed, and it was brought to this point in the highway by artificial means; and it is this diverted water, accumulated at this point, that she now claims is flooded back by the defendants upon her land; and it is this water, so diverted by this artificial ditch, that the plaintiff now seeks to compel the highway officials to take care of and protect her against. This cannot be done.

Many questions are argued, involving motions and demurrers preliminary to the tendering of the final issue herein submitted, and error is predicated upon the action of the court in respect to these matters. We have preferred, however, to determine the controversy upon its merits, and do not, therefore, discuss or consider these preliminary matters, since we find the defendants entitled to have the case reversed upon its merits.

Upon the whole record, we think the court erred in its conclusion; and the case is, therefore, reversed and re-

manded, with directions to the court to enter decree in accordance with this opinion.—*Reversed and remanded.*

PRESTON, C. J., LADD, EVANS, and STEVENS, JJ., concur.

DENNISTON & PARTRIDGE COMPANY, Appellant, v. VIOLA BROWN et al., Appellees.

**MECHANICS' LIEN: Permanent Improvements on Leased Prem-**

1 **ises.** Real estate is subject to a mechanics' lien for permanent improvements placed upon the land by a tenant under a lease providing for such improvements by the tenant, with proviso that the same shall belong to the owner upon the termination of the lease. Especially is this true when the owner is immediately active in causing the improvements to be made.

**MECHANICS' LIEN: Minors.** A minor's interest in real estate is 2 not subject to a mechanics' lien, in the absence of a showing that the minor was represented in the making of the improvement by his or her duly authorized and acting guardian. (See Sec. 3089, Code, 1897.)

*Appeal from Jasper District Court.*—JOHN F. TALBOTT, Judge.

APRIL 4, 1918.

ACTION to enforce a mechanics' lien. The district court dismissed plaintiff's petition. Plaintiff appeals.—*Reversed and remanded.*

Tim J. Campbell, for appellant.

A. D. Pugh and Ross R. Mowry, for appellees.

GAYNOR, J.—This action is to foreclose a mechanics' lien on certain property owned by the defendants jointly. The defendants Alice and Elizabeth Sherbon are minors.

The defendant Viola G. Brown is the widow, and the other defendants are heirs direct, of one James Brown, deceased, who, at the time of his death, was the owner of this property. The widow, Viola G. Brown,

1. **MECHANICS' LIEN: permanent improvements on leased premises.**

owns a one third, and the other heirs, the other two thirds in common. Prior to the furnishing of the material involved in this suit, the widow and these heirs rented the property in question to a corporation known as the Victoria Sanitorium. This corporation took possession of this property, and one of these heirs or owners, to wit, Florence E. Sherbon, became and was its secretary, treasurer, and manager, had general charge of its business, and was in possession and control of the property for the corporation. She testified:

"My mother and sister were in California. The other children are minors. My mother and my sister left matters in my charge, both as to the Brown estate and the Victoria. The improvements and repairs were made by the Sanitorium under the lease from the Brown heirs (the defendants), and the arrangement was that the Sanitorium was to make the repairs and improvements."

While so in possession of the property, she employed one Charles Nelson to erect certain buildings on it, and was present when the buildings were put up. The material furnished for these buildings was purchased from the plaintiff by Nelson, and was used in the construction of the buildings. The buildings consisted of a barn; with a foundation under it, a "lean-to" to the kitchen, and a chicken yard. The material furnished by the plaintiff for these structures was charged by it on its books to the Victoria Sanitorium. The material, however, was used in making these permanent improvements upon defendants' land, with consent of the owners. Miss Florence Sherbon, called in this record Dr. Sherbon, was present, and saw the buildings constructed. Her sister, Mrs. Maude A. Brown, was present part of the time.

There is no question in this record that Florence Sherbon made the contract with Nelson for these improvements upon this particular property. There is no question that

the plaintiff furnished the material that went into the improvements. It does not appear affirmatively for whom Florence Sherbon acted, in making her contract with Nelson for these improvements. She was one of the owners of the property. It had been leased to the Victoria Sanitorium. The Victoria Sanitorium was in possession under the lease. Florence Sherbon was its secretary, treasurer, and manager. It appears that the plaintiff had a running account with the Victoria Sanitorium, and that, after these goods were purchased by Nelson for these structures, the material was charged to the Victoria Sanitorium. The lease under which the Victoria Sanitorium held possession of the property is not in the record. It was made by these defendants to the Sanitorium Company. The evidence is that these improvements were to be made by the Sanitorium Company under the lease, under some arrangement with defendants, and that the arrangement was that the Sanitorium Company was to make repairs and improvements. It does appear from the testimony of Florence Sherbon that at least her mother and her sister left her in charge, in a general way, both of this property, which is called the Brown estate, and of the Victoria Sanitorium; that she was in possession with their authority, and with authority from them to take charge, in a general way, of the property; that, while she was in possession, she ordered these permanent improvements to be made; that, when they learned of these improvements, they made no objection to her action in placing them upon the property.

As to these other defendants, the minors, Alice and Elizabeth, there is no showing in this record that they had a guardian, or were represented by a guardian in any of the

transactions here involved. In the absence

2. MECHANICS'  
LIEN : minors.

of any showing of authority to bind them,  
we cannot assume that they are bound by

any matters involved in the right to enforce a claim against

their estate, such as is sought to be enforced here. As to these minor defendants, we think the plaintiff has made no showing entitling it to the foreclosure of any lien as against their interest. But as to these adult heirs (defendants), a different question arises. They entered into a contract with this Sanitorium Company by which they gave the Sanitorium Company possession of these premises, under an arrangement that the Sanitorium Company was to make repairs and improvements upon the premises leased. This they had a right to do. It also appears from this record that the property in question, called the Brown estate, which evidently means the real estate which came to these defendants through the death of their ancestor, was placed in charge of Florence by these adult defendants. The extent of her authority over the estate is not given in the record. It is said that they left matters in her charge, in a general way, both as to the Brown estate and the Victoria Sanitorium. We assume, and must assume, that it was left in her charge either as secretary, treasurer, and general manager of the Sanitorium Company, or as the representative of the owners. The lease to which these defendants were parties required the Sanitorium Company to make repairs. We may assume that the authority for what she did is found in this lease, given by the owners to the Sanitorium Company. The right to make repairs and improvements, then, came through the lease to the Victoria Sanitorium, and through it to Florence. All the authority came from defendants. So we may rightfully assume that it was under this authority granted the Sanitorium Company that she acted in making the contract with Nelson. The authority, therefore, came from these adult defendants to make these improvements. The exercise of the authority granted bound these defendants. The record is not as explicit on these points as we would like to have it, but we think enough is in the record to justify our conclusion that

Florence Sherbon acted for the Sanatorium Company and for these adult defendants in contracting for these improvements. Here, the defendants were the owners of the property. They leased it to the Victoria Sanatorium, and contracted with the Sanatorium to put permanent improvements upon the leased premises. The permanent improvements put upon the premises reverted to the owner, upon the termination of the lease. It would open the door to great fraud in practice to allow the owner of property to lease it to another, contract with the other to put on permanent improvements,—improvements that are only valuable when standing upon the property,—and then say that the materialmen and the laborers who place these permanent improvements upon defendant's property have no claim against the property, and must go unrewarded if the tenant is insolvent. It would be an invitation to short leases with agreements in the lease that the tenant should build permanent structures upon the premises during the term of the lease, and this without jeopardizing any interest which the owner had in the property, while he greatly profited from the transaction. The owners had a right to put these structures upon the land. They contracted with the Sanatorium to make these improvements upon the land. The improvements were made under the authority granted, and in pursuance of the authority given. It would be inequitable to hold that the materialmen and the laborers should, under a state of facts as shown here, be deprived of the benefit of a statute made for their protection. They have parted with their property, it has enhanced the value of the defendant's property, authority was given by the defendants to make the improvements, and we think that the interest of these adult defendants in the property should be held for the improvements.

As tending to support the conclusion we have reached, see *Nellis v. Bellinger*, 6 Hun (N. Y.) 560; *Ward v. Nolde*,



259 Mo. 285; *Moore v. Jackson*, 49 Cal. 109; *Sullivan & Langston Co. v. Richardson*, 169 Ill. App. 578; *Webster City Steel Radiator Co. v. Chamberlain*, 137 Iowa 717; *Janes v. Osborne*, 108 Iowa 409; *Ehrhardt Bros. v. Columbia Candy Co.*, (Mo.) 186 S. W. 1113.

Under the record here made, we think the plaintiff had a lien, and was entitled to enforce it against the interests of the defendants Viola G. Brown, Florence Sherbon, and Maude A. Brown, and that a decree should have been entered by the district court to that effect.

The cause is reversed and remanded for a decree in conformity with this opinion.—*Reversed and remanded.*

PRESTON, C. J., LADD and STEVENS, JJ., concur.

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HENRY DIRCKS, Appellant, v. ERNEST TONNE et al.,  
Appellees.

**HIGHWAYS: Law of Road—Inability to Turn to Right.** One who  
1 knows that the driver of an approaching conveyance is unable to give one half the traveled way because of the condition thereof, and who might easily stop his own conveyance, but does not do so, is guilty of negligence.

**NEGLIGENCE: Instructions—Non-Applicability to Pleading.** When  
2 plaintiff and defendant both claim damages of the other by reason of the same transaction, and on the allegation by each that the other was negligent in said transaction, instructions which authorize the jury to allow both claims are wholly at war with any allowable theory of the law of negligence.

**NEGLIGENCE: Imputed Negligence—Use of Automobile.** One who  
3 purchases an automobile for the use, convenience, and enjoyment of his family, and permits members of his family to use it for said purposes, thereby constitutes such members his agents, and the negligence of such members, while so operating said machine for such purposes, will be imputed to the principal.

*Appeal from Jones District Court.*—JOHN T. MOFFIT, Judge.

APRIL 4, 1918.

ACTION for damages resulting from a collision of two automobiles. Verdict for plaintiff for \$1.00. Both parties appeal. *Reversed* on plaintiff's appeal; *affirmed* on defendant's appeal.

*C. J. Lynch* and *J. C. France*, for appellant.

*Chas. W. Kepler & Son* and *E. A. Johnson*, for appellees.

STEVENS, J.—At the time of the accident complained of, plaintiff and other members of his family were riding in a Cadillac car, driven by his son upon a public highway, which had been made slippery by a recent rain. Shortly before plaintiff's car crossed a culvert, a car owned by defendant Ernest Tonne, which was occupied by his two minor sons, and which was being driven by S. Tonne, the older of the two, appeared on the top of a hill, about 24 rods distant. The cars collided at a point, apparently, near the foot of the hill. Both cars were considerably broken and damaged. Plaintiff brings this action for damages to his car, and for injuries alleged to have been received by his wife, whose claim therefor was duly assigned to him. Defendant interposed a counterclaim for damages to his automobile.

At the close of plaintiff's evidence, the defendant E. Tonne, appellee herein, moved for a verdict in his behalf, on the ground that he was in no wise responsible for the damages to plaintiff's car, or to his wife, and that the evidence wholly failed to show that the driver of the automobile was either the servant or agent of defendant, and that it appeared therefrom that said driver was driving the car for his own benefit and pleasure, and that, if neg-

1. HIGHWAYS:  
law of road:  
inability to  
turn to right.

ligent in the operation thereof, same should not be imputed to the defendant. At the close of the evidence, plaintiff moved for a verdict in his favor on defendant's counterclaim, and that same be withdrawn from the consideration of the jury. Both motions were overruled. The jury returned a verdict for plaintiff in the sum of \$1, on which verdict judgment was duly entered. Plaintiff and defendant E. Tonne both appeal. As plaintiff's appeal was perfected first, he will be treated as the appellant.

I. We will dispose first of the questions presented by plaintiff upon his appeal. The negligence charged in defendant's counterclaim is that plaintiff permitted his minor son, who was inexperienced and incompetent, to drive the car, upon the occasion in question; that the son failed to turn to the right soon enough to permit defendant to pass, and at a point where he could easily have done so; that the son failed to give one half of the highway, and to stop his car after he knew, or, by the exercise of ordinary care, should have known, that he was unable to get the same out of the rut on the left side of the highway. The evidence showed that a rut had been formed on each side of the traveled portion of the highway, and that it was very difficult for the driver of plaintiff's car to get the hind wheels out of the same.

The evidence further disclosed, without conflict, that the driver of defendant's car was coasting down the hill without power, with the left wheels of the car in the rut on the right side of the track in which were the left wheels of plaintiff's car; that the driver of plaintiff's car attempted to turn the same out of the road to the right, but the hind wheels slid in the rut, and he was unable to get the car out of the rut. The defendant S. Tonne, who was driving the car, observed the situation of plaintiff's car and the effort of the driver thereof to get the same out of the way, but continued to coast down the hill, with the left wheel of his

car in the rut on the left side of plaintiff. It must have been apparent to the defendant S. Tonne that, unless he turned further to the right, a collision was unavoidable. Had the driver of plaintiff's car stopped with the left hind wheel in the rut on the left side of the road, unless the defendant turned further to the right, or stopped, it would not have avoided the collision. The defendant S. Tonne testified that he made no effort, after he discovered that the driver of plaintiff's car was unable to get out of the road, to avoid the collision. He saw the peril of plaintiff's car when he was six rods away, and when he had his car under full control, and there was nothing to prevent him from turning to the right, and thereby avoiding a collision. It is no excuse for him now to say that he mistakenly thought that plaintiff's car would get out of the way. The danger of a collision must have been apparent to him, and he should not have taken chances. Of course, it was the duty of the driver of plaintiff's car to turn to the right, and give one half of the highway; but, by reason of his inability to get the hind wheel of the car out of the rut, he was unable to do this.

We fail to discover any evidence in the record tending to show negligence on the part of the driver of plaintiff's car. No evidence was offered tending to show that he was inexperienced or incompetent. The jury may have found against the defendant on its counterclaim, in which event, discussion of this question would, of course, be unnecessary; but, for reasons hereafter appearing, it is impossible to tell whether the jury found against defendant on the counterclaim or for both plaintiff and defendant. The motion to direct a verdict for plaintiff upon the counterclaim and to withdraw the same from the consideration of the jury should have been sustained.

II. Following the customary instructions upon the question of negligence, the court gave the following:

2. NEGLIGENCE:  
instructions:  
non-applicabil-  
ity to plead-  
ing.

"If you find from the evidence that the plaintiff is entitled to recover some amount upon this petition against the defendant E. Tonne, and that the defendant E. Tonne is entitled to recover some amount against the plaintiff on his counterclaim, then you will take the lesser from the greater amount, and return your verdict for the difference in favor of the party entitled thereto. If the amounts are equal, your verdict should be for the defendant E. Tonne."

The error in this instruction is manifest. If plaintiff was guilty of negligence contributing to the injury complained of, he could not recover. Likewise, if the defendant was guilty of negligence contributing thereto, he could not recover. Plaintiff was entitled to recover, if at all, only if it appeared from a preponderance of the evidence that the negligence of the defendant was the proximate cause of the damages sustained, and that plaintiff was without fault on his part. The same rule applied to defendant's counterclaim. The jury could not have found in favor of both plaintiff and defendant. There was no theory upon which a verdict could be returned in favor of the party suffering damages in a greater amount. There must have been a verdict for plaintiff in some amount, or for the defendant in some amount, or for the defendant without naming any amount. No special interrogatories were submitted to the jury, and it is impossible to tell by what method the verdict was arrived at. If plaintiff was entitled to recover, the verdict, under the undisputed evidence, should have been for a more substantial sum. It cannot be said that the instruction was without prejudice. For the reasons stated, the judgment of the court below must be reversed upon plaintiff's appeal.

III. We come now to the questions presented upon defendant's appeal. We need only consider in detail his contention that his son, who was, at the time of the acts com-

3. NEGLIGENCE: imputed negligence: use of automobile.

plained of, operating the car, was not acting for or on behalf of defendant, either as his servant or agent, and that, therefore, if negligent, the same cannot be charged against appellee, and that his motion for a directed verdict in his favor should have been sustained.

There is some conflict in the holding of the courts in different jurisdictions upon the question of the father's liability for damages resulting from the negligent operation of an automobile by his minor son. We held the husband liable in *Crawford v. McElhinney*, 171 Iowa 606, in an action brought to recover damages claimed to have been caused by the negligence of the wife in driving his automobile, at a time when he was present, on a sight-seeing trip. The car was being operated with his permission, and for the pleasure of both. The court said:

"It is not contended by defendant that the wife may not be an employee or agent of her husband. It is doubtless true that the mere existence of the relation of husband and wife will not create the relation of master and servant, or agent on the part of the wife, so as to render the husband liable for negligence in operating his automobile; but here there are other circumstances. It is further shown that the wife acted as the chauffeur of the car bought by the husband for the use of both of them, and in the particular instance, it was being used for the mutual pleasure of both. In the instant case, if defendants were engaged in a common enterprise, or if Mrs. McElhinney was the employee and agent of her husband at the time, in the use of the car by his authority, for some purpose for which the car was bought and kept by him, they would both be liable for her negligence in such use."

The doctrine of this case was re-affirmed in *Sultzbach v. Smith*, 174 Iowa 704; and in *Lemke v. Ady*, 159 N. W. 1011 (not officially reported), we approved an instruction

containing the following language:

"If a man owns a car which he keeps, among other things, for use as a pleasure vehicle by his family, and permits his son to drive it, if his son takes the mother out for a drive in the car, the son would be the agent of the father, and the car, under such circumstances, would be used in the father's service, the furnishing of comforts and enjoyments within his means to his wife and family being part of a father's business or service."

The court in the opinion said:

"The testimony tended to show that the auto was kept for the pleasure and amusement of the family; that both the son and the father drove it; that the mother oftentimes directed its use; and that it was kept not only for family use, but for the entertainment of guests. On the day of the accident, the son drove the machine, and his mother, with two visiting guests, were being taken on a pleasure trip from West Liberty to Iowa City."

The holding of the foregoing cases finds support in the following: *Stowe v. Morris*, 147 Ky. 386 (144 S. W. 52); *McNeal v. McKain*, 33 Okla. 449 (126 Pac. 742); *Birch v. Abercrombie*, 74 Wash. 486 (133 Pac. 1020); *Smith v. Jordan*, 211 Mass. 269 (97 N. E. 761); *Kayser v. Van Nest*, 125 Minn. 277 (146 N. W. 1091).

In the case at bar, the evidence tended to show that defendant and his family had formerly resided near Clarence, and were members of an evangelical church at that place; that, on account of the distance, he purchased the automobile for general use, and particularly for the use of himself and family in attending church; that he had never operated the car, and the two sons, who were in the car at the time of the accident, were the only members of his family who had done so. The sons were members of a young people's society of the church, and had been requested to attend a meeting thereof on the day in question. They

took the car with the knowledge and consent of appellee. There was no evidence tending to show that they left home with the car for any other purpose than that of attending the meeting. They were engaged in using the car for one of the purposes for which the same was purchased by appellee. That he was interested in having his sons attend the church of which the family were members may well be assumed.

The case is ruled by our prior holdings; and, while the father is not liable for the torts of the son because of the relationship alone, we think there was evidence upon which the case should have been submitted to the jury, and the court did not commit error in overruling defendant's motion for a directed verdict. In view of our conclusion, we need not consider defendant's exceptions to the court's instruction upon this question.

Other alleged errors discussed by counsel are not likely to arise upon a retrial of this case, and we need not further discuss them. For the reasons indicated, the judgment of the lower court is—*Reversed* on plaintiff's appeal; *affirmed* on defendant's appeal.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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WILLIAM E. FORSYTH et al., Appellees, v. J. M. LOBAUGH et al., Appellants.

**MORTGAGES: Redemption—Sale of Equity—Specific Performance.**

Evidence held sufficient to sustain a finding that a conveyance of mortgage-foreclosed premises by the owner was on the consideration that grantee discharge specified encumbrances.

*Appeal from Cedar District Court.*—F. O. ELLISON, Judge.

APRIL 4, 1918.



SUIT in equity for specific performance and other relief in equity. The facts are fully stated in the opinion.—*Affirmed.*

*Kirkland & White*, for appellants.

*Hamiel & Mather, Treichler & Treichler, and Dutcher, Davis & Hambrecht*, for appellees.

STEVENS, J.—Plaintiffs, on and prior to February 14, 1913, were the owners of a tract of 200 acres of land in Cedar County, Iowa, which was encumbered by numerous mortgages. George J. Nicolaus, the holder of the first mortgage, instituted proceedings to foreclose the same, and the remaining mortgagees appeared and filed petitions in intervention. On May 31, 1915, judgment and decree were entered on each of the notes secured by the several mortgages, and the liens thereof were established in the following order: George J. Nicolaus, \$23,864.73; Emma S. Reeder, \$4,488.43; City National Bank, \$3,175.90; Smith & Havard, \$5,722.57; Drumm Commission Company, \$6,362.34; O. C. Pennock, \$3,316.48. Special execution was issued on the Nicolaus judgment, and the land sold thereunder to him for the full amount thereof, and sheriff's certificate issued to Nicolaus as purchaser.

It will be observed that Smith & Havard, intervenors herein, held the fourth mortgage, and that their lien was established, subject to the three preceding mortgages. They did not redeem from the sale under the first mortgage, but, on January 29, 1916, took an assignment of the first, second, and third mortgages, and of the sheriff's certificate.

On or about February 24, 1916, J. M. Lobaugh, representing the Drumm Commission Company, procured a quit claim deed from plaintiffs, conveying the land in question, together with the right of redemption, to him. Within the time allowed by law to the owner, the defendant paid to the

clerk of the district court of Cedar County \$26,574.11, for the purpose of redeeming from the sheriff's sale. At this time, the amount of the claims held by intervenor was approximately \$14,684.67.

On July 20, 1916, plaintiffs commenced this suit, alleging in their petition that the quitclaim deed conveying to Lobaugh the 200-acre tract, together with the equity of redemption, was made upon the express agreement and understanding with plaintiffs that Lobaugh would pay all liens prior to that of the Drumm Commission Company, and in consideration thereof, together with the release by the Drumm Commission Company of its lien and judgment against plaintiffs. The relief prayed is that the defendant be compelled to specifically perform said contract, or that the deed be cancelled and set aside; that the court make suitable provision for the adjustment and settlement of the rights of plaintiffs, intervenors, and the defendants herein. Except the necessary formal matters, the allegations of intervenors' petition and the relief prayed are substantially the same as that of plaintiff. The court found in its decree that the consideration for the quitclaim deed and the assignment of plaintiff's equity of redemption was the agreement of the defendant Lobaugh to take care of and pay the prior liens, and to receipt in full and cancel all claims and judgments against the plaintiffs.

Counsel for appellant frankly concede that, if the conclusion of the trial court upon the facts is sustained upon this appeal, the judgment and decree entered below should be affirmed. The purpose of the Drumm Commission Company in obtaining the quitclaim deed and plaintiff's right of redemption was to extend the time within which it could redeem from the prior judgments. Intervenors allege in their petition that they took the assignments of the prior judgments and purchased the sheriff's certificate of sale in reliance upon an oral agreement with William E.

Forsyth that he would hold his title and equity of redemption for the benefit of intervenors, and not make any transfer thereof in any form prejudicial to them; that they did not know of the execution of the quitclaim deed and assignment of the equity of redemption to Lobaugh until after the time for redemption from the Nicolaus judgment had expired.

The defendants, within the time allowed by law, redeemed from the sheriff's sale by depositing with the clerk \$26,574.11, the full amount necessary for that purpose. The result, therefore, was that intervenors, who, as stated above, were the owners of judgments against plaintiffs for something over \$14,000, in addition to the amount represented by the certificate of purchase, lost their lien upon the land, and defendant obtained title thereto by paying the amount necessary to redeem from the sheriff's sale, which, added to the judgment of the Drumm Commission Company, was much less than the fair value thereof, which was estimated by the several witnesses called by plaintiffs at from \$200 to \$225 per acre. This left plaintiff indebted to intervenor for the amount of the judgments held by it, and defendant in a position to receive full payment of its judgment, together with the amount paid to redeem from the sheriff's sale, and a handsome profit besides.

The evidence relating to the transaction between plaintiffs and Lobaugh, as the result of which the quitclaim deed conveying to him the 200-acre tract, together with the equity of redemption, was executed, in substance was that, on or about the 24th day of February, 1916, Lobaugh, with O. C. Pennock, a brother-in-law of the plaintiff William E. Forsyth's, went to the latter's home, where he proposed said conveyance. This, according to the testimony of plaintiff, he declined to make, for the reason that he was unwilling to do anything to prejudice the interests of the prior lien holders, or to sign any instrument until he had

consulted his attorney. He further testified that Lobaugh agreed, in consideration for the quitclaim deed conveying to him the land and the equity of redemption, that he would pay off and satisfy in full all prior liens and encumbrances against the land, release the judgments and all claims in favor of the Drumm Commission Company, including a mortgage upon a 35-acre tract owned by plaintiff, in addition to the 200 acres which had been sold at sheriff's sale; that he repeatedly told him he would not execute the deed unless the defendant would do this. Pennock testified in chief that Lobaugh assented to this, but was somewhat less positive upon cross-examination. Another witness testified that Lobaugh told him, in August, 1916, that he had agreed to pay off the claims ahead of the Drumm Commission Company, but that the attorney for Nicolaus had slept on his rights, and that he did not then have to do so. Lobaugh frankly admitted that, at the time he procured the execution of the quitclaim deed, he fully expected to pay the prior indebtedness. This, of course, was necessary, in case intervenors redeemed from the sheriff's sale, to protect the judgment in favor of the Drumm Commission Company. No other consideration was paid for the deed and assignment, except the alleged agreement of defendant to pay and settle all prior encumbrances, and the release of the judgment of the Drumm Commission Company and of its mortgage upon the 35-acre tract, which, on account of prior liens, was clearly of no value. Lobaugh, however, denied that he at any time agreed that the Drumm Commission Company or he himself would pay the prior encumbrances; and some correspondence between himself and the attorneys for plaintiff, offered in evidence by him, tended in some degree to sustain his theory of the transaction, but, when viewed in the light of all the evidence, is not persuasive. The court below found an express agreement on the part of the defendant, in consideration of the

execution of the quitclaim deed to him, to pay off and satisfy the prior liens, and to release all claims held by the Drumm Commission Company against the plaintiff, and a decree was entered in accordance with this finding. It may be that intervenors were somewhat careless in failing to redeem from the sheriff's sale, but they did not know of the quitclaim deed to defendant, and evidently felt secure in the belief that plaintiff could and would not redeem, and that the time within which defendant could do so had expired. If appellant's contention were to prevail herein, the Drumm Commission Company would be in a position to obtain full payment of the amount paid for redemption, its own judgment, and a substantial profit on the sale of the land, whereas plaintiff would be left with unsatisfied judgments against him for \$14,000. It is claimed that he is insolvent, but whether solvent or not, he had a right to have the full value of the land applied to the discharge of the liens established against it. Under the agreement found by the court, defendant was required to pay all of the liens that were superior to that of the Drumm Commission Company, and to also release its judgment and the mortgage held by it upon the 35-acre tract.

In our opinion, this finding is amply sustained by the evidence, and we are not disposed to interfere therewith. It is our conclusion, therefore, that the judgment and decree of the lower court should be, and it is,—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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MARY E. GRIFFITH, Appellee, v. COLE BROTHERS et al.,  
Appellants.

**MASTER AND SERVANT: Workmen's Compensation Act—Jurisdiction of Court to Review Decision of Industrial Commissioner.**  
1 The jurisdiction of the district court to enter a decree "in accordance" with the order or decision of the Industrial Commis-

car in the rut on the left side of plaintiff. It must have been apparent to the defendant S. Tonne that, unless he turned further to the right, a collision was unavoidable. Had the driver of plaintiff's car stopped with the left hind wheel in the rut on the left side of the road, unless the defendant turned further to the right, or stopped, it would not have avoided the collision. The defendant S. Tonne testified that he made no effort, after he discovered that the driver of plaintiff's car was unable to get out of the road, to avoid the collision. He saw the peril of plaintiff's car when he was six rods away, and when he had his car under full control, and there was nothing to prevent him from turning to the right, and thereby avoiding a collision. It is no excuse for him now to say that he mistakenly thought that plaintiff's car would get out of the way. The danger of a collision must have been apparent to him, and he should not have taken chances. Of course, it was the duty of the driver of plaintiff's car to turn to the right, and give one half of the highway; but, by reason of his inability to get the hind wheel of the car out of the rut, he was unable to do this.

We fail to discover any evidence in the record tending to show negligence on the part of the driver of plaintiff's car. No evidence was offered tending to show that he was inexperienced or incompetent. The jury may have found against the defendant on its counterclaim, in which event, discussion of this question would, of course, be unnecessary; but, for reasons hereafter appearing, it is impossible to tell whether the jury found against defendant on the counterclaim or for both plaintiff and defendant. The motion to direct a verdict for plaintiff upon the counterclaim and to withdraw the same from the consideration of the jury should have been sustained.

II. Following the customary instructions upon the question of negligence, the court gave the following:

2. NEGLIGENCE :  
instructions :  
non-applicabil-  
ity to plead-  
ing.

"If you find from the evidence that the plaintiff is entitled to recover some amount upon this petition against the defendant E. Tonne, and that the defendant E. Tonne is entitled to recover some amount against the plaintiff on his counterclaim, then you will take the lesser from the greater amount, and return your verdict for the difference in favor of the party entitled thereto. If the amounts are equal, your verdict should be for the defendant E. Tonne."

The error in this instruction is manifest. If plaintiff was guilty of negligence contributing to the injury complained of, he could not recover. Likewise, if the defendant was guilty of negligence contributing thereto, he could not recover. Plaintiff was entitled to recover, if at all, only if it appeared from a preponderance of the evidence that the negligence of the defendant was the proximate cause of the damages sustained, and that plaintiff was without fault on his part. The same rule applied to defendant's counterclaim. The jury could not have found in favor of both plaintiff and defendant. There was no theory upon which a verdict could be returned in favor of the party suffering damages in a greater amount. There must have been a verdict for plaintiff in some amount, or for the defendant in some amount, or for the defendant without naming any amount. No special interrogatories were submitted to the jury, and it is impossible to tell by what method the verdict was arrived at. If plaintiff was entitled to recover, the verdict, under the undisputed evidence, should have been for a more substantial sum. It cannot be said that the instruction was without prejudice. For the reasons stated, the judgment of the court below must be reversed upon plaintiff's appeal.

III. We come now to the questions presented upon defendant's appeal. We need only consider in detail his contention that his son, who was, at the time of the acts com-

SALINGER, J.—I. The statute (Section 34, Chapter 147, Acts of the Thirty-fifth General Assembly) provides that:

“Any party in interest may present certified copy of an order or decision of the commissioner or a decision of an arbitration committee from which no claim for review has been filed \* \* \* or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court \* \* \* whereupon said court shall render a decree in accordance therewith.”

1. MASTER AND  
SERVANT:  
Workmen's  
Compensation  
Act: jurisdiction  
of court  
to review de-  
cision of in-  
dustrial com-  
missioner.

The position of appellants is that the district court had no power to do what it did, because the words “in accordance therewith” refer to the order or decision, and nothing else, and that the formulation of decree cannot be affected by the words “all papers in connection with same:” in fewer words, that the district court is bound by the final conclusion reached, and cannot consider the record upon which the conclusion certified rests. Appellants insist this contention is sustained because it was said, in *Fischer v. Priebe*, 178 Iowa 512:

“It was not within the authority of the court to review or reverse or modify the award. Its function in the matter was simply to receive the award certified to it and ‘render a decree in accordance therewith and notify the parties.’ This is what seems to have been done, and we find no error therein.”

That this is purely *arguendo*, is not necessary to decision, and does not *decide* what appellant claims, is made manifest by consideration of the situation to which these words were addressed. The complaint was that the district court had made an allowance which the commissioner had not made. We held that the commissioner did make such allowance, that it is not objected to, and, in effect, that insufficient objection is made to whatever the



district court did do. It is manifest that, when we found the court had made no original allowance, it became utterly unnecessary to determine whether it had power to make one.

The *Fischer* case makes no reference to *Hunter v. Colfax Cons. Coal Co.*, 175 Iowa 245, and indeed, refers to no decision. In the *Hunter* case, at 308, we deal with an express objection that the act works "an improper delegation of judicial power, and a denial of judicial hearing; that the courts are compelled to enter judgment upon the award without further hearing; that there is no provision for appeal from the judgment on the award except the limited one permitted by the act; that the judgment must be modified by the court, if modified by the commissioner, and that this works a denial of and taking property without due process of law." It is self-evident that to pass upon this objection made it necessary to determine whether the powers given, or the limitations put upon, the district court made the statute vulnerable to these objections. Of course, this could not be determined without bindingly passing upon what these powers and limitations are. We found them to be of such character as that the objections were not well taken.

We hold, first, there is no ouster of the courts where the act is rejected, and then proceed to say:

"A somewhat more difficult question arises when the provisions of the act are accepted. In that case, if the parties cannot come to an agreement, compensation fixed by statute schedule is awarded by arbitration provided for in the act. In a sense, then, the acceptance of the statute operates to take from the courts so much of the controversy as is determined by the applying of the statute schedules through the agency of the statute arbitrators. Before we reach the question whether, if this constitute a total ouster of the jurisdiction of the courts, it would invalidate

the act, we of course have to determine whether such total ouster is so effected. We are forced to deal with this question as one of first impression, because no decision that sustains the Compensation Act of other states is applicable. The Washington Act and that of Massachusetts reserve recourse to the courts and full judicial review. In *Sabre's* case (Vt.), 85 Atl. 694, 695, a delegation is sustained because, in the end, the matter may get to the Supreme Court and have full review. *Borgnis v. Falk Co.*, (Wis.) 133 N. W. 209, sustains the Wisconsin act, with a holding that there is review if the act be without power, or fraudulent; that, if the board act without or in excess of its jurisdiction, there may be action in court to set aside the award, and that this may also be done if its findings of fact are not supported by the evidence. Our act has no such reservations, in terms, and, therefore, these decisions afford us no light." (314, 315).

In determining that there is not a total ouster of the courts, and that, therefore, the act is valid, we group certain things as being jurisdictional,—things upon which the power of the statute tribunals to act at all hinges. On this head, we said:

"The very basis of power to award compensation under the act is that its provisions must first be accepted; that the claimant must be an employe; that he must have sustained personal injuries; that they must have arisen out of and in course of the employment; and that the compensation shall be at rates fixed by the statute." (317)

We point out that *Sabre v. Rutland R. Co.*, 86 Vt. 347 (85 Atl. 693), holds that, as the Constitution provides courts shall be open for trial of all cases proper and cognizable, therefore, the courts, regardless of statute, may determine whether the board created has gone beyond the powers granted it. And we add:

"We are in no doubt that the very structure of the law

of the land and the inherent power of the courts would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded; that they could inquire whether the act was being enforced against one who had rejected it, whether the claiming employe was an employe, whether he was injured at all, whether his injury was one arising out of such employment, \* \* \* or, acceptance (of the act) being conceded, \* \* \* into whether that body attempted judicial functions in violation of, or not granted by, the act."

We sustain the act for being in analogy with the rule that makes contracts lawful which provide that the value of certain property and other like matters shall be determined by a certain person therein named, and that his decision shall be final, and say that such contracts are usually upheld as lawful because "they do not oust the courts of their jurisdiction over the subject matter, but only provide a safe and speedy manner of fixing definitely some fact which is usually of a complex and difficult nature," and because, when such fact is determined in the manner provided by the contract, "the parties are at liberty, after so fixing such fact, to go into court and litigate such differences as may still exist between them" (315, 316). We say that, "so far as specific delegation goes, the arbitration committee can do no more than to find that the employe should have compensation under some item of the statute schedule, and the commissioner may, on investigation, make a finding that an award thus made shall be modified or terminated. It is manifest that this does not in terms deprive the courts of all jurisdiction in the premises;" that there are "provisions that indicate it is not intended, literally at least, to give the statutory arbitrators all the powers that courts have" (317).—and, in commenting upon the appeal allowed, we hold that, "though the act does not

in terms provide for judicial review except by said appeal, the statute does not take from the courts all jurisdiction in the premises." We conclude thus:

"All of which establishes that the statute works no complete ouster of jurisdiction. \* \* \* The utmost it does is to provide administrative machinery for applying rates of compensation fixed by the legislature, as between parties who have agreed to have the amount of compensation, merely, thus determined. The effect of statutes never challenged, so far as we are advised, which limit recovery for negligence causing death, is to compel the courts to do what here is done by the arbitrators." (318, 319)

In *Des Moines Union R. Co. v. Funk*, decided January 27, 1919, it is recognized that certiorari will lie "where the objection made is clearly one of jurisdictional nature, and it satisfactorily appears that the proceeding sought to be reviewed is wholly unauthorized," as a mere right of appeal in such case would not be a speedy or adequate remedy, within the meaning of the statute.

The Massachusetts Act (Acts & Resolves of Massachusetts, 1912, Ch. 571, Sec. 14) is on this point quite similar to our own. It provides that when "copies of \* \* \* decision of the board \* \* \* and all papers in connection therewith [have been transmitted] to the superior court, \* \* \* said court shall render a decree in accordance therewith." Construing this act, it was, in effect, held, in *In re Employers' Liability Assurance Corp.*, 102 N. E. 697 (Mass.), that this means such decree as the law requires upon the facts found by the board, and does not reduce the action of the superior court to a mere perfunctory registration of approval of the conclusion of law reached by the board or commissioner, and that "the obligation placed upon the superior court by the requirement to enter a decree in accordance with the decision, is to exercise its judicial function by entering such decree as will enforce the legal

rights of the parties, as disclosed by the facts appearing on the record."

One may not read the *Hunter* case without being fully persuaded that we gravely doubted the constitutionality of the act, if it were open to the construction of appellant, and say that:

"Contracts by which the parties undertake to deprive themselves *in toto* of the right to resort to the courts to settle controversies between them in which are stipulated away all the rights of each or either to resort to the tribunals created by law, have been universally condemned. *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *Barron v. Burnside*, 7 Sup. Ct. Rep. 931, 935." (313, 314).

Should we now hold that "in accordance therewith" means simply a formal approval of the conclusions of the commissioner, we would not only overrule the *Hunter* case,

but go counter to the rule which requires  
2. STATUTES :  
construction : that construction of the two, which will the  
avoiding in-  
validating least imperil the validity of a statute. We  
construction. would subject the statute to danger which  
the *Hunter* decision sought to avert. We should not construe the statute as appellant desires unless no other construction is in reason permissible. Our construction may interfere with the legislative purpose to provide a speedy method of obtaining compensation, rather than add to existing remedies. But if that be the result, it is still our duty to avoid any holding which will even gravely imperil the constitutionality of the statute. Some benefits may be lost by inability to effectuate the full purpose of the legislature. But better that than to lose all of the benefits of the statute. All possibility of this may be avoided by a perfectly permissible construction, to wit: The court may not go into a general fact controversy. It is limited to determining, upon the transcript and findings which the statute requires to be sent up, whether the committee or the

commissioner had jurisdiction, and to effectuating what it finds upon that point. This is in analogy to cases like *Hatch v. Board of Supervisors*, 170 Iowa 82, which limit an inquiry of fact on certiorari to evidence addressed to whether the tribunal in review had jurisdiction, or, having it, exceeded it. Concretely, the court may investigate whether the commissioner has exceeded his jurisdiction. If that be found, it may set his award aside. If it finds the commissioner had jurisdiction, because an injury arose in course of and out of the employment, and the commissioner has refused to make an award, the court may remand, with direction that he allow what the statute provides; or, to avoid circuitry of action, the court may effectuate its finding that the injury did so arise by itself allowing the statutory compensation, if it appear as matter of law what that compensation should be. It follows that the district court did not err in entering upon an inquiry whether the injury complained of arose as aforesaid, nor because it proceeded to fix the amount of compensation due, there being no complaint that it erred in determining the amount.

This leaves for our determination whether, on the merits, any recovery on part of the plaintiff is warranted.

II. One is in the "course of his employment" though he has not yet actually entered upon his task (Note to 3 N. C. C. A., at 270); while returning to work (*In re Heitz v. Ruppert*, 218 N. Y. 148 [112 N. E. 750]);

while going to meals (*Martin v. Lovibund & Sons*, 5 N. C. C. A. 985, 988, *Sundine's case*, 218 Mass. 1 [105 N. E. 433], *Rowland v. Wright*, Note to 3 N. C. C. A. 278);

while on way to cook his meals (*Morris v. Lambeth*, 22 Times Law Rep. 22, Note to Ann. Cas. 1913C, p. 20); while eating his meals (*Brice v. Lloyd*, 2 B. W. C. C. 26, *Blorell v. Sawyer*, 3 N. C. C. A. 277); where he leaves his work and is on the roof for the purpose of taking fresh air (*Von*

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SERVANT:  
Workmen's  
Compensation  
Act: injuries  
in "course of  
employment."

*Ette's* case, 223 Mass. 56 [111 N. E. 696]); where, while delivering ice, he leaves his team while going toward a house for shelter (*State v. District Court*, 129 Minn. 502 [153 N. W. 119]); while he is going for his dinner pail after working hours (*Taylor v. Bush & Sons*, 5 Penne. [Del.] 378); while he is putting on his coat after his day's work (*Helmke v. Thilmann*, 107 Wis. 216); while on his way from work (*Gane v. Norton Hill Colliery Co.*, 2 K. B. [1909] 539, *Terlecki v. Strauss*, 85 N. J. L. 454 [89 Atl. 1023], *In re Shroeb*, Ohio Ind. Com. No. 36817, *In re Fahey*, Opinions So. Dept. of Labor, 283, *Stacy's* case, 225 Mass. 174 [114 N. E. 206]); where he is returning, after working hours are done, to a sleeping room furnished by the employer (*Doherty v. Employers' Liability Assur. Corporation*, 1 Mass. W. C. C. 450). If the employment is continuous, injury has been held to arise out of the employment where the servant, after a day's work, was sitting writing a letter, in a car furnished him by the employer to sleep in (*International & G. W. R. Co. v. Ryan*, 82 Tex. 565). And so where a servant girl, residing in her employer's home, was suffocated while asleep in her bed, through a fire which broke out in the house (*Chitty v. Nelson*, 126 L. T. J. 172).

"The general rule in construing compensation laws is that the responsibility of the employer begins when his employee enters his premises to perform the services required of him, and terminates when the employee leaves such premises, provided that he does not loiter needlessly, or arrive at an unreasonable hour in advance of the beginning of his duties." *Gordon v. Eby*, 1 Cal. Indus. Acc. Commis. Dec. No. 1.

The test seems to be whether deceased, "though actually through with the work, was still within the sphere of the work" (Note to *Hills v. Blair*, 182 Mich. 20 [148 N. W. 243]); was doing what "a man so employed may reasonably do within a time during which he is employed, and at a

place where he may reasonably be during that time" (*Bryant v. Fissell*, 84 N. J. L. 72 [86 Atl. 458]).

There are some holdings that run counter to these,—say, for instance, *Mahoney v. Sterling Borax Co.*, 2 Calif. Ind. Com., 700. But, on the whole, we incline to think that this employee was injured while in the course of his employment. He was where he was hurt because he had been employed. While his day's work was done, yet he remained where it was his duty to be, in order to begin the next day's work. He remained all the time within the sphere that his employment had fixed. Thus far, we sustain the decision of the trial court.

III. But it does not suffice that he was injured while in the course of his employment. It must further appear that his injury arose out of such employment. The defendants

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SERVANT:  
Workmen's  
Compensation  
Act: "injuries  
arising out  
of employ-  
ment;" bolt  
of lightning.

were bridge builders, who had charge of construction of county bridges in Story County. Deceased was employed by them. Decedent and others in such employment were by defendants lodged and boarded on the ground where the work was done. On the

night of the accident, the day's work had been finished, but the employees were in the boarding tent. They had got through washing the dishes, and were sitting there until it was time to go to bed. While thus engaged, the decedent came to his death from a stroke of lightning. Concede that he was in the course of his employment while thus in the tent awaiting his bedtime, or supervising other employees in getting ready for bed, and still there must be proof that the injury arose out of such employment. The burden is on the claimant. It is not discharged by creating an equipoise. It requires a preponderance. See *Eisen-trager v. Great Northern R. Co.*, 178 Iowa 713; *Savage's case*, 222 Mass. 205 (110 N. E. 283).

"The burden of furnishing evidence from which the in-



ference can be legitimately drawn that the death of an employe was caused by an accident arising out of and in the course of his employment rests upon the claimant." *Barnabus v. Bersham Colliery Co.*, 103 L. T. R. 513.

It must appear by a preponderance that there is some causative connection between the injury and something peculiar to the employment (*Jones v. United States Mut. Acc. Assn.*, 92 Iowa 652); that it resulted from some risk reasonably incident to the employment, because "out of" involves the idea that the injury is in some sense due to the employment (*Fitzgerald v. W. G. Clarke & Son*, 2 K. B. [1908] 796); a causative danger peculiar to the work, and not "common to the neighborhood," an injury fairly traceable to the employment as a contributing cause,—to some hazard other than one to which the workman would have been equally exposed though in a different employment (*McNicol's case*, 215 Mass. 497 [102 N. E. 697]); a hazard peculiar to the business which is "the immediate cause" of the injury (*Rodger v. Paisley School Board*, 1 Scots Law Times [1912], 271, and see *Robson, Eckford & Co. v. Blakey*, 5 B. W. C. O. 536); an injury due to something more than the normal risk to which all are subject, which, at the least, means that the employment necessarily accentuates the natural hazard attendant upon work done in the course of the employment (*State v. District Court*, 129 Minn. 502 [153 N. W. 119]).

The words "out of" involve the idea that the accident is in some sense due to the employment. *Barnabus v. Bersham Colliery Co.*, 103 L. T. R. 513; *Fitzgerald v. W. G. Clark & Son*, 2 K. B. (1908) 796. It is said in *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87 (150 N. W. 325), "an employe may suffer an accident while engaged at his work, or in the course of his employment, which in no sense is attributable to the nature of or risks involved in such employment, and therefore cannot be said to arise out of it."

*McNicol's* case, 215 Mass. 497 (102 N. E. 697), wherein recovery for injury by lightning is denied. It is done because no causal relation or peculiar exposure appears, and it is said that, while the injury need not have been foreseen or expected, yet, "after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence;" and that there can be a recovery only "when there is apparent to the rational mind, upon consideration of all the circumstances," there exists "a causal connection between the conditions under which the work is required to be performed and the resulting injury. \* \* \* A causative danger peculiar to the work \* \* \* incidental to the character of the business." While an accident arising out of an employment almost necessarily occurs in the course of it, the converse does not follow. *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87 (150 N. W. 325). To be sure, the nature of the occupation may supply causative relation. In *State v. District Court of Rice County*, 135 Minn. 324 (159 N. W. 755, 756), such relation was held to exist where an employee was handling instrumentalities charged with electricity, and there were present certain conditions—as, for example, a wet cement floor—which were quite conducive to the passage of the electric current, it further appearing that deceased must have been struck at the moment he came in contact with an electric wire or socket. But it is only as to some employments that this is so; and, as said in *Andrew v. Failsworth Industrial Society*, 2 K. B. (1904) 32, speaking generally, being struck by lightning does not arise out of an employment, because *prima facie* it is something which arises altogether outside of such employment, and is a risk incidental to a small class of employments only. Because this is so, it is held in *Klawinski v. Lake Shore & M. S. R. Co.*, 185 Mich. 643 (152 N. W. 213), that there may be no recovery where a railroad section man was killed by a

stroke of lightning, while in a barn in which he had taken refuge from a storm, at the direction of his foreman. In *Kelly v. Kerry County Council*, 1 B. W. C. C. 194, deceased was, during a heavy rain storm, working at a water table in the road with a shovel, freeing outlets and gulleys from matter that tended to choke them, and, while so engaged, was killed by lightning. It was held this employment created no special or peculiar risk from lightning, though deceased was obliged to do this work while a thunder storm was raging; that he was exposed to no greater risk of being struck by lightning than if he had been working in a field or garden; and that "the antecedent probability that he would be struck by lightning seems to be no greater in this case than in the case of any other person who went to work that day within the area of the thunder storm." To the same effect is *Hoenig v. Industrial Commission*, 159 Wis. 646 (150 N. W. 996), where an employee was killed by lightning, while working at the water's edge.

In *Karemaker v. "Corsican"*, 4 B. W. C. C. 295, a seaman, while at work on his ship, had his hands frozen, from handling frozen ropes. It was held the injury did not arise out of the employment, because the frost bites were caused by the elements. *Warner v. Couchman*, 1 K. B. (1911) 351, is to the same general effect. It has frequently been held that many accidents may happen to a workman, in the course of his employment, for which his employer would be under no liability. For illustration, a servant engaged in a foundry yard, in the course of his employment, if struck by lightning and seriously maimed, would have no claim under Workmen's Compensation Acts. *Falconer v. London & G. E. & I. S. Co.*, 3 Courts of Sessions Cases (5th Series) 564. It is said in that case:

"It must, I think, have arisen 'out of' his employment, and in a more exact sense than that it occurred to him when

at or going about his own employment in or about the factory."

The most that may be said where, as here, an employee is injured while sitting in his boarding tent, preparatory to going to bed, is that, if he had not been employed, he would not have been present in the tent, and would not have been struck at the time he was. In the same sense, the fact that he was born establishes a causative connection. If he had never come into being, he could not have been struck by lightning. The same argument might be made for a claim against one who sold a carriage to one who was struck by lightning while riding in it. What was said in *Graske v. Wigan*, 2 B. W. C. C. 35, covers the situation:

"It is not enough for the applicant to say 'the accident would not have happened if I had not been engaged in this employment, or if I had not been in that particular place.' The applicant must go further, and must say, 'The accident arose because of something I was doing in the course of my employment, and because I was exposed by the nature of my employment to some peculiar danger.'"

In our opinion, the injury claimed for did not arise "out of" decedent's employment.

3-b

It is not intended to hold that injuries from lightning can in no case be due to an industrial employment. It has been rightly said that they can be. See *State v. District Court*, 129 Minn. 502 (153 N. W. 119). The vice in this decision seems to us to be that, while it recognizes there must be more than the normal risk from lightning to which all are subject, and that the employment must necessarily accentuate the natural hazard from lightning, this is not followed to its logical end, and a recovery for injury by lightning is allowed where there was no such accentuation or abnormal risk. All that is requisite is that the employment

be of such nature as that, in reason, the employee is more exposed to hazards from lightning than is one in some other employment. Cases that hold a given accident from lightning did not arise out of the course of the employment recognize that such injury may be related to the employment. See *Hoenig v. Industrial Commission*, 159 Wis. 646 (150 N. W. 996). And so of *Rodger v. Paisley School Board*, 1 Scots Law Times. (1912) 271, wherein it is said:

"To be struck by lightning is a risk common to all and independent of employment, yet the circumstances of a particular employment might make the risk not the general risk, but a risk sufficiently exceptional to justify its being held that accident from such risk was an accident arising out of the employment."

And it has been rightly held that injury from lightning did arise out of the employment, where a telephone or telegraph operator was hurt by an electric shock received in the course of his work. *Atlantic Coast Line R. Co. v. Newton*, 118 Va. 222 (87 S. E. 618). And so where a workman on a high scaffolding was kept at work during a storm. *Andrew v. Failsworth Industrial Society*, 2 K. B. (1904) 32. But where the servant is riding a corn cultivator, and plowing corn, being struck by lightning is suffering from what is not peculiarly invited by the employment. A line-man who, while at his work, is bitten by a snake, will not be allowed to trace his injury to his employment, even though he would not have been bitten had he been elsewhere than where his employment called him. On the other hand, if he touch a live wire, or is struck by lightning while repairing or putting up a wire, he may well claim that his injury is peculiarly due to his employment.

As was said in *Kelly v. Kerry County Council*, 1 B. W. C. C. 194, there must be evidence that the servant was exposed to a greater risk of being struck by lightning than if he had been working in a field or garden. In *Robson*,

*Eckford & Co. v. Blakey*, 5 B. W. C. C. 536, it is well indicated what the natural range of inquiry is, and said:

"To what class of dangers does this man's employment expose him? \* \* \* Suppose he is a collier, I may say his employment exposes him to the risk of having things falling upon him from the roof, to the danger of tumbling down a shaft, and so on. In short, there is a peculiar class of dangers which exist only for people who go down into mines."

It is further illustrated by employments which compel walking in the street, and remaining off the sidewalk, as to which it has been said that there is a peculiar exposure to hazard from moving vehicles. In one word, it all turns upon whether it may in reason be said that, as distinguished from being hurt while employed, the injury is due to the nature of the employment. As said, we do not deny that being struck by lightning may be reasonably traceable to the nature of the work done, but decide that that may not be done in this case.

## 2-c

And it might well happen, too, that no recovery could be had under the compensation statute, even though injury was due to the negligence of the master. The negligence

5. MASTER AND SERVANT: Workmen's Compensation Act: remedy for non-industrial accidents. that sets the statute in motion is one that involves a failure to discharge a duty which the employer, as such, owes to the employee, as such. If the master furnish a defective scaffold for those who are erecting his building, the statute will give compensation; but if he ride a vicious horse to the premises where his bricklayer is at work, and the horse escape and strike the employee while he is preparing to ascend with brick, the one who caused the injury will be held responsible, but not under the provisions of the statute.

It does not necessarily follow, from the fact that one

struck by lightning might recover upon an accident insurance policy, or otherwise recover for such injury, that, therefore, recovery may be had under the Compensation Act. The statute, Section 2477-m16, Code Supplement, 1913, seems to contemplate injuries arising out of an industrial employment—industrial accidents. It is a fair analysis of *Hills v. Blair*, 182 Mich. 20 (148 N. W. 243), and *Rayner v. Sligh Furn. Co.*, 180 Mich. 168 (146 N. W. 665), that recovery under compensation acts can only be had for what is, in its nature, an accident growing out of an industrial employment. And in a concurring opinion in *Falconer v. Ship Co.*, 3 Court of Session Cases (5 Series) 564, Lord Trayner said that many accidents may happen to a workman in the course of the employment for which the employer would incur no liability, "for example, a servant engaged in a foundry yard in the course of his employment, if struck by lightning and seriously maimed, would have no claim for compensation under the act." It is said in *Klawinski v. Lake Shore & M. S. R. Co.*, 185 Mich. 643 (152 N. W. 213):

"There is no doubt that it was the legislative intent to compensate workmen for injury resulting from industrial accidents, and that such compensation is charged against the industry because it is responsible for the injury."

And in *Hoenig v. Industrial Commission*, 159 Wis. 646 (150 N. W. 996), that the law assumes "to provide compensation for industrial accidents only—those growing out of the employment and caused by the industry. \* \* \* Those caused by the industry and chargeable to the industry, and does not apply to injury resulting from those forces of nature described in the common law as acts of God, such forces as are wholly uncontrollable by men."

2-d

The evidence shows that the tent was placed in a river

bottom; that, on the afternoon of the day on which decedent was injured, the ground about the tent was saturated with water; that the tent had no floor, and was wet and muddy that afternoon; that it had

6. NEGLIGENCE: failure to erect lightning rods on tent. no lightning rods nor lightning arresters of any sort; that it was higher than the surrounding objects; that wire fences, which were part of the highway fence, were about the tent; that, just north of it, in close proximity to its guide ropes, there was a pile of steel rods, for use in re-enforcing concrete; and that the tent poles, besides being connected by the canvas comb or ridge of the tent, were further connected by a No. 12 wire, used for hanging dishcloths and other articles to dry, which wire stretched above the top of the table in the tent. It is testified that the phenomenon of lightning and danger therefrom may, in a certain degree, be guarded against; that occupants of steel or metal structures are immune from danger from lightning; that metal is a good conductor of electricity; that a wire fence increases lightning hazards in its immediate vicinity; and that wet earth is a conductor of electricity. Appellee uses these facts for the proposition that defendants may not defend with *vis major*, because that defense is available only where the act of the elements is the sole cause of injury, and is not available where the "act of God" is coupled with human negligence. And it is true there is a general rule that "act of God" is no defense unless what happens is due to natural causes which can neither be anticipated, guarded against, nor resisted, and which could not have been prevented by any human prudence. *City of McCook v. McAdams*, 76 Neb. 1 (106 N. W. 988); *Colt v. McMeachen*, 6 Johns. (N. Y.) 160 (5 Am. Dec. 200); *Garrett v. Beers*, 97 Kan. 255 (155 Pac. 2). He contends that, in this case, this negligence is furnished by the fact that the defendants did not equip this tent with appliances which are accepted as preventatives of light-



ning, or as reducing the hazard therefrom. Before considering this position, it is first to be said that, throughout, the claimant had the burden of showing that the alleged negligence *was* the proximate cause of his injury. It will not suffice that it is equally probable or possible that such negligence caused the injury, and that it did not. There is no evidence that the wire fence, the failure to have lightning arresters, and the like, caused the injury, rather than a bolt of lightning that came directly from the clouds, and which would have struck where it did though the things complained of had not been present. Let us assume, for the sake of argument, that, abstractly speaking, it may be no defense to a claim under our Compensation Act that the employer used every care that a reasonable man would, and was not obliged to use super care. Be that as it may, when, even as to such a claim, it becomes necessary to assert that *vis major* is no defense, because of the concurring negligence of the master, there may be an inquiry into whether the master was as careful as reasonably prudent men are in like circumstances. We think that failure to rod this tent and the like, not to anticipate the possibilities of lightning therewith, and the existence of the wire fence and the like, constituted no such negligence as deprives defendants of the defense of *vis major*. They were bridge contractors, constructing and equipping a boarding tent, and not an electrical telegraph or telephone system or the like, as to which ordinary and reasonable prudence demands precautions against lightning. See *Atlantic Coast Line R. Co. v. Newton*, 118 Va. 222 (87 S. E. 618). They are not within the rule of *Sloan v. J. G. White Eng. Co.*, 105 S. C. 226 (89 S. E. 564), wherein the Supreme Court of South Carolina, by a divided vote, held that, where a servant is struck by lightning, which came into a power house wherein he was working, and over a negligently grounded wire, and the proper grounding was a matter peculiarly within the

knowledge of the master, that, if the latter pleaded *vis major*, he has the burden of showing that the injury arose from an act of God, without contribution thereto by the negligence of the employer. To the same effect is *Brown v. West Riverside Coal Co.*, 143 Iowa 662, 671; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243 (60 N. W. 430); *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564 (86 Am. Dec. 415, at 418); *Amend v. Lincoln & N. W. R. Co.*, 91 Neb. 1 (135 N. W. 235, 236). In *Hoenig v. Industrial Commission*, 159 Wis. 646 (150 N. W. 996), there was testimony tending to prove that the surroundings created a peculiar exposure to lightning. But it was held, upon the physical facts, that there was no special hazard, and that the claimant might not recover. The vast majority would never think of lightning, and appliances to insure safety from it, in putting up such a tent. As well hold that a livery man is liable because he permits a team and buggy to go out in a rain storm without putting lightning rods or some other device on the buggy. On the theory of appellant, why would not a farmer be liable because his hired man was killed by lightning while sleeping in the bedroom provided for him, because the farmer's house had not been rodded?

In our opinion, it was error to hold that here was an injury arising out of the employment. Wherefore, we are constrained to reverse.—*Reversed*.

GAYNOR, C. J., LADD, WEAVER, EVANS, PRESTON, and STEVENS, JJ., concur.

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W. H. HALL, Trustee, Appellee, v. D. B. GETTY et al.,  
Appellants.

**CHATTEL MORTGAGES:** Sale of Property as Working Waiver of  
Lien. One of several beneficiary creditors under a trust deed

to chattel property who allows the trustee to sell the property, and later approves of a sale by the purchaser to a third party who, in good faith, supposed that the property was free of any incumbrance, will not be permitted, subsequently, to bring forth a prior chattel mortgage on the property and foreclose the same.

*Appeal from Linn District Court.*—MILO P. SMITH, Judge.

APRIL 4, 1918.

SUIT in equity to foreclose a chattel mortgage. Judgment in favor of the plaintiff. The defendant Hess appeals.—*Reversed.*

*Voris & Haas, B. L. Wick, and E. A. Johnson*, for appellants.

*Redmond & Stewart*, for appellees.

STEVENS, J.—The plaintiff is an employee of the defendant bank; the defendant Huston is its cashier, and Getty is one of its stockholders. On May 12, 1915, Henry U. Zuber was the owner and in possession of a stock of hardware at Cedar Rapids, which was encumbered by a mortgage in favor of the defendant Paul H. Huston, given to secure the payment of a note of \$5,000, payable to the defendant bank. On the date above mentioned, Zuber and wife executed a bill of sale, conveying said stock of hardware to the plaintiff. Although not so designated therein, the stock was in fact conveyed to him in trust, for the benefit of the bank and other creditors of Zuber's. Possession of the stock was immediately taken by the plaintiff, who continued the business, under the belief that a sale of it could be made to better advantage as a going concern. On the same date on which the bill of sale was executed, an agreement in writing was entered into between Zuber and wife and the defendant Huston, which acknowledged the indebtedness of Zuber to the bank and other creditors, with-

out naming them, and provided that Huston should take charge of the stock in trust, and sell and convey the same, and apply the proceeds received therefrom to the payment of all the indebtedness of Zuber, and account to him for any balance thereafter remaining. On the 23rd day of September, 1915, the plaintiff, as trustee, sold the stock of hardware, except a small portion that was reserved, to the defendant D. B. Getty. The contract of sale in writing was entered into, containing the following provision:

"It is specifically understood that the said Hall, trustee, shall retain and collect all accounts receivable to the old firm and to himself, as trustee, to the date of October first, 1915, and that from the proceeds of said sale, and collections from said accounts receivable, he is to take care of, pay, settle and assume all accounts payable by the said old firm, or the trustee aforesaid, up to October first, 1915."

Getty took possession of the stock on the last-named date. The consideration for the sale to Getty was \$4,550, and was to be paid on October 1st, when possession of the stock was delivered to him. Nothing, however, was ever paid by him. It may be inferred from the evidence that Getty expected to borrow the money of the defendant bank for that purpose, upon collateral held by him. This was fully talked over between Getty and Huston before the contract was signed, but the arrangement had not been consummated at the time the former took possession of the stock.

On October 18, 1915, plaintiff notified Zuber's creditors of the transfer of the hardware stock to him as trustee, and of the sale to Getty, and represented that he would be able to pay about 85½% on accounts, and stated that, if the creditors would forward receipt in full for their claims upon the above basis, he would forward draft by return mail. On October 23rd, Getty wrote a letter to plaintiff, complaining that the stock had been grossly misrepresented

to him, and indicating his unwillingness to pay the full purchase price agreed upon therefor. On the 30th day of December, 1915, defendant Getty entered into a contract in writing with appellant, by the terms of which he exchanged the stock of hardware to him for a 120-acre tract of land in Delaware County, securing the payment of the difference between the agreed value of the stock and the farm by mortgage on the latter. Hess placed his son-in-law in possession of the stock, who continued the business.

This action was commenced on August 25, 1916, against all of the defendants except Huston, who was later made a party. In his petition, plaintiff alleged and sought to have a vendor's lien established and foreclosed upon the hardware stock. We gather from the record that a demurrer was filed by Hess to plaintiff's petition, and sustained by the court. Plaintiff thereupon amended his petition, and set up the Zuber mortgage, asking the foreclosure thereof. Separate answers were filed by each of the defendants, the bank and Huston joining with the plaintiff in the relief prayed in the amendment to his petition. Judgment was entered against the defendant Getty, and the Zuber mortgage established as a lien upon the hardware stock, and special execution ordered for the sale thereof. The defendant Hess alone appeals.

While the evidence is somewhat conflicting upon some of the material questions involved upon this appeal, the conclusion from the evidence that the mortgage was not, at the time of the trial of this case, a lien upon the hardware stock, would seem to be irresistible. It is conceded by all parties that the plaintiff was a mere figurehead in the several transactions involved, and that the real party who had charge and management thereof was defendant Paul H. Huston. The mortgage held by him was as security for an indebtedness due from Zuber to the defendant bank, so that he was the representative and agent of the bank, the real

creditor of Zuber. It is claimed that Zuber had other creditors than the bank, and that the stock was transferred to Hall as trustee for all of them.

As before stated, the defendant Getty was a stockholder in the bank, and, prior to the purchase of the hardware stock, evidently had tentative arrangements with Huston to borrow the money of the bank with which to pay for the stock. The arrangement, however, was not completed when possession of the stock was taken by Getty. It may be assumed, however, that, while the bill of sale was executed by plaintiff, it was approved by Huston.

Very shortly after Getty obtained possession of the hardware stock, he apparently became convinced that it was not as represented, and he protested to plaintiff, and, in the letter above referred to, intimated that he would not pay the full purchase price agreed upon. So far as the record discloses, this is probably the reason Getty failed to pay for the stock. Getty testified that, at the time he purchased the stock, he did not know of the Zuber mortgage. Plaintiff testified that he believed he informed him thereof. It is quite apparent that, at the time of the sale of the stock to Getty, plaintiff intended to convey full title to him. This is further evidenced by the fact that, in his original petition, he does not refer to the mortgage, but relies upon an alleged vendor's lien on the stock. A rescission of the sale was not attempted, nor is any explanation offered for the failure to proceed under the mortgage, instead of attempting to have a vendor's lien established upon the stock.

After negotiations had been entered upon between Hess and Getty, which finally resulted in the sale of the stock to the former, he visited the defendant bank, and, it is agreed, had some conversation with Huston. As to what was said, the evidence is in conflict. Appellant is positive and definite in his assertion of what was said, whereas Huston is not. Appellant testified that he had been informed

that a former owner of the stock had conveyed the same to Hall, or the bank as trustee; that he had no actual notice of the Zuber mortgage; that he went to the county seat and examined the chattel mortgage record to ascertain whether Getty had placed any encumbrance on the stock; and that he then went to Huston and inquired whether there was any reason why Getty could not give him an absolutely good title to the property and that Huston said:

"No, Mr. Hess, you go ahead and make the deal. Mr. Getty is owing here a little at the bank, but he has collateral, and he has some interest in the bank and plenty of real estate outside,—you go ahead and make the deal."

Huston's version of the conversation was, as he remembered it, that he told appellant that Getty was the owner of the stock, and would be able to turn it over to him; that nothing was said about the mortgage or the title. He further admitted that Mr. Getty had, prior to this conversation, talked with him about the contemplated sale of the stock to appellant, and had informed him that he was trading same for an equity in some Delaware County land.

Appellant further testified that he told Huston, at the time, that no money was to be paid to Getty. This fact, however, was, at the time, known to Huston. The representative of the bank who had charge of the stock, prior to the sale to Getty, and who thereafter was employed by Mr. Getty, testified that he told appellant about the mortgage, and inquired whether he intended to purchase it without its being released. This conversation is claimed to have taken place in the presence of H. F. Ohman, appellant's son-in-law. Ohman testified that no such conversation ever occurred in his presence, and Hess at all times insisted that the first he knew of the mortgage was when notice of this suit was served upon him. Shortly after, or the same day, Huston went to see Hess, when some conversation was had, concerning which Huston testified as follows:

"I remember meeting Mr. Hess about November 20th, down at the store in controversy, and mentioning Redmond & Stewart. I heard Mr. Hess' testimony as to what was said there between us. As I remember it, that morning,—the bank had been made a party to the case, and I think Mr. Hess was named on the paper I got. I was going down there, and saw Mr. Hess, and went in and asked him if he had seen Redmond & Stewart. He said he had not, and wanted to know what it was about. I told him regarding this stock; that Hall had brought an action against him and myself, as cashier of the bank, and Mr. Getty. He said, as I remember it, 'You told me there was nothing against the stock.' I told him I did not remember of saying any such thing."

In this connection, it should be observed that Hall was a mere figurehead; and the bank for whom he worked, and of which Huston was cashier, was the real party in interest. It also appears from the testimony that appellant immediately insisted that Huston had told him there was nothing against the stock. This, Huston did not deny, but stated that he did not remember having so informed him.

That, at the time Hess purchased the stock of Getty, he believed the same was clear of encumbrance, and that, whether his or Huston's version of the conversation between them is adopted, Huston must have known that Hess believed Getty had full authority and right to convey the title, free of the lien of the Zuber mortgage, is beyond reasonable controversy; and the evidence, coupled with the circumstances, tends to support the claim of Hess. Getty was dissatisfied with the stock. This was known to Huston. He had not paid the purchase price, but has possession of the stock. Huston admits that he did not apprise appellant of the Zuber mortgage. The sale from plaintiff to Getty was with the knowledge, acquiescence, and assistance of Huston and the bank, all of whom now ratify the sale. The sale from



Getty to appellant was likewise with the knowledge and consent of the bank and Huston, and it is fairly inferable from the testimony that Getty did not have actual notice of the mortgage; and in our opinion it is apparent that Hess had no actual knowledge thereof. If, at the time Huston talked with Hess, he was making some claim under the Zuber mortgage, upon his own admissions he should have so informed him. It must have been apparent to him that Hess would thereafter proceed with the understanding that Getty would impart a good title to the stock. As a part of the contract between plaintiff and Getty, the former specifically agreed to pay the claims of all creditors of Zuber and himself out of the bills payable of the old firm and the trustee. This was intended, doubtless, to vest in Getty a clear title to the stock.

It is the contention of counsel for appellant that, by reason of the matters above stated, the mortgagee waived the lien thereof upon the stock, and they are now estopped to assert the same. We are in full accord with this contention. It is unnecessary to elaborate upon the reasons therefor. They are apparent from the foregoing statement, and find support in our former decisions. *Livingston v. Stevens*, 122 Iowa 62; *Smith v. Clark*, 100 Iowa 605; *Hoyt v. Clemans*, 167 Iowa 330; *Byam v. Johnson Bros.*, 93 Iowa 243.

Some contention is made by counsel for plaintiff and the bank that the value of the Delaware County land was misrepresented to Getty by appellant, and that he in reality paid little or nothing for the stock. The record fails to disclose that Mr. Getty joins in this contention. In any event, it has no controlling importance in this case. For the reasons indicated, the judgment and decree of the court below, in so far as the same established a lien upon the hardware stock, or is adverse to appellant, must be and are—*Reversed*.

PRESTON, C. J., LADD and GAYNOR, JJ., concur.

MILLIE HAWTHORNE, Appellee, v. FREDERIC A. DELANO et al.,  
Appellants.

**APPEAL AND ERROR:** Effect of General Reversal. A general order of reversal, on the ground of insufficiency of evidence to sustain the verdict, sends the cause back to the trial court for full retrial. If no materially different evidence is produced on such retrial, a directed verdict should be entered against plaintiff.

**EVIDENCE:** Privileged Communications—Report of Accident. The report of an accident, made by a railroad company to the railway commission, under Section 2120-k, Code Supp., 1913, is not privileged.

*Appeal from Shenandoah Superior Court.*—GEORGE H. CASTLE, Judge.

APRIL 4, 1918.

ACTION to recover damages for mutilating a dead body. Judgment for the plaintiff in the court below. Defendant appeals.—*Reversed.*

*J. L. Minnis, N. S. Brown, and Jennings & Mutton*, for appellants.

*Earl R. Ferguson and C. R. Barnes*, for appellee.

GAYNOR, J.—The plaintiff brings this action in two counts, one bottomed on a common-law liability, and the other bottomed on a claimed violation of Section 4945 of the Code of 1897, which reads:

"If any person, without lawful authority, wilfully dig up, disinter, remove or carry away any human body, or the remains thereof, from its place of interment; or aid, assist, encourage, incite or procure the same to be done or attempted; or wilfully receive, conceal or dispose of any such human body or the remains thereof; or if any person, with

the intent to commit any of the aforesaid acts, partially perform the same; or if any person wilfully and unnecessarily, and in an improper manner, indecently expose, throw away or abandon any human body, or the remains thereof, in any public place, or in any river, stream, pond or other place, he shall be imprisoned in the penitentiary not more than two years, or be fined not exceeding twenty-five hundred dollars, or both."

The contention of the plaintiff is that, some time on the night of August 11, 1913, one Charles Hawthorne was killed by being pushed or kicked from one of defendant's trains, known as No. 14, and the body left lying upon the track; that, while it was so lying, the company wrongfully mutilated it, thereby causing plaintiff, as the mother of the dead boy, to suffer great mental pain and anguish. The father assigned to this mother, plaintiff, an alleged cause of action existing in his favor, based upon the same facts. The body was discovered in the morning of the 12th, greatly mangled, and lying between the rails of the track.

Damages for the wrongful death of the decedent were settled in another action, and are not involved in this action. The only claim here rests upon the alleged wrongful act of the defendant in mutilating the body after death, resulting in great mental pain and suffering to the father and mother.

This particular case was in this court before on appeal. The opinion of the court is found in 172 Iowa 44. On the former trial, this court found that the evidence in the record was insufficient to justify a verdict for the plaintiff, and that a motion interposed by the defendant for a directed verdict should have been sustained. The case was accordingly reversed and remanded. Upon its return to the district court, the defendant filed a motion for judgment in its favor, based upon the fact that this court, on the

1. APPEAL AND ERROR: effect of general reversal.

former appeal, judicially determined that the evidence was insufficient to justify a verdict against it, and that the court to which it was remanded should, therefore, enter judgment in its favor. This motion was overruled, and this is the first complaint made.

It will be noted that, on the first appeal, this court determined that, upon the record there made, the evidence was insufficient to justify a verdict for the plaintiff. It did not determine that the plaintiff did not have a cause of action against the defendant, if the facts relied upon were proven. It reversed it simply because the evidence submitted on that trial did not justify a verdict against the defendant, and remanded it for retrial. It was then up to the plaintiff to introduce further evidence to support her contention. If no further evidence were offered upon the second trial than appeared upon the first trial, then the finding of this court upon that evidence would be conclusive upon plaintiff's right to recover. But upon the retrial,—a retrial having been permitted by reversal,—plaintiff might offer further evidence supporting her contention, and a case might be made against the defendant sufficient at least to go to the jury.

Of course, on an appeal to this court in a law action, a finding by this court that the record does not disclose sufficient evidence to justify a verdict against the defendant, is not a finding that sufficient evidence does not exist to justify a finding against the defendant. So, upon reversal, unless otherwise ordered, it was up to the plaintiff to make a further showing in support of her contention, and to this end she introduced further evidence upon the issues tendered. This court, however, may, upon an examination of the whole record submitted to it on appeal, determine that all the evidence which either party can offer legitimately is before the court, and that it is insufficient to justify a verdict against the defendant; and it may, thereupon, by special

order, direct the court to enter a judgment in the defendant's favor. Or if, on appeal, it is found that, conceding all that plaintiff contends for as established, plaintiff has no cause of action, the court may, by proper order, dispose of the case on appeal, and so direct the lower court. A simple reversal and remand of the case to the district court does not necessarily determine either of these questions, and does not necessarily end the case. The plaintiff may, if he has other testimony supporting his claim, have a retrial and introduce further testimony and take the judgment of the court upon the case as then made. However, we have had occasion recently to pass upon this question, and our finding is against the contention of plaintiff on this point. See *Owens v. Norwood-White Coal Co.*, 181 Iowa 948.

Upon the overruling of the motion for a directed verdict based upon the finding of this court upon the former appeal, the case proceeded to a retrial in the district court. At the conclusion of all the evidence, the defendant moved again for a directed verdict, based upon the insufficiency of the evidence to justify a verdict against it. This motion was overruled. The theory on which this motion was overruled is that the record as made upon this second trial was not the same as the record made upon the former trial; that further evidence bearing upon issuable facts was submitted by the plaintiff; and that this was sufficient to justify a submission of the cause to the jury. A verdict was returned for the plaintiff. The overruling of this motion is the second ground of complaint on the part of the defendant.

This requires an examination of the record as now before us. We will say, however, that the record is substantially the same as made on the former appeal, with the exception of two or three matters, to which attention will be hereafter called. The opinion on the former appeal recites fairly the facts as they then existed in the record, and at

tention is called to a recitation of facts there; and we will not attempt to repeat them here, but confine ourselves to a consideration of this added testimony which, it is claimed, distinguishes this record from the record on the former appeal.

On the former appeal, Earl Polk, upon whom the plaintiff relies specially to prove one of the material facts in this controversy, testified:

"I never saw him going to the cornfield; I saw him in the cornfield. The porter followed him along and then got on the train. Deceased ran parallel, inside the cornfield, going the same way as the train. At the cut, he slid down the bank, and caught the back end of the sleeper. He had hold of the train, and someone in blue uniform pushed him off. I was watching. He fell. I was looking out of the window near the middle of the chair car. The weather was warm. My window was up. I was leaning out as far as I dare without falling off. I never saw him since they pushed him off and he fell. He fell from the rear steps of the sleeping car. The train was going reasonably slow up a big grade. When they pushed him off, he lit about the middle of the rails. They pushed him off, and that was the last I saw of him."

He adds to his testimony in this trial that he saw him lying in the middle of the track, after he fell or was pushed off.

This really is the only substantive testimony that the deceased was killed by being pushed or kicked off the train, and his dead body left lying upon the track. There is no evidence that any officer in charge of the train knew that he was dead and that his dead body was left lying upon the track. The most that can be said from this evidence is that, after he fell from the train, he was seen lying upon the track. There is no evidence that anybody knew or had reason to believe at that time that the fall had killed him.

The train went on its way. There was no evidence that anyone on the train knew then that he was injured. The train was picking up speed rapidly. It passed into a cut. We say the evidence does not show that he was then dead, or that anyone in charge of the train had reason to believe that he was dead,—that the fall had killed him. To make a case, it must appear that the defendant, before allowing its trains to pass, knew that a dead body was lying there upon the track. The knowledge of these train officers, even if the evidence could be construed to reach this point, that the decedent had been pushed off or kicked off or had fallen from the train, and was lying upon the track immediately after his fall, did not charge the company with notice, through these officers, that the decedent was dead and lying on the track at the time the later trains were permitted to pass that way over the body, if they did so do. The question is not now whether the company was legally responsible for the death, even though caused by other trains. The cause of action for alleged mutilation could arise only after the death of the decedent, and because of the mutilation of the dead body. The argument for the plaintiff is that the circumstances shown were sufficient to warrant the jury in finding that decedent was killed in falling from train No. 14, and that the trainmen must have known it. Train No. 14, of course, did not mutilate the body. The deceased fell behind this train, and this train moved on its journey. The mutilation, if any, must have been caused by trains following over the same track later. It is not claimed that any of the employees of any of these following trains knew that the body was upon the track at any time. It is the claim of the plaintiff that the train crew, or some of them, knew that the body was upon the track, and that this knowledge should be imputed to the defendant company, regardless of any want of knowledge on the part of the employees who ran trains over the body. The theory

upon which plaintiff plants her case is that the decedent was killed by the train from which he was removed; that the employees in charge of that train knew that he was killed in falling from that train; that, with this knowledge, which is sought to be imputed to the company, it left him lying upon the track, and thereafter permitted trains to pass over the place where the dead body was lying, and mutilate it.

As we have said before, there is not sufficient evidence to justify the jury in saying that any member of this crew on No. 14, the train from which he fell, knew that he was killed in the falling, or knew that his dead body was left lying upon the track. There being no knowledge in this crew, there was no knowledge to impute to the company that would call for action on its part. We may assume that the knowledge of this crew, if it had knowledge that the dead body was lying on the track, would be imputed to the company and would be the knowledge of the company; and if, with this knowledge, as imputed, it wrongfully permitted its trains to pass over the track while the dead body was there exposed, and mutilated it, the company might be liable; but knowledge must be shown in these employees before any can be imputed to the company.

On this trial, however, the plaintiff introduced a paper, on which she relies to show that the company did have knowledge that the dead body was lying upon the track.

This paper came from the files of the railroad commissioners, and purports to be, and we may assume is, a certified copy of a notice given by the defendant company to the railroad commissioners, in pursuance of the requirements of Section 2120-k of the Code Supplement of 1913, which reads as follows:

2. EVIDENCE:  
privileged  
communications:  
report  
of accident.

"That upon the occurrence of any serious accident upon any railway within this state, which shall result in



personal injury, or loss of life, the corporation operating the road upon which the accident occurred shall give immediate notice thereof to the board of railroad commissioners whose duty it shall be, if they deem it necessary, to investigate the same, and properly report to the governor the extent of the personal injuries, or loss of life, and whether the same was the result of mismanagement or neglect of the corporation on whose line the injury or loss of life occurred. Provided that such report shall not be evidence or referred to in any case in any court."

In obedience to this requirement of the statute, it appears that the defendant company made to the board what is called a report of this accident, on a blank furnished by the board, in which it said:

"Report of accident at or near Strahm, Iowa, on Moberly Division of above-named road [defendant's road], on August 12, 1913. Time, eight P. M. Killed, one, Charles Hawthorne, a trespasser. Was stealing a ride on passenger train 14, engine 347, and fell off train and fatally injured.

"[Signed] General Superintendent."

Assuming, but without deciding, that this report was competent evidence, we have to say that it fails to show the fact to establish which it was offered: to wit, that the company knew, prior to August 12, 1913, that the dead body of Charles Hawthorne was lying upon the track at the time of or before the passage of the trains that followed No. 14, which, it is claimed, mutilated the body. There is no date to this report, no showing when it was filed with the board of railroad commissioners, no showing when the information came to the company upon which the report was predicated, or by whom it was communicated to the company. If it be true, as contended for by the plaintiff, that Charles Hawthorne died immediately upon falling from the train, and was left lying upon the track, his death must have occurred about 8 o'clock in the evening of August 11th. The

first train passing after that was a westbound train, passing through Shenandoah about 9:09 P. M.; the next, a freight train, 1:40 A. M.; next, 4:09 A. M.; next, 7:32 A. M. The body was removed from the track about 7:00 o'clock on the morning of the 12th. The paper introduced in evidence indicates on its face that the party signing the paper understood that the accident occurred on the 12th. It is apparent, then, that the person signing the paper did not know that the accident occurred prior to the passage of the trains which it is claimed mutilated the body. Therefore, the paper itself does not show that the person signing the paper knew that the dead body of Charles Hawthorne was lying on the track prior to the passage of these trains which mutilated the body. Assuming that the knowledge of the sender of this notice was the knowledge of the company, the knowledge was of an occurrence on the 12th, and after the time when the body was removed, and could not be construed into a holding that the sender of this notice to the commissioners knew that the fatal injury occurred on the night of the 11th, so as to charge the defendant with notice before the passage of the trains which it is claimed mutilated the body.

So we hold that this notice, even conceding it to be admissible as evidence, does not furnish proof that the defendant knew, prior to the time these trains that followed No. 14 passed over the track and mutilated the body, that the dead body was lying upon the track and would be mutilated by the trains, if they were permitted to pass.

It is the contention of the defendant, however, that this paper was not admissible; that, the paper having been furnished to the railroad commissioners, under the compulsion of the section hereinbefore set out, it was, by the terms of the section, privileged information, and could not be used against the company furnishing it.

We cannot agree to this proposition. The report which

is privileged is the report made by the commissioners to the governor. The company, under the statute, is required simply to give notice to the commissioners of the fact of the accident, the time and place, and is not required to furnish any detailed statement as to how the accident occurred, or the circumstances or conditions under which it occurred. Ordinarily, there would be needed no protection against the use of the report made by the commissioners to the governor; since it would be, of necessity, an ex-parte investigation, made, not in the interest of future litigants, not in the interest of the injured party or his legal representatives, but in the interest of the general traveling public, and to aid in the better regulation and control of train service, in the interest of the state and the public. In an investigation of this kind, started under this statute by the railroad commission, however, it may have been the thought of the legislature that much of the information on which the report to the governor rested, must be secured through an examination of the agents and employees of the company, and would necessarily be embodied in the report to the governor; that, to secure a full, fair, and honest exposé of all the facts by the company to the commission, on an examination or investigation, the report made upon such examination could not be used in evidence or referred to in any case in court: this, that the company might be free in its communication with the state officers, to tell them the truth, the whole truth, and nothing but the truth; that the investigation in the interest of the public and the state might be full, free, and untrammelled, and without fear of consequences to the company or to those who aid in making the report, in the event litigation grows out of the transaction. This, we think, was the purpose of the statute, and this, we think, is a fair interpretation of the statute. The notice, however, which the company is required to give, does not involve an exposé of matters which involve the

cause of the accident or the circumstances under which it occurred. If the company voluntarily makes statements in this notice, beyond the requirements of the statute, such statements may not be protected even by any rule of public policy invoked by counsel for the defendant in this case. In the language of our former holding, we now hold that, regardless of the question of whether, upon any view of the evidence, the defendant might be held for the alleged wrongful killing of the decedent by means of some train, no special liability is disclosed as for the mutilation of the dead body, or as for a violation of Section 4945 of the Code.

Other questions are discussed, but we do not deem it necessary to pass upon them at this time, and the judgment of the district court is—*Reversed*.

PRESTON, C. J., LADD, SALINGER, and STEVENS, JJ., concur.

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MARY ANN McKEOWN, Appellant, v. W. W. MORROW et al.,  
Appellees.

**ESCHEAT: Liability of State—Interest.** One who proves his heirship to funds which are held by the state under an order of escheat, is entitled to interest on the fund only from the date of the decree which establishes such heirship, and then, only for such amount of interest as the state or its officers *actually* receive after said date on the fund, as a school loan. (Sec. 3391, Code, 1897.)

*Appeal from Franklin District Court.*—EDWARD M. McCALL,  
Judge.

APRIL 4, 1918.

THIS case involves the right of a claimant to a fund held as for escheat. The opinion states the facts. The right was

denied by the court below. Plaintiff appeals.—*Reversed and remanded.*

*Jno. M. Hemingway*, for appellant.

*H. M. Havner*, Attorney General, and *C. A. Robbins*, Assistant Attorney General, for appellees.

GAYNOR, J.—On March 1, 1908, one James Murray died intestate in Franklin County in this state. An administrator of his estate was duly appointed. After paying all claims and charges against the estate, there was left in the hands of the administrator for distribution, the sum of \$7,853.99. No person appeared, as heir or otherwise, to claim the estate in the hands of the administrator. It was, therefore, adjudged to be in escheat, and an order was entered by the district court, directing the administrator to pay the sum so in his hands to the treasurer of the state. In pursuance of such order, the administrator did pay to the treasurer of the state the full sum aforesaid, on the 21st day of April, 1911. Thereafter, on October 9, 1911, the plaintiff herein appeared, filed a petition in the district court, setting up the facts above recited, and alleging that she was and is the sole heir of the said James Murray, and as such is entitled to have and receive the entire estate left by him, subject only to proper charges and expenditures necessary to the settlement of the estate. In her application for the funds, she made the treasurer and auditor of state parties defendant. A showing was thereupon made by her as to her heirship, and as to her right to receive the funds. In that proceeding, the treasurer of the state appeared and contested her right. The trial court found that plaintiff had established her right to the funds, and was entitled to judgment for the return of the money, as claimed in her petition, with accumulated interest, less such sum as the state was entitled to retain under the collateral inheritance law; and an order was, accordingly, duly entered.

The state appeared in said proceeding and filed an answer. An appeal was taken from the order and judgment of the court aforesaid to this court, and was, upon a hearing in this court, affirmed. Thereupon, the state, through its proper officers, paid over to the clerk of the district court, for the use and benefit of the plaintiff, the sum of \$7,853.99, being the amount received by it, as aforesaid, less the sum due the state under the collateral inheritance statute. Thereupon, the plaintiff filed a further motion in the district court, requiring the said officers of the state to pay to her the interest that accumulated during the time it was held by the state under the order of escheat. This motion was overruled by the court, and from this, the plaintiff appeals.

The only question here for our consideration is whether or not, under the facts herein disclosed, the plaintiff is entitled to interest on the funds while the same remained in the hands of the proper officers of the state.

For a fuller statement of the facts in this case, see the opinion of this court filed in the former appeal, 167 Iowa 489.

In plaintiff's original application to have this fund returned to her, she prayed that, upon proof of her heirship, the judgment of escheat be set aside, and that an order be entered directing the treasurer and auditor to refund and pay over to her, not only the sum received under the order of escheat, but such interest also as had been received thereon by the auditor and treasurer during the time it was so held. The court in that proceeding decreed that the amount received be withdrawn and returned, with accumulated interest thereon, less the amount of the collateral inheritance tax due the state under the collateral inheritance tax law.

The allegations of plaintiff's motion now before us are that, while the money so received from the estate of James Murray was in the hands of the state and its proper officers, the money was loaned out at  $4\frac{1}{2}$  per cent interest, payable annually, and that the money continued to bear interest

at that rate until the 24th day of March, 1915, when the auditor of state recalled the sum of \$4,000, and paid the same to the plaintiff; that the balance remained drawing interest until May 1, 1915, when the auditor paid the further sum of \$2,000 to the plaintiff; that the balance then remaining, \$1,409.69, remained in the hands of the officers of the state, bearing interest at 4½ per cent, until December 28, 1915, when the same was paid over to the plaintiff. Plaintiff further says that, notwithstanding the order and judgment in the case, the auditor has taken the interest as collected, and distributed it among the various counties of the state, and has refused to recall said interest and pay the same over. Plaintiff asks that a mandatory injunction issue, commanding the auditor to direct the various counties to pay back the amount of interest aforesaid distributed to them, and that, when so paid, the same be turned over to her.

The judgment of the court overruling this motion was entered on April 12, 1917, and from this action, this appeal is taken.

Two propositions present themselves:

The first is: Is the state liable for interest accruing upon money received by it, under an order of escheat, to the one who subsequently appears and proves his heirship?

Second. Though not liable under the law as written, is the decree requiring the state and its officers to pay over accumulated interest so binding upon the state and its officers that, though not liable at law for interest, they become bound to account therefor, by reason of the decree of the court, directing them to pay the principal sum with accumulated interest?

This judgment and order having been affirmed by this court on appeal, a third question arises, as an incident to the first two, to-wit: in the event the state or its officers are liable to the plaintiff for interest, from what time should interest be reckoned? Or rather, what accumulated interest is the plaintiff entitled to?

Section 3388 of the Code of 1897 provides:

"When the judge or clerk of the district court has reason to believe that any property of the estate of an intestate within the county should by law escheat, he must forthwith inform the state auditor thereof, and appoint some suitable person administrator to take charge of such property, unless an executor or administrator has already been appointed for that purpose in some county in the state."

Code Section 3389 provides for notice best calculated to notify those interested, or supposed to be interested, in the property.

Code Section 3390 provides:

"If within six months from the giving of such notice no claimant thereof appears, such property may be sold and the proceeds, under the direction of the state auditor, paid over by the administrator for the benefit of the school fund. If real estate, the sale shall be conducted and the proceeds treated like those of school lands."

Code Section 3391 provides:

"The money \* \* \* shall be paid at any time within ten years after the sale of the property or the appropriation of the money, but not afterwards, to anyone showing himself entitled thereto."

Code Section 3387 provides:

"If there is property remaining uninherited, it shall escheat to the state."

Code Section 2838 provides:

"The permanent school fund, the interest of which only can be appropriated for school purposes, shall consist of \* \* \* the proceeds of all intestate estates escheated to the state"

Article 9, Subdivision 2, Section 3, Constitution of Iowa, provides:

"All estates of deceased persons who may have died without leaving a will or heir, \* \* \* shall be, and remain a



perpetual fund, the interest of which, \* \* \* shall be inviolably appropriated to the support of common schools throughout the state."

Section 7 of the same article and subdivision provides:

"The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the general assembly."

An estate does not become fully escheated until the expiration of ten years. Section 3387 of the Code of 1897 indicates that fact. It says:

"If there is property remaining uninherited [that is, at the end of ten years], it shall escheat to the state."

It then becomes a permanent part of the school fund of the state, and as such remains inviolable, the interest only to be used as indicated in the statutes hereinbefore quoted. Until the end of ten years, the state holds the funds in trust for the rightful owner; holds them under the provisions of Section 3390, for the benefit of the school fund. While it holds them as trustee, we think, clearly, under the provision of the statute, the school fund alone receives the benefit that may arise from the funds. The benefit that comes must come through the way of accumulated interest. The right of the state to hold the funds continues in its officers until the expiration of ten years, or until the heirship is established. If no claimant appears at the end of ten years, and establishes a right to the fund, then, without any further action on the part of the court, the fund escheats to and becomes a part of the permanent school fund of the state. If, however, one does appear within ten years, and establishes his right to the funds, then, under the provisions of Section 3391, it becomes the duty of the state to pay them to the one showing himself entitled thereto. After the claimant has fully established his right to the fund, it no longer becomes the subject of

escheat, for, under Section 3387, only the property remaining uninherited,—only the property remaining to which no heirship has been established within the ten years,—escheats to the state at the expiration of that time.

It follows, therefore, that, upon the establishment of plaintiff's heirship and her right to the fund so held by the state in the hands of its officers, to be paid over to one who should establish his title within the time limit, she became entitled to it immediately upon the entry of the decree establishing her heirship and her right to the fund. The state then had no longer a right to hold it, and no longer a right to appropriate the interest to any of the uses of the state. This fund never became a permanent part of the school fund, for the reason that, when plaintiff appeared, and established her right to it, the state had no longer a right to hold it, under the provisions of the state's own statute. The state said, in Section 3391:

"The money shall be paid at any time within ten years to anyone showing himself entitled thereto."

With this mandate from the state to its officers, it became their duty to pay the fund to the plaintiff immediately upon the establishment of her heirship. To hold it longer was holding it in violation of her right, and in violation of the mandate of the statute.

It appears from this record that plaintiff established her right to the fund, and, on the 7th day of February, 1913, the court entered its decree to the effect that she was entitled to the fund, as heir of James Murray, and directed these officers of the state, acting for the state, to pay the same over to her with accumulated interest. The provisions of Section 3390 to the effect that the sum received shall be held for the benefit of the school fund, we take it, refer only to that time between the time it is received and the time the rightful claimant to the funds establishes his heirship. In establishing the heirship, it is determined that the prop-

erty cannot escheat and never can become a part of the permanent school fund. Upon the establishment of heirship, the claimant became entitled to the fund, and a duty arose out of this to pay the fund to her. Any withholding after that time is in violation of the rights of the claimant, and in violation of the express provision of the statute, and any interest accumulating after heirship is established belongs to the claimant.

The fact that an appeal was taken postponed only her right to enforce her claim, but did not postpone or impair her right to the fund. Her right to the fund dates from the establishment of her right to it, and that carried with it a right to the interest that accrued upon the fund after her right was established. It is true the statute makes no provision for the payment of interest on the fund. The statute says the fund shall be held by the officers of the state for the benefit of the school fund. This we take it to mean, until such time as the rightful owner of the property appears and establishes his heirship. We construe the decree of the court involved here to mean interest that accumulated on the fund in the hands of the state after plaintiff's right to the fund had become fixed by the decree. The question of interest seems not to have been discussed or considered on the former appeal. Section 3038 of the Code of 1897 provides for the payment of interest on "money received to the use of another and retained beyond a reasonable time, without the owner's consent, express or implied." This section provides for six per cent interest; but here, we think the state, holding, as it did, the fund in trust for the plaintiff, ought not to be required to pay more than the amount of interest actually received by it after the duty arose to repay it to the plaintiff. The interest, therefore, that accumulated on the fund after the decree was entered fixing her right, ought to be accounted for by the state, up to the time of actual payment, and we think this is the purpose and intent of the law.

The action of the court, therefore, in overruling defendant's motion, is reversed, and the cause remanded, with direction to the court to enter decree in accordance with this opinion and the facts as they now appear in the record in that court.—*Reversed and remanded.*

PRESTON, C. J., LADD, SALINGER, and STEVENS, JJ., concur.

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WILLIAM PETERSON et al., Appellees, v. FRANK PRATT et al., Appellants.

**SCHOOLS AND SCHOOL DISTRICTS:** Tuitioning Pupils in Foreign District. The power of a school board to contract for the tuitioning of its pupils in the schools of another district depends on securing from the county superintendent authorization "to shorten" its statutory school year, and being thereby released from its obligation to maintain its school. But authorization to entirely *discontinue* a school, being a power not possessed by the county superintendent, will not open the door to such a contract. (Secs. 2773, 2774, Code, 1897.)

**SCHOOLS AND SCHOOL DISTRICTS:** Relief From Void Acts. Relief from the *void* acts of a school board may be had by direct appeal to the courts. (See Sec. 2818, Code, 1897.)

*Appeal from Page District Court.*—THOMAS ARTHUR, Judge.

APRIL 4, 1918.

ACTION involving the validity of a contract. The trial court held that said contract was invalid. Defendants appeal.—*Affirmed.*

*Genung & Genung*, for appellants.

*Denver L. Wilson* and *Thomas W. Keenan*, for appellees.

SALINGER, J.—The board of directors of the defendant Independent School District of Union Grove discontinued the school in that district for the on-coming school year of

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1917-18. Thereafter, a contract was entered into between said board and the board of the defendant Independent District of South Liberty, wherein the first agreed to pay to the last \$600 for tuition of the pupils of the Union Grove District. The first payment was to be made on September 1, 1917. On the petition of the plaintiffs, the district court ordered the officials of the Union Grove District to employ a competent teacher, and maintain a suitable school for said school year. It restrained making any payment under the contract and cancelled said contract.

The appellants contend: First, that the court had no power to act, because appeal to the department of public instruction was the sole remedy; and, second, that, if power to act be assumed, the action had is erroneous. This is a case wherein both contentions may be disposed of by determining whether the district court had jurisdiction. For, if the board had no power to make this contract, then the district court had jurisdiction, and appeal to the department of public instruction is not the remedy. And if the district court has power to act because the contract was beyond the authority of the board, then the contract made is void. So the trial court would get its power to act because the contract is void, and if the contract is void, it was not error to cancel it.

It does not seem to be claimed that there is express authority, to make this contract, and the reliance of the appellants seems to be the existence of express powers which cannot be exercised unless there is authority to make the contract in question. 'We are not called upon to inquire into power by implication, because we are of opinion that what is expressly enacted by statute sustains the action of the trial court. We find that Section 2774 of the Code permits such a contract as this to be made, among other things, when "the board is released from its obligation to maintain a school." This amounts to a legislative declaration that

such a contract may not be made unless the conditions specified in the statute exist. And, upon analysis, it will be found the controversy narrows to whether the board has been released from said obligation. It is manifest that Section 2774 assumes the board may be released from such obligation. But it does not say what the obligation to maintain a school is, nor who may release the board from it. The only statute which speaks to these points is Section 2773, Code Supplement, 1913. It provides that, in each school year, commencing with the third Monday in March, school shall be maintained for at least 24 weeks of 5 school days each, unless the county superintendent shall authorize the board to "shorten this period" because, in his judgment, there is sufficient reason for so doing. Reading the two statutes together, then, as we must, and it is enacted that school boards may contract as these two boards did, provided there has been a release from the obligation to maintain school, worked by a permit from the superintendent to "shorten" the statute minimum of 24 weeks. The sole question, then, is whether the superintendent has authorized such a shortening. The county superintendent never gave authority to shorten the statute minimum school time, but did consent that the school in Union Grove District might be closed for the 1917-18 school year. We find nowhere any statute which permits a county superintendent to wholly close a school. And he has no such authority unless a statute gives it. On the contrary, since the only authority given him is to shorten the period, power to close the school is utterly inconsistent with the power granted. To shorten of necessity implies the opposite of abolition. Shortening involves maintaining the school, though for a shorter period than it would be maintained were it not for the shortening. The power of the two boards to contract as they did depends upon an authorization which was not obtained, and upon a contingency which has not happened. Therefore, the

boards acted without authority. It may be conceded there is as much or more reason for providing for the tuition of pupils in another district when closing the school entirely than there is when no more than a shortening of the school period is done. But this argument must be made to the legislature, and not to us. If it can be convinced that the county superintendent should have power to authorize the discontinuance of a school *in toto*, then his permission to discontinue will release the board from its obligation to maintain a school, and will, therefore, authorize it to make such a contract as was here made. But at this time, the statute declares that the board had no power to make this contract, unless it obtained the only release from the superintendent which the statute empowers him to give.

As said, holding that the boards had no power to make this contract disposes not only of the claim that cancelling the contract and restraining payments thereunder and ordering

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courts may act without an appeal to the department of public instruction, and the fact that such power was lacking also justifies the relief which the district court granted.

It follows that the decree below must be, and the same is,—*Affirmed*.

PRESTON, C. J., LADD and EVANS, JJ., concur.

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ELMER ROBISON, Guardian, Appellee, v. WILLIAM D. BOONE,  
 Appellant.

**INJUNCTION: Restraining Prosecution of Action.** Injunction will lie to restrain the prosecution of an action to remove a guardian of the property of another until another action is determined wherein an adjudication is sought as to the status of the property held by the guardian.

*Appeal from Dallas District Court.*—LORIN N. HAYS, Judge.

APRIL 4, 1918.

ACTION for temporary injunction restraining the prosecution of a suit to remove a guardian, pending a hearing in equity to determine and construe certain wills under which the ward became entitled to the property, and to fix the character of the property in the hands of the guardian—whether a trust fund or otherwise. Temporary injunction issued in the court below, as prayed. Defendant appeals.—*Affirmed.*

*Burton Russell and Parsons & Mills*, for appellant.

*White & Clarke*, and *Clark & Byers*, for appellee.

PER CURIAM—The defendant herein is the son of Joshua Boone and Emeline Boone. Joshua Boone died testate, in the month of December, 1910. His will was duly admitted to probate. In this will he devised and bequeathed to his wife, Emeline Boone, one third of all his property, real and personal. The remaining two thirds he devised to his nine children, among whom was this defendant. The will provided:

"The remaining two thirds I give, devise and bequeath to my lawful children, share and share alike [naming them], to have and to hold forever with exception of share of William D. Boone whose share may be placed in the hands of guardian or trustee at the discretion of executors."

Emeline Boone died in March, 1916, testate. After certain devises, this will, in the fifth clause, provided:

"To my son, John W. Boone, I give, devise and bequeath one ninth of the balance of my estate, both real and personal, less the sum of one thousand dollars."

The balance was bequeathed to other heirs, to have and to hold forever, excepting the share of William D. Boone,



which must be placed in the care of his duly qualified guardian. The same executors were named in each will. These wills were duly admitted to probate, and the executors named in the wills were appointed executors in each estate, at the time of the probate. The estates were duly administered upon. The executors named in each of the wills and appointed by the court were George A. Gutshall and Clarence Dunn, and they duly qualified and entered upon the discharge of their duties. In August, 1911, a suit was instituted by one of these executors, Clarence Dunn, to have a guardian appointed of the person and property of the said William D. Boone, defendant herein, under the provisions of Section 3219 of the Code of 1897, alleging, among other things, that William D. Boone was of unsound mind. In pursuance of this action, one Frank Boone, brother of the defendant, was appointed guardian of the person and property of William D. Boone. He qualified and entered upon the discharge of his duties as guardian. In May, 1913, this guardian, Frank Boone, died, and thereafter, this plaintiff was appointed guardian, on his own application, to take the place of the said Frank Boone, then deceased. This guardian qualified as such, and entered upon the discharge of his duties. The executors named in the will of Joshua Boone, and appointed by the court to administer upon his estate, made their report and were discharged in March, 1914. It does not appear that the executors of the will of Emeline Boone have ever been discharged.

The property bequeathed to the defendant herein, Wm. D. Boone, coming to him from the estate of his father, Joshua Boone, was, upon the discharge of the executors, turned over to his then guardian, and is now in the hands of this plaintiff as his guardian. In the month of December, 1916, this defendant, William D. Boone, filed his petition, under the provisions of Section 3222 of the Code of

1897, alleging, among other things, that he was no longer a proper subject for guardianship, and asking that his guardianship be terminated. The plaintiff herein, as guardian, appeared to said proceeding and answered, saying that the said William D. Boone had no property except property devised under and through the will of his father, Joshua Boone, and his mother, Emeline Boone; that the executors of said wills placed the entire share of William D. Boone coming to him under said wills in the hands of his guardian, Frank E. Boone, and it was by him held and invested until his death in May, 1913; that, upon the death of Frank E. Boone, this guardian was appointed by the court, duly qualified, and as such, received from his former guardian the entire property so received by his former guardian, derived as aforesaid; that this guardian holds it under the conditions of the will aforesaid; that these wills provided that the property should be so held. A motion was filed to strike all this affirmative matter in the answer of the guardian, and this motion was sustained, the court holding that it did not present a proper issue in that case, holding that the character of the property in the hands of the guardian ought to be declared in a proper proceeding, and that the character of the property, whether trust property or not, should be determined in a separate proceeding instituted for that purpose. Thereupon, the plaintiff herein, the guardian, commenced this suit, filing his petition alleging that the property was trust property; was in his hands as trust property; that the effect of discharging him as guardian would be to release the property in his hands; that there would be no one to care for it; that the will contemplated that it should be held in trust for the ward; and asking a construction of the will and a determination of the character of the property, to the end that it might be preserved for the ward, in the event it was found that he, as guardian, under the appointment made, had no

authority over the funds, and asking that a temporary injunction issue, pending the hearing on this petition. A hearing was had upon this application for temporary writ of injunction, and a temporary writ was ordered as prayed, restraining the defendant from prosecuting his suit to have this guardian discharged, until the final determination of this suit. This is the order appealed from, and now before us.

Section 3219, hereinbefore referred to, provides that, when a petition is presented to the district court that any inhabitant is of unsound mind, upon satisfactory proof of the fact, the court may appoint a guardian of the property of such person.

Section 3222 provides that, at any time not less than six months after the appointment, the person under guardianship may apply to the court or any judge thereof, and ask that the guardianship be terminated. If issue is joined, the petitioner may demand a jury trial.

There is no question that, under Section 3222, this defendant had a right to maintain the action instituted to have the guardianship terminated. A determination of this question in his favor would, of necessity, have the effect of discharging the guardian, and withdrawing from him all further hold on the property. Whatever rights the defendant in this suit acquired to the property must be found in the will of his father and his mother. The father, in making the bequest, provided that the share bequeathed to this defendant "may be placed in the hands of guardian or trustee, at the discretion of the executors." The mother's will provided that the share of this defendant must be placed in the care of his duly qualified guardian. This guardian is the duly appointed guardian, at least of the estate of defendant. Neither of the wills provided that the executors should have the appointment of a guardian or trustee. In the father's will, the provision is that the share of this defendant may be placed in the hands of a guardian

or trustee, at the discretion of the executors. The mother's will provides that it must be placed in the care of his duly qualified guardian. Both wills contemplated the appointment of a guardian or trustee of this property by someone having authority to make an appointment.

It is claimed that it was not the intention of either testator that the property bequeathed should pass directly to this defendant. It is to determine this question that this suit was instituted and is now pending, and is yet undetermined. The temporary injunction restrains the defendant only from prosecuting his suit to have the hold of this guardian released upon the property. This suit is to determine the status of the property. The property has passed into the hands of this guardian, placed there by the executors in the exercise of that discretion given them by the wills. In this preliminary hearing for the temporary writ, it was not determined, nor do we now determine, what the status of this property is, nor whether, under the terms of the will, a guardian or trustee of the property must be appointed. This we leave to the later determination of the court, on the trial upon the merits. The order appealed **from in this case** simply restrains the plaintiff from prosecuting his suit to have the guardianship terminated, until this question is settled by the court in which the case is pending. In granting this temporary writ, the court simply suspended the further prosecution of that suit until the determination of this important question, to wit: What shall be done with the property passing under the will, in view of this limitation on the right to possession? In the event the court should hold, in the proceeding to remove the guardian, that the guardianship was not made in pursuance of the will, but under the provisions of Section 3219, there is no one to hold the property as the wills direct.

Conceding that the appointment was made under Section 3219, and that the plaintiff has a right, under Sec-

tion 3222,—more than six months having elapsed,—to have the guardianship terminated for reasons provided in that statute, it does not necessarily follow that he has a right to the possession of the property bequeathed to him in trust to be held by another. But, a controversy having arisen as to whether or not, under the provisions of this will, a guardian or trustee must be appointed, to take possession of and hold the property, it is essential that the status of the property be fixed. If the court determines that, under the provisions of the will, a trustee or guardian must be appointed to conserve and preserve it, it becomes immaterial, then, so far as the property is concerned, whether the defendant succeeds in his suit to remove the guardian or not. The question for the court to determine in this case is whether the defendant is entitled to the personal possession of the property bequeathed, or whether a guardian or trustee should be appointed for it. The prayer of the petition in this suit is that the court determine the intention of Joshua Boone as to that part and portion of his estate which would otherwise have become the property of this defendant, and the intention of Emeline Boone as to that part and portion of her estate which would otherwise have become the property of the defendant, to the end that it may be determined by what right and in what capacity, whether as trustee or otherwise, the said guardian holds the funds derived by him from the estates of Emeline Boone and Joshua Boone; and the prayer is that a temporary restraining order be issued, pending the hearing of this petition, and further, that the funds in the hands of the guardian be declared a trust fund for the use and benefit of the defendant, and that testimony be taken to show the intention and purpose of these testators in making these provisions in their wills.

As we take it from this record, there was no hearing upon the merits. The only hearing here that was had,

and the only order appealed from, was that which related to the restraining order pending the hearing and the determination of the issues presented in the petition; and we think the court did not err in exercising its discretion in restraining this defendant from further prosecuting his suit for removal of the guardian until the questions herein presented were determined. Without this restraining order, the court could have ordered this issue tried first.

We see no ground for interfering with the order of the court herein complained of, and the action of the court is—*Affirmed*.

PRESTON, C. J., LADD, GAYNOR, and STEVENS, JJ., concur.

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JOHN H. SLATER, Appellant, v. WM. SLATER, SR., et al.,  
Appellees.

**DEEDS: Undue Influence and Intoxication.** Evidence reviewed, and held insufficient to establish the invalidity of a deed by reason of undue influence on the part of grantee, or intoxication on the part of grantor.

*Appeal from Worth District Court.*—M. F. EDWARDS, Judge.

APRIL 4, 1918.

Suit in equity to set aside a deed on the ground of undue influence and false representations in obtaining the same, and on the ground that the plaintiff was intoxicated when he executed the same, to such an extent that he did not know what he was doing. After a full hearing upon the merits, the trial court dismissed the petition, and the plaintiff appeals.—*Affirmed*.

*Dunn, Bryant & Clough*, for appellant.

*Robinson & Boomhower* and *Gordon & Osmundson*, for appellees.

EVANS, J.—The plaintiff is the son of the defendant. The deed in question was executed on September 10, 1904, and conveyed the plaintiff's undivided one half in a farm of 200 acres. The evidence involves the history and the personal characteristics of the parties. The defendant and his wife, Sarah, moved upon the farm in question about 1872 or 1874, and lived together thereon with their family until 1897. At this time, there was a separation between husband and wife, and a decree of divorce. The title to the farm was in the name of the wife. A stipulation as to alimony gave her the full ownership thereof, subject to an undertaking by her to pay alimony to the defendant in the sum of \$2,500. The mother and the two sons, John and William, continued to live upon the place. The defendant removed to Minnesota, from there to North Dakota, and back to Minnesota again. He remarried. He sometimes visited the family at the old home. He visited there for a short time in the summer of 1904. Shortly thereafter, on August 2, 1904, the divorced wife, Sarah, died. The defendant came to the funeral. He remained upon the place for some weeks. Both John and William were unmarried. John was born in the year 1867, and William was about two years older. John, the younger, however, managed the place, after a fashion, for his mother. William had been injured, and was of little economic value. John was addicted to the use of intoxicating liquors, and was of still less economic value. As a witness, he testified:

"I began drinking heavily in 1898. Drank about a quart a day,—sometimes a little more or less,—of whiskey. Continued drinking this way through '99 and 1900, and on up to 1906. Lived on the farm until 1904, save for two winters spent in Chicago, the winters of 1901–2 and 1902–3. Drank heavily in Chicago, sometimes taking as many as fifteen drinks of whiskey a day. During 1902 and 1903, dur-

ing the time I was at home, would go to Mason City or Minneapolis on drunken debauches. Would get drunk frequently at Joice and Hanlontown. Kept liquor about the farm. Drinking sometimes more than a quart a day. Continued this until the time the purported deed was signed, in September, 1904. Consumed about a quart daily, except a few times that I might be out of it, and unable to get it. Would go on drinking spells lasting three or four days."

He testified with much particularity as to times and places concerning all his movements for the first ten days of September. According to such testimony, he was besottedly drunk during every part of every day of such period. The claim on his behalf is that such was his condition at the time that he executed the deed. He testified that he had no recollection of having signed it, and did not know that he had signed it. He introduced the testimony of other witnesses in corroboration. Several of these were persons who shared his bottle and the joys and sorrows thereof. On the other hand, it is made to appear for the defendant, by witnesses fully as credible, and apparently disinterested, that John was apparently sober, at the time of signing such deed. The case is purely a fact case. The evidence is not very satisfactory on either side. The plaintiff's accurate memory of all the details of a ten-days' spree is not consistent with his utter forgetfulness of the transaction pertaining to the deed. On the morning of September 10th, the father and son had driven from their home to Northwood, a distance of 17 miles. They appeared at a bank, where they seemed to have been acquainted, for the purpose of having the deed made. The banker referred them to a reputable attorney, to whose office they went. He was a stranger to both parties. He talked the transaction over with the plaintiff alone. He was a witness upon the trial. He appears to have been entirely disinterested as between the parties. According to his testimony, the plaintiff gave



no evidence of intoxication at that time. Several witnesses who saw the plaintiff the same forenoon testified substantially to the same effect. Taking the testimony as a whole, we have no doubt that the plaintiff understood that he had executed the deed to his father. He had no intention of staying on the farm. About a week after the deed was executed, he returned to the farm and spent a couple of days there, and then left. His itinerary is described by him as follows:

"He gave me \$50, the day that I left. I went to Minneapolis and stayed there about a week. Went from there to Fergus Falls, and remained until the following April, 1905. Then went to North Dakota, worked through the harvest and threshing. In October, went into the pineries in Minnesota. During that time, continued to drink all that I could consume. Later, went to southern Arkansas, and remained until May, 1906. Continued drinking while there. From Arkansas, went to Kansas City, Missouri, and then out into the harvest fields in western Kansas. After leaving there, went to Springfield, Illinois. Remained at Springfield from 1906 until July or August, 1908. Continued to drink at Springfield, not so heavily. From Springfield, in July or August, 1908, went to High Forest, Minnesota. Father was living there."

Later in 1910, he worked for a time in and about Mason City. Thereafter, he went to Missouri, and later, to Montana. More or less correspondence was carried on continuously between father and son. The consideration for the deed was indefinite. The deed purported to be for a consideration of \$100. The plaintiff's title was acquired through the will of his mother, not yet probated. There was much indebtedness. There was a mortgage for the principal sum of \$2,750. There was a further lien of the defendant's himself for \$1,500 unpaid alimony. There was a large amount of personal indebtedness, besides. More than

two years' interest was in arrears, and two years' taxes, likewise. The father had advanced to the son considerable money previously. The evidence of value of the farm consists solely of one statement in evidence on the part of the defendant that the property could not have been sold for more than \$40 an acre, but that it ought to have been worth \$50. It appears, also, that, at the very time this deed was made, the plaintiff had outstanding checks issued by him which were fraudulent, in the sense that he had no funds on deposit to meet the same. Shortly after his departure from home, he was arrested in Minneapolis, and there held in jail upon charges pertaining to such checks. The father, being sent for, came to his aid, and obtained his release by the payment of his obligations. The fact of the previous issue of these checks has some tendency to explain the conduct of the plaintiff in his apparent desire to deed the farm to his father. By the deed, the father became a tenant in common with his son William, who took, under the will of his mother, the other undivided one half. In the settlement of the mother's estate, the personal property was not sufficient to pay the personal debts. The defendant assumed and paid all the unpaid debts, for the purpose of protecting himself and William against a sale of the land. He also proceeded to make valuable improvements upon the farm. He built thereon a large barn and a hog house, a double corn crib, new fences, and a cement-floored yard for feeding hogs,—all of which was known, from time to time, by the plaintiff. In the matter of the obligations assumed by the defendant and the expenditures incurred by him, he appears to have understood that one half thereof would rest as a charge upon the interest of William in the real estate, or that he should be reimbursed by William's obligations. There appears to have been later some disappointment or misunderstanding on that subject between him and William. There was some correspondence pertain-

ing thereto, to be referred to later. John and William were the only living children of the defendant. Many of his letters to them are in evidence, and they indicate a continuing affection for his boys, with occasional flashes of criticism and combative repartee, probably consistent with his genealogy. On October 30th and November 9th, 1914, he wrote letters, one to William and the other to John, from his home in Minnesota, both William and John being then in Montana.

On November 18th, John answered him as follows:

"Dear Sir: Your favor of the 9th at hand. You either won't start something or near the verge of insanity. Wm. owes you nothin on that old acct. of Mrs. Sarah Slater. Any person with the brains of sons would understand that. I would advise you not to crowd me too far. He always had lots of regard for you, and a kind word went a long ways with him from my obessains. You have treated him like a yellow dog they say the most menial of worms will turn. I think you better show a latent spark of manhood and send some of that rent money, all we have made this sumer. We have put back in the claims I am not going to waste any work on you in my own behalf. You know what belongs to me. I am going to get the regards of cash. When the men of the west started in to rid it of cut throats and outlaws they found the best way was to shoot first and talk after. If you cant act the man with me we had better cease correspondence. If you try to onload any wind on me or shove his claw through I will tell you a few thing that will burn in your brain while life lasts. You probably will see me sooner than you desier.

"John H. Slater, Grass Range, Montona."

In January, 1911, the defendant wrote to John as follows:

"I received your letter and am glad to hear you are well. William stopped with me last night and started for

South Dakota this morning—going to be married to some lady there. He had 2.25 Two hundred and 25.00 from Mr. Roeder and settled up last Saturday with him. He sold his colt for \$55.00 the team he hold untill he moves back on the farm the first of Oct. I have no apology to make with you only one. When William moves onto the farm go back and when I die you will get your share. You called for \$50.00 but I enclose you \$25.00 at the present time I have got to pay the taxes in Iowa, call upon some more later on if you get hard up, and Will moves on next fall you go on for I will never sell the farm as long as I live you go and live on it also. I was very glad to hear from you. Wm Slater."

The examination of the defendant as a witness appears to have been preserved phonetically by the stenographer, and it discloses his history as follows:

"My name is William Slater Senior. Oi am 81 and one-half years old, sor, Oi was born in Oirland, sor. Oi am Oirish by birth, a Catholic by faith, and a Dimocrat by the Constitution of the United States. Oi first set me feet on the wharf in New York in the year 1852 and from there Oi went up the Hudson River, sor, and worked on the estate of William B. Astor, whose nephew John Jacob Astor went down in the Titanic. This was at Esopus on the Hudson River and Oi hired out then to another of them big bugs who has a country estate on the Hudson River, a man by the name of Pell, another sich man as Astor. From there Oi went to South Carolina and Oi got married and brought the little woman out to Fox Lake, Wisconsin, in 1854. From there Oi went to the territory of Minnesota into Rochester, settled on Section 12, Northwest Quarter, Olmstead County. Remained there 18½ years. From there Oi immigrated up to the farm Oi have now. Oi couldn't tell you the exact years it was but Oi can give you a pointer so that you can get at it. Oi went to the polls and voted

against Grant the last time he run and Oi would have to count the presidents and count the time and that would take too long for me to do for ye now. In '74 if Oi ain't mistaken, Oi come here to Worth County. Oi had one child at Fox Lake and raised six on the farm, brought my family to Worth County in sleighs, sor. Had eight children in all, sor. They are all dead now but the two men here, Johnnie and William Slater, Jr."

On cross-examination, he testified also as follows:

"Q. Did you tell him that day that, if he did go away and straighten up and quit drinking, you would keep the farm for him? A. Oi never did. No, sor. When I bought the farm, I bought it to keep until I died. Then he can have it, he and William. Q. You intend to give it to him when you die? A. Yes, sor, Oi will niver go back on him, no matter what he does to me. Ould Billy Slater niver went back on his son, and he niver will. Q. You say that you intend to give it to him when you die. Did you tell him so then? A. He spoke about a will, and I said that I would make no will. When Oi die, you can get all that belongs to you,—you and Billy, you get it all. \* \* \*

Q. Now, Mr. Slater, you stated, I believe, on direct examination, that you wanted the boys to have the homestead, did you not? A. Oi would be only too glad if it was to come out that way, but it is impossible now, Oi'm afraid,—there is six lawyers in it, and they will cut a big chunk out of it—foive lawyers, I should say— or four, we have got four lawyers here—oh, foive, Oi see another one. There is foive of them here. Well, the more the merrier, as the old sayin' is."

The foregoing letters of the parties and the quoted testimony of the defendant do not bear very directly upon the issues in the case. But they are photographic in their nature, and disclose somewhat the personalities of the litigants. And this throws considerable light upon certain

features of the evidence. Each of these parties seems to be a character somewhat *sui generis*.

The second wife of the defendant died in January, 1915. He thereupon proposed that he make his home with the sons for the brief remainder of his time. He also proposed that they make their home upon this farm. This proposal was not welcomed, and this suit was instituted in the March following. We have given no attention to the statute of limitations, because of the continuing residence of the defendant in Minnesota. Lapse of time, however, is a very proper circumstance to be considered as bearing upon the knowledge and understanding of the plaintiff, and upon the question of adoption and ratification. We have read the evidence in its entirety with much care, and reach the conclusion that the trial court properly decided the case. Its decree is, therefore,—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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STATE OF IOWA, Appellee, v. WILLIAM KURTZ, Appellant.

**CRIMINAL LAW:** *Accomplices in Crime of Incest.* A 16-year old  
1 daughter is, under the record, held to be an accomplice with her  
father in the crime of incest.

**INCEST:** *Duty of Court and Jury as to Corroboration.* The exist-  
2 ence of corroborating evidence is a question for the court; the  
sufficiency thereof, for the jury.

**CRIMINAL LAW:** *Existence and Sufficiency of Corroboration.* Cor-  
3 roborations of an accomplice may consist of a failure of the ac-  
cused to deny his guilt when openly accused thereof, by con-  
duct impliedly admitting his guilt and inconsistent with inno-  
cence.

**CRIMINAL LAW:** *Spectacular Conduct of County Attorney.* It is  
4 not necessarily reversible error for a county attorney to sud-  
denly appear before the jury with a 22-day-old infant in his  
arms, to hand the child to the prosecuting witness, and to have  
the witness *identify* the child, and testify to its *paternity*.

**INCEST: Weight and Sufficiency of Evidence.** Evidence reviewed, 5 and held sufficient to sustain a verdict of "guilty of incest."

*Appeal from Butler District Court.*—M. F. EDWARDS, Judge.

DECEMBER 11, 1917.

REHEARING DENIED APRIL 4, 1918.

THE defendant appeals from a conviction on a charge of incest. The facts are fully stated in the opinion.—*Affirmed.*

W. T. Evans and F. J. McGreevy, for appellant.

H. M. Havner, Attorney General, F. C. Davidson, Assistant Attorney General, and W. C. Shepard, County Attorney, for appellee.

STEVENS, J.—I. The defendant, who is a man somewhat past middle life, was indicted upon a complaint charging him with the crime of incest, committed with his sixteen-year-old daughter. Upon the trial, she testified that illicit relations between them had existed for about a year prior to Easter Sunday, 1916, on which latter date the last act of intercourse took place, and she became pregnant. This is the date upon which the State elected to rely for conviction. No other witness testified to any act or circumstance from which the alleged relationship could be directly inferred.

The defendant's family, besides himself, consisted of his wife, a son, Willie, about 20 years of age, Glenn and Viola, aged 11 and 5 respectively, Gladys, who was married, and at the time in question, did not reside at home, and Henrietta, 16 years of age. The father and mother occupied a bedroom on the first floor, and the children slept in one room on the second floor of their residence. Henrietta, the daughter, testified that she and her father had illicit relations whenever the mother went to the neighbors' or for

groceries. The record does not disclose where or at what time the act of intercourse took place on Easter Sunday.

Numerous errors are alleged by counsel for appellant, who apparently rely, however, principally upon the following: (1) That Henrietta was an accomplice in the crime, and that her testimony was not sufficiently corroborated to justify a conviction. (2) Prejudicial misconduct on the part of the county attorney during the trial. (3) That the verdict of the jury is not sustained by the evidence.

Henrietta, who alone testified to the criminal acts, was an accomplice, and, without corroboration, her testimony was insufficient to convict the defendant. It was not necessary that the corroborating testimony relate to all the details of plaintiff's testimony. *State v. Waters*, 132 Iowa 481; *State v. Jones*, 115 Iowa 113; *State v. Duncan*, 158 Iowa 652.

Whether there was any corroborating testimony was a question of law for the court, but the sufficiency thereof was a question of fact for the jury. *State v. Waters*, supra; *State v. Baker*, 106 Iowa 99; *State v. Bricker*, 135 Iowa 343; *State v. Hogan*, 145 Iowa 352; *State v. Dudley*, 147 Iowa 645.

The evidence relied upon as corroborating the testimony of Henrietta, as tending to connect defendant with the commission of the crime, is that when, in October, 1916, Mrs. Kurtz informed him that Henrietta was pregnant, for which he was responsible, he made no reply. When accused by his wife upon a former occasion, his reply was, "Don't set me crazy." On the occasion of the first conversation referred to, Henrietta and some of the other children were present. Henrietta was crying, and she testified upon the trial:

"I was crying because he was scolding me that I had

1. CRIMINAL  
LAW: accom-  
plices in crime  
of incest.

2. INCEST: duty  
of court and  
jury as to  
corroboration.

3. CRIMINAL  
LAW: exist-  
ence and suffi-  
ciency of cor-  
roboration.



told ma about it,—that I was in the family way. I had told ma at that time.”

A couple of days after this conversation, he went in his automobile with his son to a neighbor's, where Gladys was working, got her, and the three went to Parkersburg, where the defendant took the train, and was next heard from at some point in New York. The defendant testified that he detected something unusual in his coffee and food at the breakfast table, the morning he left home, following which he became sick, and threw up his breakfast; that he then asked for his good suit of clothes, directed Willie to get the car ready, and they went, as above stated, to Parkersburg, where he took the train, as claimed by the other witnesses. The defendant further testified that he left home because he and his wife were having trouble, and he wanted to go to New York to visit his brother, whom he had not seen for about 22 years. The record does not disclose that, before going away, he made any arrangements for the disposition or care of his family or property while absent. Willie testified that defendant did not state why he was going to Parkersburg until they had crossed the railroad track going into town, when he told them he was going to New York, and wouldn't be back until it was all over, and that, if he didn't go away, ma would put him in the penitentiary—he was sure of that. Gladys testified that he requested them not to tell Mrs. Kurtz until they heard from him, but requested them to tell her to take Henrietta to a doctor at Ackley, for the evident purpose of having an abortion performed; that he further stated to her that, if he did not go away, his wife would put him in the penitentiary. Shortly after his arrival in New York, he wrote a postal card to Willie, stating that he had not yet been able to locate his brother, and later, a nephew wrote, stating that defendant was at his brother's home. On November 4th

following, he voluntarily returned home, and was immediately arrested upon the charge of incest.

The court submitted the question of the sufficiency of the corroborating evidence to the jury, under proper instructions, and we think that there was ample evidence to justify the submission thereof. The court also instructed the jury upon the question of flight, and the effect to be given the evidence which the State claimed established flight.

II. The alleged misconduct on the part of the county attorney consisted in leaving the court room while Henrietta was on the stand, and returning, shortly thereafter, with her baby, which was, at the time, twenty-two days old, in his arms, and in handing the same to her, and propounding the following questions, with the answers shown.

4. CRIMINAL  
LAW: spectacular conduct  
of county attorney.

"Q. Henrietta, is the baby that you now have in your hands your baby? A. Yes, sir. Q. And who is its father? A. My father."

Counsel for defendant at the time objected to the conduct of the county attorney in going from the court room and returning with the infant in his arms and placing the same in the hands of the prosecuting witness. The court's attention was called particularly to the fact that such conduct was prejudicial to the defendant; that the conduct of the county attorney was spectacular, purely for effect, and to create prejudice against the defendant. To this the county attorney responded that he only desired to identify the child and its paternity, and that he brought it in for no other purpose.

Attached to defendant's motion for a new trial was the affidavit of the defendant, in which the above matters are recited, with the further statement that the child was so held that the jury could see it. Upon the oral argument in this court, counsel for defendant claimed that the de-

defendant had black hair, as did also the child, and that the emphasis by this conduct of the apparent resemblance in this respect was necessarily prejudicial to the defendant. No cautionary instruction was requested or given to the jury by the court regarding this occurrence.

No claim is made that the prosecuting attorney in any way referred to this incident during the trial. The testimony elicited by the questions propounded was clearly admissible. The fact that she had given birth to a child corroborated her claim as to the fact of intercourse. The only conduct, if any, on the part of the county attorney subject to criticism is the manner in which he brought the child into the court room and handed it to its mother. Naturally, the appearance of the county attorney coming from another room in the courthouse bearing this small infant in his arms would attract the attention of the jury and bystanders, and very likely cause some confusion. When counsel for appellant protested against the conduct of the county attorney, he frankly stated to the court that he desired only to prove the identity and paternity of the child. It would not have been error for the mother to have held the child in her arms while giving her testimony. Had she done so, the jury would have had equal opportunity to observe any resemblance between the child and the defendant. The possible resemblance of the child to defendant does not appear to have been the subject of comment at any time by the county attorney, nor was this subject referred to during the trial.

5. **INCMST:**  
weight and  
sufficiency of  
evidence.

should always avoid conduct spectacular in character, or such as would excite or cause a demonstration prejudicial to the defendant; but the record in this case does not disclose such prejudicial misconduct on his part as to necessitate a reversal. Whether the defendant was the father of the child or not, his relationship to it was such that a resemblance would

be quite likely. The authorities cited by counsel for appellant dealt with conduct upon the part of the prosecuting attorney quite different from that here complained of. The errors pointed out in the cited cases were apparent.

III. It is also argued by counsel for appellant that the evidence is insufficient to sustain the verdict. It is earnestly contended that the wife and children of defendant conspired together to charge him with this offense. From the evidence, we infer that the defendant and his wife have not lived very happily together, and that he, some years ago, accused her of improper relations with two different men. He claims that she made some admission touching these matters, but she denied, upon the witness stand, having done so, or that she had ever been guilty of wrongdoing. None of the witnesses, apparently, were very intelligent, and the mother manifested rather unusual indifference to the shame and disgrace that had fallen upon her family; but there is little or nothing from which a corrupt purpose on her part or that of the children to wrongfully accuse defendant of crime can be inferred. The defendant did not, when accused, in her presence and that of the other children, of being the author of his daughter's misfortune, deny the same, and made no response thereto. It is not shown that Henrietta kept company with young men, or that she was much of the time away from home. It does appear, however, that she occupied the same bedroom with her brother Willie and the other children, but she and Willie both deny having had illicit relations at any time.

Willie further testified that defendant at one time accused him of being responsible for his sister's condition, but that he promptly denied his guilt to his father. Evidence was offered tending to show that Gladys was not possessed of a good reputation before her marriage, and that her husband obtained a divorce from her on the ground of adultery. She, however, testified that she did not know upon what

ground the divorce was granted. No witness testified to any admission of guilt on the part of the defendant. Several of his neighbors testified that, prior to the accusations made against him by his daughter, he had borne a good reputation in the community for chastity and moral character. The defendant testified that he attended Sunday school, and was, for a period of six years, superintendent thereof. For the purpose of showing a bad motive on the part of his daughter for this prosecution, he testified that, one morning, probably at the breakfast table, after a dance the night before, one of the girls—but he did not remember which—stated that they could have made four or five dollars with the “fellows” the night before if they had wanted to. Both girls deny having made this or any similar statement. This testimony, in the view we take of it, could not have been helpful to the defendant. It is quite inconceivable that these young girls had fallen so far below common standards of decency or respect for parental authority or regard as to utter a statement of the character indicated in either the presence or possible hearing of the parents, and that he would offer no protest, or rebuke them therefor. So far as the record discloses, defendant said nothing to the girls, but told his wife not to have any more of that kind of fellows around, and that there would be no more dances at his house.

The evidence of Henrietta is very brief, and goes but little into detail. None of the family appears to have observed conduct on her part with the defendant which aroused their suspicion, or caused them to believe that improper relations existed; except that Mrs. Kurtz testified that she, at a time previously, accused the defendant of having ruined his daughter, when it turned out that she was mistaken in her belief that she was then pregnant. The opportunities for such relations probably frequently existed. Henrietta testified that it occurred as often as two or three

times a week, when her mother had gone visiting, or after groceries. It further appears from the record that defendant was accustomed to lie in bed until after he had eaten his breakfast; that the morning meal was usually prepared by Henrietta, and frequently Willie and Mrs. Kurtz would go to the barn to do the chores.

It was also rather remarkable that the defendant would, under the circumstances, have left his family so suddenly and gone to visit his brother, whom he had not seen for 22 years, and from whom he had not heard for more than 10 years. That he would have submitted in silence and without protest to the accusations made against him by his wife in the presence of their children, is utterly inconsistent with innocence. No father of good character and without guilt would have deported himself, under the circumstances shown in evidence, as the defendant did.

The offense charged is most revolting in character, and it is difficult to conceive the possibility of its commission; but we have searched the record thoroughly, and examined the court's instructions to make sure that the defendant had a fair trial. So far as the record discloses, he did; and, while other alleged errors are argued by counsel for appellant, we reach the conclusion that no reversible error is shown. The instructions clearly submitted the case to the jury, and the guilt of defendant is quite satisfactorily established.

The judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, J.J., concur.

JOHN E. TUSANT et al., Appellees, v. GRAND LODGE ANCIENT  
ORDER OF UNITED WORKMEN et al., Appellants.

**INSURANCE: Mutual Benefit Insurance—Validity of Fundamental**

- 1 **Change in Insurance.** A statutory fraternal mutual benefit association possesses no power, subsequent to its organization, incorporation, and receipt of members, to fundamentally change the nature of its insurance, without the consent of members adversely affected, by arbitrarily dividing its membership into distinct classes, and compelling each class to separately meet its own death losses by discriminatory rates applied in utter disregard of the long-maintained membership of members.

**PRINCIPLE APPLIED:** An unincorporated fraternal beneficiary insurance association met its death losses, for many years, by monthly assessments of \$1 on each member, irrespective of age. It then abandoned this rate, and adopted a *changeable* rate: i. e., so long as a member was 18 and under 25 years of age, he paid \$1.30 as monthly assessment on a \$2,000 certificate. When he became 25 years of age, he paid \$1.45 until he became 29 years of age, and so on, with advancing rates, through several age classifications, until he became 50 years of age, when he paid \$3.85 thereafter. No objection was made to this change. There was never any limitation upon the number of assessments which might be made. In 1911, the association was incorporated, under Section 1822 *et seq.*, Code, 1897. Prior to this, the managing officers claimed that the outstanding policies would ultimately be so large that they could not possibly be paid, *under the rates then in force*. This condition was ascribed to the old members over 50 years of age, as they were practically the only ones dying, and claim was made that *their* assessments did not pay *their* death losses. To avoid this condition, the association enacted by-laws, and started on the plan of putting its existing membership, composed of aged members, in a class by themselves, to be known as Class A, and its accruing and future membership in a class by itself, to be known as Class B, and *compelling each class to bear its own death losses*.

Class B was put on an *unchangeable* level premium rate, determinable by the member's age *at time of joining*. This rate, for \$1,000 insurance, ranged from \$1.30 per assessment, for a member 18 years of age, to \$10.64 for one 70 years of age or over. Members in Class A were at first given the privilege of

dropping their old insurance and joining Class B. So doing, for a member 70 years of age, would increase *each* assessment, on a \$2,000 policy, from \$3.85 to \$21.28, or, on 10 assessments a year, from \$38.50 to \$212.80. A new member *might* join Class A, but strong and successful influence was exerted to induce him not to do so. A year later, Class A was wholly closed to new members, thereby preventing further accession of members to that class.

Under the above plan, Class A continued to pay the old changeable rate, which had a maximum of \$3.85 for a \$2,000 policy, and *death losses in Class A were charged against that class alone, and those of Class B were charged against it alone.* Class A was not able to raise sufficient funds to meet *its* losses, and an existing reserve fund was drawn on, with increased insolvency. Class B prospered, paid all its losses from 10 assessments per year, and built up a large reserve.

In 1916, the Grand Lodge adopted a new by-law, under which the members of Class A were peremptorily ordered to join Class B. This, in its last analysis, meant that Class A members should rejoin the association, as of their *then* age. In so joining, they were given two alternatives: (a) to pay under the Class B rates, according to their *then* age, *regardless of their long-maintained membership and insurance*, or (b) to continue paying at their old rate (the maximum of which was \$3.85), but submit to a scaling of the face of the policy, commensurate with such rate. Expulsion was the penalty for failure to embrace one of the alternatives. To take the first option and pay under Class B rates would increase some assessments from 350 to 450 per cent; to continue their old rate, but submit to such scaling, would, for a member 70 years of age, reduce a \$2,000 policy to \$366. This procedure effected three intended results as to Class A: (1) Many old members lapsed their insurance; (2) many of the younger members did join Class B; and (3) Class A, with 7,000 members in 1916, soon dwindled to 115 members.

*Held*, the said by-laws of 1911 and subsequent thereto, the fictitious creation of said so-called Classes A and B, and the procedure thereunder by which Class A was denied the benefit of new membership, and consequently the benefit of existence, and the application of said rates to the members of Class A, in utter disregard of their long-maintained membership and insurance, were *legally unreasonable*, and therefore void.

**INSURANCE:** Action on Policy—Non-Attached Applications. Applications or representations of an assured, which, by the terms



of the policy, are made a part thereof, or referred to therein, or which may in any manner affect the validity of the policy, are, under Section 1741, Code, 1897, non-provable to defeat an action on a *fraternal beneficiary certificate of insurance*, unless attached to the certificate by true copy, even though Section 1826 of said Code, enacted some years *subsequent* to Section 1741, and dealing with beneficiary associations alone, covers the same subject-matter, though less comprehensively than said Section 1741.

**STATUTES: Construction—Subsequent Enactment on Same Subject-**

- 3 **Matter.** Principle recognized that a subsequently enacted statute does not *necessarily* supersede a prior and still existing and more comprehensive statute on the same subject-matter.

**INSURANCE: Mutual Benefit Insurance—Limitation on Rates.**

- 4 Whether a statutory fraternal beneficiary association has power, *by advance contract*, to limit assessments to an amount less than is reasonably necessary to pay death losses, etc., *quaere*.

**INSURANCE: Mutual Benefit Insurance—Power to Apply Level**

- 5 **Premium Rates.** Whether a statutory fraternal beneficiary insurance association has power to adopt a table of level premium rates which are sufficient not only to pay all current death losses, but to create a *reserve* fund which will be sufficient to mature all certificates many years hence, regardless of the future acquisition of any new members, *quaere*.

**APPEAL AND ERROR: Review, Scope of—Decree Beyond Plead-**

- 6 **ings.** Issues not tendered by the pleadings, and which do not necessarily inhere in the controversy, will, in an equity case, on appeal and trial *de novo*, be excluded from the adjudication.

*Appeal from Polk District Court.*—W. S. AYRES, Judge.

MAY 14, 1917.

REHEARING DENIED APRIL 4, 1918.

Suit in equity by the plaintiffs as members of the defendant association, asking to enjoin the enforcement against them of certain by-laws and amendments purporting to have been adopted by the defendant association, whereby the rights of the plaintiffs, as certificate holders of life insurance, will be greatly depreciated in value. There was a de-

cree for the plaintiffs, and the defendants have appealed.—  
*Modified and affirmed.*

*E. B. Evans* and *H. F. Zeuch*, for appellants.

*Miller & Wallingford* and *Roy E. Curray*, for appellees.

EVANS, J.,—The defendant is a fraternal beneficiary association, organized under the provisions of Sections 1822 and 1823 of the Code. It was originally organized about fifty years ago, as a voluntary association, and was formally incorporated in 1911, as a voluntary association not for profit. It is essentially a life association, which purports to pay its death losses by appropriate assessments upon the surviving members. Its maximum insurance is \$2,000, for which it issues its certificate to a member. For many years, and up to the year 1901, monthly assessments of one dollar upon every member were made, for the purpose of paying death losses. In 1901, a change was made, which appears to have been generally acquiesced in. This change increased and classified the rates of assessment so as to impose a somewhat heavier rate upon the older men than upon the younger. A minimum rate of \$1.30 and a maximum rate of \$3.85 per assessment were adopted. The maximum rate applied to men fifty years of age and over. Monthly assessments at this rate were thereafter made. In 1911, certain changes were made, which greatly affected the plan of insurance theretofore in force, and this change was further intensified by certain actions had in 1916. The controversy centers upon these latter changes, and these will be dealt with more in detail. The plaintiffs are four members of the defendant order who have been such for many years, and have brought this suit in their own behalf as certificate holders, and in behalf of other members similarly situated. Up to a time shortly prior to the bringing of this suit, the defendant order had a membership in Iowa of about 15,000.

1. INSURANCE:  
mutual benefit  
insurance:  
validity of fun-  
damental  
change in in-  
surance.

Since that time, its membership has been somewhat reduced, and its life may be at stake in this proceeding. Leading up to the action of which complaint is made, it may be said, first, that the officials of the defendant order claim that, for many years, they had collected from their members less than the cost of their insurance; that the company had been organized in a haphazard sort of way, without any reference to mortality tables; that the computation of actuaries showed it to be in fact insolvent, in the sense that its certificates or policies were ultimately greater in sum total than could possibly be realized by the collection of assessments at the rate then in force; that the older members of the order were furnishing practically all the mortality, and were, therefore, a liability, rather than an asset; that the assessments collected from members over fifty years of age were not sufficient to pay the death losses of members above such age; that, if these older members could be eliminated, or could be required as a separate class to pay a rate which would of itself pay the death losses in their ranks, then the order would become automatically solvent, in the actuarial sense. The separation of these older members as a class from the remaining body of the order became the objective of the officials, and their acts to that end are the occasion of this controversy. By methods to be further stated, the older members were put into a separate class, and were required to pay the death losses of such class, the great body of the younger membership being wholly exempted from any liability for such death losses. The result of such classification was to increase the rates of assessment of this class to a prohibitive degree, being an increase of 350 to 450 per cent. The class into which the older men were gathered is known in this record as Division A. This class now contains 115 members. The 115 members are assessed at a rate fixed by the computations of an actuary, which will be sufficient to pay the earlier death losses as they occur, and to build up a re-

serve sufficient to pay the beneficiary of the last man to succumb. By this plan, the problem of insolvency has been rendered exceedingly simple. If the older members *pay* the rates of assessment imposed, solvency will thereby be accomplished. If they *fail to pay*, they must lapse, and thereby solvency will be likewise accomplished. In other words, the alleged insolvency of the order was gathered into this one place, and was charged up to these older members, on the theory that they were responsible for it. But they were allowed the generous option of taking it or letting it alone. It was enough that the body of the younger membership was wholly exempted from its obligations. The method adopted for bringing about this result impresses us as somewhat original. In 1911, a by-law was adopted, creating a new class into which future membership would be received. The class is known in the record as Division B. The following rate of assessment per \$1,000 was provided for such new class.

Age	Rate	Age	Rate
18 . . . . .	\$1.00	35 . . . . .	1.68
19 . . . . .	1.03	36 . . . . .	1.74
20 . . . . .	1.05	37 . . . . .	1.81
21 . . . . .	1.08	38 . . . . .	1.88
22 . . . . .	1.10	39 . . . . .	1.95
23 . . . . .	1.13	40 . . . . .	2.03
24 . . . . .	1.17	41 . . . . .	2.12
25 . . . . .	1.21	42 . . . . .	2.21
26 . . . . .	1.24	43 . . . . .	2.31
27 . . . . .	1.28	44 . . . . .	2.41
28 . . . . .	1.32	45 . . . . .	\$2.52
29 . . . . .	1.37	46 . . . . .	2.63
30 . . . . .	1.41	47 . . . . .	2.75
31 . . . . .	1.45	48 . . . . .	2.89
32 . . . . .	1.50	49 . . . . .	3.04
33 . . . . .	1.55	50 . . . . .	3.20
34 . . . . .	1.62	51 . . . . .	3.36

52 .....	3.54	62 .....	6.43
53 .....	3.73	63 .....	6.85
54 .....	3.94	64 .....	7.30
55 .....	4.20	65 .....	7.94
56 .....	4.39	66 .....	8.29
57 .....	4.66	67 .....	8.82
58 .....	4.95	68 .....	9.31
59 .....	5.29	69 .....	10.00
60 .....	5.64	70 .....	10.64
61 .....	6.02	Over 70, at 70.	

The existing membership was thereafter known as Division A, and continued to pay assessments according to the rates established in 1901, which were as follows:

Class.	Ages.	Assessment Rates	
		\$ 1000	\$2000
1—18 to 24 years inclusive.....		\$ .65	\$1.30
2—25 to 29 years inclusive.....		.75	1.45
3—30 to 34 years inclusive.....		.80	1.65
4—35 to 39 years inclusive.....		.95	1.90
5—40 to 44 years inclusive.....		1.15	2.25
6—45 to 49 years inclusive.....		1.45	2.90
7—50 years and over.....		1.95	3.85

The table of rates adopted for the new class was what is known as "the level rate plan." The rate of assessment of a member was determined therein by the age attained by him at the time he became a member, and such rate would continue unchanged thereafter; whereas the rate of assessment for a member in Division A increased with advancing age, and was determined by the age of the member at the time of the assessment. Theoretically, at first, any proposed member had the option of joining either division. As a matter of fact, the officials favored Division B. They invited all new membership into such division. The division was also open to a transfer by the membership of Division A.

The table of level rates for Division B was naturally more attractive to the younger members than to the older. In 1912, Division A was closed entirely to new membership, and new members were received only in Division B. This of itself not only throttled Division A, by the cutting off of its new membership, but it increased the pressure upon the younger members to transfer to Division B. And such was the result, as we have already indicated. By a system of blood transfusion, Division B took all the strong blood of the original association and absorbed all its solvency, and left it nothing but its former liabilities.

From 1911 to February, 1916, the officials of the order in effect operated two independent companies, side by side. The death losses in Division A were charged against that division alone, and those of Division B were charged against it alone. The 1901 table of assessment rates was applied to Division A, and the 1911 table was applied to Division B. The monthly assessments in Division A were not sufficient to pay all the death losses therein, so that the reserve was encroached upon, and the insolvency of the division increased. In Division B, only ten monthly assessments were made each year, and the amount thereof paid all death losses and built up a reserve fund of more than \$350,000. In February, 1916, further amendments were adopted at a special session of the Grand Lodge, which were intended to end pretense, and to heal the dripping wound by removing the seat thereof. By these amendments, the members of Division A were peremptorily required to transfer to Division B. Upon such transfer, they were given the option of two courses:

- (1) They could maintain their insurance, by paying the Division B rate, which we have above set forth; or
- (2) They could continue to pay their assessments according to the 1901 table of rates of Division A, and submit to a scaling of their certificates down to an amount com-

mensurate with such date of assessment, as shown by the mortality tables of the actuaries.

The table of scaling thus presented as an alternative was as follows:

Age	Rate	Rate	Rate	Rate
	\$1.00	\$1.95	\$2.95	\$3.85
50 . . . . .	\$305	\$610	\$915	\$1220
51 . . . . .	290	580	870	1160
52 . . . . .	275	551	826	1102
53 . . . . .	261	523	784	1046
54 . . . . .	247	495	742	990
55 . . . . .	232	464	696	928
56 . . . . .	222	444	666	888
57 . . . . .	209	418	627	836
58 . . . . .	197	394	591	788
59 . . . . .	185	369	554	738
60 . . . . .	173	346	519	692
61 . . . . .	162	324	486	648
62 . . . . .	152	303	455	606
63 . . . . .	143	285	428	570
64 . . . . .	134	267	401	534
65 . . . . .	123	246	369	492
66 . . . . .	118	235	353	470
67 . . . . .	111	221	332	442
68 . . . . .	105	209	314	418
69 . . . . .	98	195	293	390
70 or over . . . . .	92	183	275	366

Under the first option, a member 70 years of age, though he had been such member for 40 years, would be required to pay, upon transferring to Division B, precisely the same rate as a new member of such age, namely, \$10.64 per assessment for \$1,000 insurance. For the holder of a \$2,000 certificate this would be \$21.28 per month. Under the second option, such member must consent to a scaling down of his certifi-

cate from \$2,000 to \$366. It will be seen, therefore, that the options presented to the members of Division A were not options, but alternatives. It mattered little to the member which way he faced; he was confronted with menace either way.

In the pioneer days of this state, there was extant a boy story of two hunters, Caucasian and Indian. In the division of game, the Caucasian said to the other: "I'll take the turkey and you take the buzzard; or if you would rather, *you* take the buzzard and *I'll* take the turkey." The Indian grunted his reply: "You never said turkey to me." This resembles the situation of the members of Division A as they see it. They see nothing but "buzzard" in either alternative.

At the time of the adoption of this last amendment, 7,000 members remained in Division A. The immediate result was that thousands of them lapsed, and other thousands of them submitted to the compulsion of a transfer; so that now, as already indicated, only 115 remain.

In order to accomplish this amendment, which was an amendment of the constitution, a two-thirds vote of the representatives at the special session was required. This was accomplished by counting only the votes representing Division B. The only questions litigated herein are those involving the rights of the 115 remaining members. Four of them are the plaintiffs herein. These have been members of the order, in good standing, for from 25 to 30 years. They challenge the legality of the purported amendments of 1911 and 1916; they challenge the power of the Grand Lodge to establish *two* so-called divisions to occupy the same field of insurance; they challenge its power to charge the mortality of the order against the older membership; they challenge its power to make an amendment so fundamental as to change the essential character of the order, by converting it from a mutual assessment company, paying death losses when they occur, to what, in practical effect, is



an old line investment company; they challenge the new rate proposed as being unreasonable and inequitable, and the proposed scaling of certificates as illegal. These propositions are reducible to the one ultimate proposition: Were the acts done and proposed by the order so beyond the bounds of reasonableness, in a legal sense, that they should be held ineffective?

I. Preliminary to the ultimate question, a question of evidence is presented. On the trial below, the defendant offered in evidence the respective applications of the plaintiffs when they applied for membership to the order. By these applications, the applicants agreed to be bound by future amendments to the by-laws. Plaintiffs' objection to this offer was sustained, on the ground that such applications were not attached to the certificates, as required by Code Section 1741. Appellant's first complaint is directed to this ruling. Its contention is that Section 1741 has no application, because of the provisions of Code Section 1826. These two sections are as follows:

2. **INSURANCE:**  
action on policy: nonattached applications.

"Section 1741. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such

application or representation, but may do so at his option."

"Section 1826. All such associations shall, upon the issue or renewal of any beneficiary certificate, attach to such certificate or indorse thereon a true copy of any application or representation of the member which by the terms of such certificate are made a part thereof. The omission so to do shall not render the certificate invalid, but if any such association neglects to comply with the requirements of this section it shall not plead or prove the falsity of any such certificate or representation or any part thereof in any action upon such certificate, and the plaintiff in any such action, in order to recover against such association, shall not be required to either plead or prove such application or representation."

The original adoption of Section 1741 antedated the original adoption of Section 1826. The former was adopted in 1880, and is somewhat general in its application. The

latter is a part of Chapter 9, and has special

3. STATUTES:  
construction:  
subsequent en-  
actment on  
same subject-  
matter.

reference to fraternal beneficiary associations. It will be observed that they are not identical in their provisions. If Section 1741 is applicable here, the ruling of the trial court was right. If it was not applicable, the ruling was wrong. The argument for appellant is that, because Section 1826 was adopted subsequently to Section 1741, and because it was made a part of the special chapter under which the defendant order was organized, it was intended to supersede the operation of Section 1741, so far as applicable to such an organization. As an original proposition, the argument is not without its force. But the question thus presented has heretofore received our consideration, and it is no longer open to debate. So far as the fact of subsequent adoption is concerned, both sections have been adopted simultaneously, by subsequent codification. The point now urged by appellant has been ruled adversely to it in the

following cases: *Grimes v. Northwestern Legion of Honor*, 97 Iowa 315; *Stork v. Supreme Lodge K. of P.*, 113 Iowa 724. See also *Corson v. Iowa Mut. Fire Ins. Assn.*, 115 Iowa 485; *McConnell v. Iowa Mutual Aid Assn.*, 79 Iowa 757. The ruling of the trial court was in accord with the foregoing.

II. We come to the ultimate question whether the amendments promulgated by the Grand Lodge in 1911 and 1916 were, in a legal sense, unreasonable, and therefore ineffective. In reaching a general conclusion upon this question, three particular features of these amendments stand out prominently. They are: (1) The separation of the membership of the order into two distinct divisions; (2) the alleged change of the fundamental nature of the insurance; (3) the discrimination made against the older members in the adoption of the 1911 table of rates, by refusing them recognition of their existing membership, and by applying the rate to them as of the age attained by them when they should transfer to Division B, instead of as of the age attained by them when they joined the order.

(1) We think it was an abuse of power to divide the membership of the order into two divisions, upon the basis which was actually adopted. There was no legitimate reason for such division. The two divisions thus created occupied the same field of insurance, and were necessarily competitive and hostile. No set of officials could consistently serve both of them. To serve one was to neglect the other. The law is deep-written in the nature of things and in human nature that "no man can serve two masters, \* \* \* else he will hold to the one and despise the other." This law has had its exemplification in the history of these two divisions. The amendment of 1911 purported to create Division B for the purpose of *new* members, the entire existing membership of the order being left as Division A. This was pure indirection. Though indirection it was, it had the paradox-

ical merit of frankness, and took no cover of concealment. Its purpose is frankly explained by the officials as an effort to put the order upon a solvent basis. They reasoned that, if they raised the rates upon the younger members, they might lose them, and the life of the order would thereby be threatened. If they raised the rates upon the older members, they might lose them also, but such a loss could be welcomed as a salvation of the order. It would be the equivalent of a discharge of its greatest liabilities. Such was the conceded purpose of the creation of Division B. If it were not conceded, such purpose would be no less plain. Division B, therefore, was a mere name. Division A was a mere name. The entity of the order was not affected. It was *one*, and not *two*. By the use of these names, it was intended both to extinguish and to keep alive the old order. As Division A, it was to die, and as Division B, it was to be born again. By the death of Division A, the old members would lose their membership. They would come into Division B only as new members coming into a new order. Their rates of assessment, therefore, would be determined by the age attained by them at such time, and not by the age attained by them when they joined the order originally. It should be borne in mind that these old members never joined *Division A*. That name was simply applied to them. They joined the defendant order, many, many years ago. They are still members of it. Does the order which the plaintiffs joined still live? Are they members of it? If members, are they old members or simply new ones? If we treat Divisions A and B as separate entities, or as distinct parts of defendant's entity, could *both* of them at any time have had a prospect of life? When the divisions were created, Division A was made to include the entire existing order. Has Division A been dying a natural death, or have its past officials been an aid to its demise? If they have

held to one division and despised the other, which have they despised?

(2) Turning now to another phase of the discussion, much is said in the argument for the defendant as to the alleged insolvency of the defendant, and the necessity of adopting some means to save its existence. We are by no means satisfied that the question of solvency or insolvency of the defendant order has much pertinency to the case, if, indeed, it can be said in any case that a strictly mutual assessment company is either solvent or insolvent. This company existed originally as a purely voluntary association, without even the formality of incorporating. It was formally incorporated in 1911, as already indicated. It was purely a mutual assessment company, imposing and collecting assessments from its surviving members for the payment of death losses after they had occurred. It gave no guarantees. It came into being nearly fifty years ago. It has always paid its death losses. The claim of insolvency is based upon the figures of the actuaries, from which it is deduced that, with the prospect of future mortality, it cannot continue forever to pay its death losses upon the rate of assessments obtaining prior to 1911. Up to 1901, a uniform assessment of one dollar per month had been made upon all members, regardless of age. In 1901, the differential rate was adopted which we have hereinbefore set forth, wherein a heavier rate was charged upon older members than upon the younger. This rate has always been acquiesced in by the membership, and we assume its reasonableness, for the purpose of this discussion. While the by-laws prior to 1911 fixed a *rate of assessment*, there never was any limitation in the by-laws as to the number of assessments which might be levied at such rate. So far as the constitution and by-laws were concerned, the only limitation upon the number of assessments was determined by the number of deaths. The power of the order, therefore, to make sufficient assessments to cov-

er the death losses, was ample under the by-laws. The difficulty with the exercise of this power was a practical one. It was that the making of assessments more frequently than once a month had a manifest tendency to materially reduce the membership of the order. The question involved in this litigation, therefore, is not so much the power of the order to make sufficient assessments to pay all death losses; it is, rather, whether the methods adopted by it are unreasonable, as being discriminatory, and therefore unfair. If the order had the power to make assessments sufficient to pay all losses, then surely it was not insolvent, unless it may be said that all assessment companies are in that sense insolvent, from their very inception. If the order was simply confronted with the practical difficulty of inducing its membership to submit to the necessary assessments to pay all losses, that was a contingency which inhered in the very nature and plan of the association. Mutual insurance has its own natural limitations. It is not the equivalent of what is usually known as "old line" insurance. It can give no guarantee. It has no assets, and is entitled to none. Whatever it collects belongs to some beneficiary of a death loss. It has the merit of cheapness and the demerit of uncertainty. It is something less than absolute insurance. Its cheapness is attractive, and the real value of it is often more than commensurate with its cost. The defendant order is one of the time-honored orders of that kind. It has been a real boon to thousands, and ought to so continue for many years to come. We are told that, when it first came into being, it was simply an undertaking by approximately 2,000 persons that, while his membership continued, each would pay a dollar to the beneficiary of every death loss. Such an undertaking could hardly be called insurance, in the "old line" sense; but mutual insurance, nevertheless, it was. Was the association at that time solvent or insolvent? It had neither assets nor liabilities. Could it be said that these 2,000

men each had secured insurance upon his life, in the sense for which defendant officials now contend? The first man died, and the surviving 1,999 paid their dollars. This proved to be insurance, at least for the first man. It later proved to be substantial insurance for the second man. If this membership were to remain stationary, surely the last man could not hope for any benefits to his beneficiary. His only hope would rest upon the continuing increase of the association and the taking in of new members. Without pursuing further the illustration, it is sufficient to say that it is of the very essence of mutual insurance and of the efficiency thereof that it shall grow, and that it shall continue to receive new and younger blood. This is the only chance for the two thousandth man. When growth sickens or dies, mutual insurance depreciates accordingly. Continual growth has been the life of the defendant order. No natural reason appears in this record why it should not have so continued, if it had been heroic enough to face its liabilities without subterfuge. That a member should live beyond the natural expectancy of his life ought not to be deemed an offense against an insurance company. It is argued by defendant that it is costing more to carry the insurance on these old men than they are paying in the way of premiums. This argument is a deduction from another fact: that the older men have furnished all the mortality of the order, and that these men must, in the course of time, create similar liabilities. Granting that these men must soon die, the death loss will be no greater than if death had occurred twenty years ago. If they are a loss to the company now, they were not such twenty years ago. They have been paying members ever since, and have cost nothing, so far. The fact that other men of their age have died is not more chargeable to them than to any other member of the order. That was the risk that all took. When these men joined the order, it was with the professed purpose of continuing in it

to the end. Can it be said that a member who lives beyond his expectancy is a greater loss to the company than the one who died prematurely? When these men joined the order, they joined themselves to a membership many of whom had already reached their expectancy. These plaintiffs began at once to pay death losses on such. When they paid such losses, they had nothing to expect in return from those whose membership had ceased by death. Their only way of compensation was from those who should come after. They relied, and had a right to rely, for the security of their insurance upon the new blood which was to come. And yet we find that, in 1912, the past officials of this order closed Division A against all new membership. Was that an act of life or of death? It not only closed the door to new membership, but it opened the door of exit from A into B for all the younger membership of the order. Having thus separated the young from the old, it then said to the older men:

"You shall constitute a little company of your own. You shall pay your own death losses. We shall assess you sufficiently to pay such death losses and to accumulate a reserve sufficient to pay the loss of the last man. Be thou faithful unto death, and we will give you a reward of life."

The net result is a little insurance company of 115 old men, who exhibit staying qualities comparable to those of some distinguished creatures in the animal world. This result has been brought about intentionally, though circuitously. The creation of the divisions A and B had no other function or purpose than to accomplish just this result. Is it a fair observance of the obligation implied by this order to its membership? Cheap insurance is a pressing inducement to a young man. But what is cheap insurance worth, even to a young man, if, after he has carried it all his life, he may be walled off in old age with a few other old men, and thereby separated from all the benefits of the growing order? True, old age is a liability, but it is the very liabil-



ity against which youth insures. When such liability is about to mature, shall it be deemed an insolvency, and as such, shall it be gathered into a little pocket, as nature gathers her pus? Shall an old membership which has paid dues for thirty years be deemed the equivalent of a mere carbuncle, to be lanced and discharged for the saving of the life of the order?

We are not unmindful of the warning contained in the briefs that an affirmance of this case will take the life of the defendant. We would fain believe otherwise. If, however, such be the result, it will be not because of the conclusions herein, but because its life has already been taken. If it may by this process become rid of its liabilities by the overthrow of its old membership, it has made a great discovery. It may adopt the same course five years hence, and every four or five years thereafter. True, it promises otherwise henceforth, but new promises are no better than old ones. These plaintiffs had promises. Future plaintiffs will have nothing more. This course furnishes a sure door of escape from the very substance of insurance liability. It is the door of repudiation, and nothing less. What is the life of the order worth, if its insurance fails? When a human being makes the saving of his life the chief end of his existence, he has already lost it. "Whoso will save his life shall lose it." If the past officials of this order had directed their solicitude less to the saving of the life of the order, and more to the faithful performance of its obligations, the life of the order would probably have been secure. No reason is apparent in this record why it should not have prospered indefinitely. The life-saving proceedings which are herein considered form the greatest menace which it has ever confronted. If they shall prove fatal, it must be charged up as a life-saving fatality. If the order can be saved, its honor must be reasserted and redeemed. No insurance company can live in the dishonor of any form of repudiation.

(3) Much of the contention of the defendant order is based upon the alleged inadequacy of rates paid by Division A. This was the 1901 table, which we have hereinbefore set forth. It is urged that the 1911 table adopted for Division B, which we have hereinbefore set forth, is a correct and scientific table, based upon the mortality experience. We shall have no occasion in this discussion to find any fault with the 1911 table. What has not been explained to us in the briefs is why the long-time membership of these plaintiffs in this order should be ignored in applying to them the 1911 rates. As already explained, this table presents a level-rate plan, based upon the age attained by the member when he joins. This is the advantage given to early joining. For instance, the plaintiff Tusant joined this order at 28 years of age. According to the 1911 table, a monthly assessment of \$2.64, limited to ten assessments a year, would not only have paid every death loss occurring during his lifetime, but would create a reserve large enough to mature every outstanding certificate, regardless of any new membership. Notwithstanding his long-time membership at all times in good standing, the only alternative that is now presented Tusant is to rejoin the order of which he has always been a member, and to assume a rate of assessment according to the age now attained by him. In other words, he is put upon precisely the same basis as any new member of his present age would be put. Take the case of Barlow, who is plaintiff in a companion case submitted herewith. He was a paying member for more than 30 years. The sum total of his assessments and dues paid amounted to \$998. He was expelled, for failure to accept either of the alternatives presented. If, instead of becoming a member of the order in the first instance, he had proceeded to create a fund of his own, by successive payments equal to his assessments and dues, such fund, including accruing interest, would now amount to a sum approximately sufficient to purchase for him, at his age

of 74, a paid-up insurance policy for \$2,000, upon the basis of the 1911 table. The expert for the defendant in his case testified that a paid-up policy on that basis would cost Barlow something over \$1,500 present payment, and that the present value of payments to be made by him in accordance with the 1911 table would total, with accruing interest, something over \$1,600. Yet Barlow is told by the officials of the defendant order that he has at all times been a charge upon the charity of the order, and that the cost of his insurance has largely been carried by other members.

Putting together the plan heretofore in operation and the new plan to be in operation hereafter, it would cost Barlow more than \$3,000 to mature his \$2,000 policy. Consistently enough, the experts of the defendant testified, in Barlow's case, that his present policy had *no* value, because the future payments necessary to mature it would, with interest, amount to its full face value. This furnishes a concrete illustration of the defendant's theory that old men who have outlived their expectancy have already cost the defendant order more than the value of their insurance. Such theory is manifestly unsound, and it devolves upon the order to find some other cause or source of its trouble. Barlow's membership has cost nothing, so far, to the defendant order, nor will it ever cost anything if his expulsion is to stand. He has paid out \$998, for which, as yet, he himself has received nothing. True, the money so paid has been expended by the defendant order for the purposes for which it was paid. But the only possible consideration for Barlow was that similar expenditures would be made in behalf of his beneficiary at the maturity of his certificate. This consideration being repudiated, he has nothing. The rates tendered to him are precisely the same as they would be if he were joining as a new member. Surely, a correct theory of insurance ought to find some present value in a certificate fully maintained for 30 years, which had cost

\$998. If this be so, then no new rate could well be reasonable if it ignored such fact. This is not saying that such certificate should be worth \$998. It may well be conceded that the fact of existing insurance for 30 years had of itself a substantial value, in that the contingency of death would have matured the certificate at any moment. We think it quite clear, however, that, if this order was justified at all in changing the fundamental character of this insurance, and in adopting an old line standard and a level rate, then it should be such for all its membership, old as well as young. The essence of the level rate is that the age attained at the time of membership fixes the unchanging rate. We have held frequently that the right of an association to amend its by-laws does not carry the right to make material reduction in benefits promised, nor to materially increase the consideration, if fixed. We need not cite authorities to these propositions. None of our previous cases have a controlling bearing upon the case at bar. In view of the fact that there was no limitation upon the power of the order as to the sum total of assessments which it might collect, the amount of the particular assessment is not a controlling question, except as bearing upon the question of discrimination among members. The following authorities from other jurisdictions bear upon some of the important features of our case. *Ebert v. Mutual Reserve Fund Life Assn.*, 81 Minn. 116 (83 N. W. 506, 834, 84 N. W. 457); *Strauss v. Mutual Reserve Fund Life Assn.*, 126 N. C. 971 (36 S. E. 352); *Benjamin v. Mutual Reserve Fund Life Assn.*, 146 Cal. 34 (79 Pac. 517); *Williams v. Supreme Conclave Improved Order of Heptasophs*, (N. C.) 90 S. E. 888.

We quote from the *Ebert* case as follows:

"It is evident that the contract contemplated an unsteady and varying death fund from which to pay death claims, and that the amount of the assessments would vary

according to the number of deaths, the growth of the association in membership, and earning capacity of the reserve fund. It is also clear that the law of self-preservation applied, and if, at any time, in order to meet maturing claims, it should become necessary to levy a larger amount than that stipulated as the maximum rate of the table, the power so to do was inherent in the association, and the directors would have authority to pass suitable rules and regulations for that purpose. But it is equally clear that neither by the contract of insurance, in contemplation of the laws of New York, the constitution and by-laws, nor from the natural, inherent power of the association, based upon the doctrine of the general good, does there exist authority to arbitrarily determine in favor of one class of members and against another class."

We quote also from the *Ebert* case, as follows:

"The old members joined the association upon the theory that it was to be a living institution,—as old members drop out and are paid off, new ones come in, younger in years, thus adding strength, and keeping up the vitality of the association. The new members entered upon the same basis and with the same expectation, yet they continue to be assessed as of the age of entry on the 1889 table. There has been shown no reason for drawing an arbitrary line as of January 1, 1890. If the board of directors could advance the age of all members who joined prior to 1890, they can keep on setting out classes according to some certain year of entry, and advance its members, also as to age. And, if the board can advance the members who joined prior to 1890 to the current rates of the 1889 table, they can for the same reason advance them to years ahead of the current age. The board of directors had no authority to levy such an assessment as Call No. 96, and the act of the defendant in cancelling plaintiff's policy for nonpayment of the call made upon such basis was void."

We quote also from the *Benjamin* case, as follows:

"The essential principle upon which co-operative associations like that of the defendant is based is that there will be a constant invigoration of the association by the accession of new members; that it shall be in fact a going concern for the advantage of all; and that every member of the association will be given the benefit of the average mortality of the entire membership in force at the last death prior to an assessment, resulting from this constant addition of new members. And it was necessarily upon this theory that the earlier members of the association joined it. They anticipated the benefit which would result from a lower average mortality through the constant accession of these new members, and it was this benefit which was secured to Benjamin as one of the earliest members, by the provision in his contract which called for an assessment 'upon the entire membership in force at the date of the last death claim, the same to be apportioned among the members according to the age of each member.' He was entitled to this benefit which would accrue from the constant accession of such members. This accession would naturally create a lower average mortality among the entire membership, and consequently a smaller cost would have to be sustained by each member, where the assessment to meet death claims was distributed over the entire membership, equally apportioned as to amount according to the respective ages of the members."

Authorities are brought to our attention by the defendant holding contrary to the views herein expressed. Practically all of such decisions, however, are based either upon statutory provisions of the respective states or upon by-laws of the order, none which are applicable here.

(4) It must be recognized that, in the long run, the actual cost of carrying insurance must be paid in some way. The only way open to a mutual assessment association to

meet such cost is by assessment of its members. Sections 1822 and 1823 in effect require such an association to make provision for the payment of death losses by sufficient assessment. This implies authority in the association to increase rates in a fair and reasonable way, when reasonably necessary. This is certainly so in the absence of a contract limiting authority.

4. INSURANCE:  
mutual benefit  
insurance:  
limitation on  
rates.

association organized under the sections above cited has any power to limit by advance contract the assessment to an amount less than is reasonably necessary to comply with the mandates of such sections, we do not now determine. What is a reasonable rate in a given case must be determined in the light of generally recognized mortality tables and actuary computations. By Section 1839-j, Code Supplement, 1913, the legislature has promulgated a mortality table which is obligatory upon all associations organized subsequently to such enactment. It is not retroactive, and therefore is not obligatory upon the defendant association. Nevertheless, it may properly be considered on the question of reasonableness in the fixing of rates, as carrying some presumption in favor of its practical correctness. So far as

5. INSURANCE:  
mutual benefit  
insurance:  
power to apply  
level premium  
rates.

appears in this record, the 1911 table of rates is consistent with such legislative mortality table. We do not denounce this 1911 table of rates, as such. It is not necessary for us now to hold that such table could or could not be applied to the existing membership, if done without unreasonable discrimination, and with recognition of the previous duration of such membership. The uncertain element at this point is whether the 1911 table is based upon a plan or form of insurance which, in its nature, is fundamentally different and more expensive than the merely mutual assessment insurance contemplated by Chapter 9 of Title IX of the Code. If yea, then, in order to be rea-

sonable, the 1911 table should be scaled down to the requirements of cheaper insurance. We have already stated that this table contemplates not only the current payment of current death losses, but also the creation of a large reserve fund, which shall be sufficient to mature all certificates many years hence, regardless of the future acquisition of any new members. The soundness of such a plan of insurance is not questioned. But the question is whether it is not fundamentally different from the plan of mutual insurance contemplated by above Chapter 9. If it is, the defendant order had no power to adopt it, or to impose increased rates for its maintenance. If the mutual insurance contemplated by the statute may be carried with reasonable safety at a substantially less cost, both to the association and to the insured, without the creation of reserves, and in reliance upon the maintenance of the membership by the acquisition of new members sufficient to make up all losses of membership by death or lapse, then it may well be urged that the statutory plan must be adhered to. The question of reserve and the profitable use and safe care thereof presents a great problem of its own. Such a trust fund calls for statutory safeguards, both for its custody and for its proper and profitable utilization. In the absence of statutory safeguards, reserve funds have heretofore proved too often to be a treasure laid up "where moth and rust doth corrupt and where thieves break through and steal." No such safeguards are provided in the cited chapter. We do not find it now necessary to decide this question. Argument has been directed to it only incidentally, and we reserve decision thereon.

By way of recapitulation, what we do hold is: That the creation of Classes A and B was a mere fiction, and was ulterior in its purpose and unreasonable in its result; that the purported partition wall between such divisions must be ignored; that the entity of the defendant is one, and not



two; that the plaintiffs are members of the defendant order, and that the members of Class B are nothing else than members thereof; that the creation of such classes to occupy the same field of insurance and for the purposes indicated was inherently inconsistent with the organization of the defendant, and that, therefore, it was without power to create them; that the action of the order in purporting to deny to the plaintiffs, as Class A, the benefits of a going concern and of new membership was a violation of their substantial rights; that the same is to be said as to its refusal to recognize their continuing membership in the order; that, if a level rate is to be applied to the plaintiffs, it must take account of the date of their membership; that, whatever the rates applied to *new* members, such difference of rate afforded no justification for the separation of the *new* members into an independent or separate class, to be exempt from the ordinary liabilities of the order; that, as members of the defendant order, the members of the so-called Class B necessarily became liable for the ordinary liabilities of the order for death losses; that such *new* members could not be organized into a separate class or association within the defendant order and be permitted thereby to appropriate the livery and life of the defendant as a going concern and yet be exempt from its obligations,—the performance of which furnished the only reason for the organization and existence of the defendant order.

One other question remains. The defendant order had accumulated a fund known as the emergency fund. This amounted to about \$120,000. The general plan that had been adopted was to apportion this fund in a way to equalize certain inequalities in the table of rates. For instance, the 1901 table of rates was based upon what is called the step-rate plan. A classification of seven classes was adopted. The same rate was applied to each member of a

6. APPEAL AND  
ERROR: review,  
scope of de-  
cree beyond  
pleadings.

class, regardless of the difference in age, there being a range of difference of from 4 to 6 years. Class 7 included all persons 50 years old or over. Assuming the rate of assessment for Class 7 to be a proper rate for a man 50 years of age, it necessarily became deficient as a rate for a man of 70. The emergency fund was applied to this deficiency, and ultimately to the benefit of the older men. The new members becoming such after 1911 had no part in the creation of this fund. It was at all times thereafter treated as belonging to Division A, as representing the existing membership antedating 1911. The plaintiffs, for themselves and for the 115 members of Division A now claim the exclusive right to this fund. Because certain of the older members who would have been entitled to share in this fund transferred to Division B, under the alternatives presented to them, the trial court apportioned this fund, and awarded about \$71,000 thereof to be set aside to the benefit of such old members who have so transferred to Division B. Both parties complain of this action of the court, and both appeal from it. The plaintiffs contend that the entire fund should have been awarded to them, without any apportionment. The defendant contends that the court should have made no order whatever on the subject, because the pleadings raised no issue pertaining thereto. For the plaintiffs it is contended also that there was no competent evidence before the court to sustain the apportionment made. The only evidence we find in the record to sustain the apportionment is certain telegrams to and from the actuary, which were put in evidence over the objections of the plaintiff. The defendant does not defend the competency of this evidence. It is also true that there is nothing in the pleadings that tenders or raises any issue concerning this fund, unless it can be said that the question of its apportionment necessarily inhered in the controversy. If there ought to be an apportionment of this fund, the state of the record is not such as to enable us to determine as to what would be

a proper apportionment. In view of the conclusion which we have reached, that the pretended creation of classes was ineffective, and that all the members of the order are members of the same order and the same class, the question of apportionment would seem to be rendered quite immaterial. The entire fund still belongs to the defendant order. The question of apportionment will be reserved from the adjudication. To the extent herein indicated, the decree of the trial court will be modified. In all other respects, it is affirmed.—*Modified and affirmed.*

All the justices concur.

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C. W. BOLES, Appellee, v. MISSOURI VALLEY ELEVATOR COMPANY, Appellant.

**ELECTION OF REMEDIES: Non-Inconsistent Proceedings.** The  
1 act of a landlord in attempting to collect rent from the tenant's estate, and, after failure, proceeding against one who had converted property upon which the rent was a lien, is entirely consistent and non-prejudicial to the conversioner.

**BANKRUPTCY: Exclusiveness of Jurisdiction of Bankruptcy Court.**  
2 Bankruptcy proceedings against one who was a tenant is no obstacle to proceedings in the state courts by the landlord against one who has converted property upon which the rent was a lien.

*Appeal from Harrison District Court.*—O. D. WHEELER,  
Judge.

APRIL 11, 1918.

ACTION for damages for conversion of corn upon which the plaintiff claimed to have a landlord's lien. There was a verdict for plaintiff, and the defendant appeals.—*Affirmed.*

*Cochran & Wolfe*, for appellant.

*H. L. Robertson*, for appellee.

EVANS, J.—The defendant was engaged in the business of buying grain. In December, 1914, it bought from Auwater 547 bushels of corn, and paid him therefor. Auwater

1. ELECTION OF  
REMEDIES:  
non-incon-  
sistent pro-  
ceedings.

was a tenant of the plaintiff's, and had raised the corn upon the plaintiff's farm. Auwater was indebted to the plaintiff for rent thereon, in a much larger sum than the value of the corn in question. The fact of the purchase of the corn is not disputed; neither is the quantity thereof, nor the price. Two defenses were interposed:

(1) That Auwater was not in fact owing rent to the plaintiff, because the plaintiff was owing Auwater for work and labor done, in excess of the amount owing by Auwater; and that Auwater was authorized by the plaintiff to sell said corn and to pay himself with the proceeds thereof, in extinguishment of the indebtedness due him from the plaintiff.

(2) That, after the alleged conversion, Auwater was adjudged a bankrupt, and that the plaintiff filed against him his claim for rent, and that he did not disclose therein any alleged claim for damages for conversion against this defendant.

As to the first defense, there was no evidence to sustain the same, and it may be disregarded. As to the second, it is the theory of the appellant that there is some inconsistency involved in the claim presented by plaintiff before the referee in bankruptcy for the rent due him from Auwater, and his present claim for damages from the defendant for the conversion of the corn. It was to the interest of the defendant that the plaintiff should pursue the bankrupt and obtain collection from him, if possible. If he had collected all of his rent from the bankrupt, it would have extinguished his claim for damages for the conversion. He tried to do so, and failed. Thereupon, he brought this action against the defendant for damages for the conversion.

His conduct was entirely consistent and clearly beneficial and not prejudicial to the defendant.

It is argued by the appellant, however, that the proceedings in bankruptcy operated as a bar to all proceedings in the state courts. That is true only as to proceedings against the bankrupt. The defendant was

2. **BANKRUPTCY:**  
exclusiveness of  
jurisdiction  
of bank-  
ruptcy court.

not the bankrupt. The plaintiff could not prosecute its action against him in the bankruptcy court. The action was properly brought in the district court. Nor was it waived by plaintiff's attempt to collect from the real debtor. The judgment below is—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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CHARLEY FERGUSON, Appellant, v. JOHN FERGUSON, Appellee.

**TRIAL:** Direction of Verdict—Repeating Request. Overruling a

1 motion for a directed verdict at the close of plaintiff's evidence is no bar to sustaining such motion when repeated at the close of all the evidence.

**EVIDENCE:** Person as Exhibit. Conceding, *arguendo*, that a hu-

2 man being may be offered as an exhibit, yet a formal offer is properly rejected when the person in question was a witness and fully examined before the jury.

**INSANE PERSONS:** Grounds for Guardianship. A jury question

3 on the issue of guardianship is presented by evidence that the person in question (a) is of great age, (b) lacked all education, business experience, training, and capacity, (c) was weak mentally, and (d) had been overreached in a transaction that would render him a pauper.

*Appeal from Jasper District Court.*—HENRY SILWOLD,  
Judge.

MAY 7, 1918.

ON an application to have a guardian appointed over the property of defendant, John Ferguson, there was a trial to a jury, at the close of which the trial court directed a verdict for the defendant; and the plaintiff appeals.—*Reversed.*

*Tripp & Tripp*, for appellant.

*E. M. S. McLaughlin and Cragan Brothers*, for appellee.

SALINGER, J.—I. We gather one assignment to be that the court erred in sustaining a motion to direct verdict, made at the close of all the testimony, because it had overruled such a motion at the close of the testimony for the plaintiff. The point is not well made. We have very many times held that, where such a motion is overruled at the close of the testimony for the plaintiff, such ruling will not be reviewed on appeal where the defendant puts in testimony and does not renew the motion at the close of all the testimony. By inevitable implication, this settles that overruling the motion when first made is no bar to sustaining it when it is repeated at the close of all the evidence.

II. Another complaint is that the court erred in sustaining objections to a proffer by plaintiff of defendant as an exhibit. If we assume that plaintiff had the right to tender the defendant as an exhibit, there is still no room for complaint here, because the plaintiff made the defendant a witness, and he was examined and re-examined and cross-examined before the jury, which certainly constituted exhibiting him to the jury.

III. The substantial question is whether there was error in directing a verdict for the defendant. It will serve no useful purpose to go into an elaborate discussion

1. TRIAL: direc-  
tion of ver-  
dict: repeat-  
ing request.

2. EVIDENCE:  
person as ex-  
hibit.

3. INSANE PERSONS: grounds for guardianship.

of the testimony pro and con. The jury might well have found, had it been permitted to act, that, in dealing with defendant's son Cress, defendant was transacting business with a loving, indulgent, and dutiful child; that transferring all his property to this son was an act of prudence, and wholly advantageous to the father; and that there was no occasion to appoint a guardian for the father. But it does not sustain directing a verdict for the defendant that the jury might thus have found. The case must go to the jury if, as we think, it might also have found that this father, a man of very great age, lacked all education, all business experience, training, and capacity, and was weak mentally; that the father had been overreached; and that permitting the transaction between father and son to stand would be sanctioning the abuse of a confidential relation made use of to make a pauper of the father. We cannot say, as matter of law, that the jury might not have found this. Take a few instances. There was testimony that the father thought he left money in a bank to pay a note, which money had been realized from selling oats. The cashier of the bank said that no money was put into the bank. There is testimony from which the jury could find that the father had practically no realization of a transaction by which he virtually made a gift of all he had in the world to this one son, and left himself destitute except for the bounty of that son. There is testimony that, at one time, when there was talk about how high corn was, the defendant imagined he had 600 bushels to sell, when he had none. There is testimony by those who knew defendant well that he has been growing childish constantly, and that his mind was badly warped. There is testimony that defendant is unable to tell what year he was born in, when he moved from Ohio, or how long he lived in Illinois, and that he does not know which one of his children is the oldest, nor the order in

which they were born. An incident is testified to where the defendant talked with one of his sons about 20 minutes, then walked across the yard to a gate, and, returning to this son, inquired of the son when he, the father, had come, and where he had come from, to which the son replied the father had been talking to him just a few minutes ago,—a fact which the father could not remember. Again, there is testimony that, when the wife of the defendant was not expected to live, he left her in the morning, to hunt an old horse; that, not returning when night came on, the children went in search, and when they found him, he began to cry, and said, speaking of his wife, "I want to see Ann, but she is dead." On being told his wife was not dead, he replied that one Joe had told him so, but he, defendant, knew she was not going to die for a week or ten days.

We are not overlooking that the defendant was a witness, and our views on the coherency of his testimony might be quite controlling, were we trying this matter *de novo*. But we are not, and the point is two-edged. The printed record cannot show us how defendant acted and spoke while he was testifying before the jury, and we are in no position to say that that which we did not see and hear might not well have induced the jury to find against the capacity of the defendant. We have already gone into detail more than can be of value to anyone. We are not as much as intimating whether defendant should or should not have a guardian. But we are constrained to hold that, upon the record, which we have examined with great care, this was a fair question for the jury. It follows that the order and judgment below must be reversed.—*Reversed and remanded.*

PRESTON, C. J., LADD, GAYNOR, and STEVENS, J.J., concur.

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W. E. KEENEY, Appellee, v. CHICAGO, BURLINGTON & QUINCY  
RAILROAD COMPANY, Appellant.

**NEW TRIAL:** Specifying Error. A motion for new trial is sufficient in form which simply asserts: (a) That the verdict is not



sustained by sufficient evidence, and is contrary to the evidence and is contrary to law; and (b) that the court was in error in overruling a motion for a directed verdict, and in giving certain specified instructions, and, as reasons therefor, assigns, *by reference to the trial record only*, the same reasons which were there assigned, ample exceptions having been duly entered to all such actions by the court. (Sec. 3755, Code, 1897.)

**TRIAL:** Waiver of Error in Declining to Direct Verdict. Error in  
2 overruling a motion for a directed verdict is not waived by failure to renew the motion after the subsequent introduction of evidence *which in no wise warrants a reconsideration of said motion by the court.*

**CARRIERS:** Interstate Bill of Lading Limiting Damages. The provision of an interstate bill of lading that the carrier's liability for loss or damage "*shall be computed on the basis of the value of the property at the time and place of shipment:*"

(a) Is valid.

(b) Applies to damages arising from *delay*.

(c) Creates a measure of damages which excludes all consideration of market variations pending the transportation.

**CARRIERS:** Limitation on Filing Claims—Waiver. The provision  
4 of an interstate bill of lading that claims for damages must be filed with the carrier within a limited time may not be waived *by the carrier.*

**PLEADING:** Orders, Etc., of Interstate Commerce Commission.  
5 Whether a ruling by the Interstate Commerce Commission should be specially pleaded, *quaere*.

*Appeal from Page District Court.*—E. B. WOODRUFF, Judge.

MAY 7, 1918.

ACTION for damages against a carrier for negligent delay in the shipment of poultry. There was a verdict for plaintiff, and the defendant appeals.—*Reversed and remanded.*

W. D. Eaton, E. C. Eicher, and Scott & Peters, for appellant.

Earl R. Ferguson, C. R. Barnes, and Harry W. Shackleford, for appellee.

EVANS, J.—In January, 1912, the plaintiff shipped to his commission merchants at New York City four carloads of live poultry. These shipments were made on different near-by dates, and originated at different towns in Iowa and Missouri. It is alleged that there was unreasonable delay in transporting such shipments, so that they were belated in their arrival at New York City; that the plaintiff suffered loss by reason of a drop in the market pending such delay, and by reason of increased expenses in caring for the poultry and increased shrinkage resulting from the delay. The shipments were all made under a uniform bill of lading, approved by, and on file with, the Interstate Commerce Commission as a part of Western Classification Number 50 and Official Classification Number 37. Under this bill of lading, a slightly reduced rate was allowed, and certain stipulations provided for limited liability. These included the following:

“No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon. Every carrier shall have the right, in case of physical necessity, to forward said property by any railroad or route between the point of shipment and the point of destination; but, if such diversion shall be from a rail to a water route, the liability of the carrier shall be the same as though the entire carriage were by rail. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events, such lower value shall be the maximum amount to govern such computations, whether or not such loss or damage occurs from negligence. Claims for loss,

damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

In the introduction of evidence, and in the submission of the case to the jury, the provision of the bill of lading as to measure of damages, requiring that it should be computed on the basis of the value of the property at the time and place of shipment, was ignored, and plaintiff was permitted to recover for damages from a drop in the market resulting after the date upon which the shipment should have arrived, regardless of the question of the reduced value of the freight as compared with the *original* value thereof at time of shipment, plus freight paid, etc.

Furthermore, plaintiff did not make claim for loss, damage, or delay within four months after delivery of the property, as required by such bill of lading. The controversy on this appeal revolves about these two provisions. The plaintiff, as appellee, has also filed a motion to affirm, which has been submitted with the case.

I. The motion to affirm is predicated upon the fact that the appeal was from an order overruling the motion for a new trial, and not from the judgment. It is contended that the motion for a new trial was not sufficiently specific in its grounds to permit a review of alleged errors committed at the trial. The jury rendered a verdict on December 11, 1915. On the same day, the following record was made:

"Comes now the jury and return a verdict which is in words and figures following, to wit: 'We, the jury, find in favor of the plaintiff and we fix the amount of his recovery at \$1,688.98. C. C. Bullock, foreman.' The jury are now discharged from further services herein. It is therefore

1. NEW TRIAL:  
specifying  
error.

ordered by the court that the defendant pay the cost of this action taxed.....dollars and that execution issue therefor."

A motion for a new trial was filed by the defendant within the ten days allowed by the court. This motion, being submitted, was held under advisement by the court until the 12th day of July, 1916, when it entered an order overruling the motion. At this time, the time for appeal from the original judgment had passed. Within six months thereafter, the defendant appealed from the order overruling the motion for a new trial. It is now contended for the appellee that the defendant may not be heard on this appeal except upon the grounds stated in the motion for a new trial, and that it may not be heard even upon these, because they are too indefinite in their specification of error to comply with the rules of this court regarding the requisites of appellant's brief.

As a general proposition, it may be said that, inasmuch as the appeal is only from the order overruling the motion for a new trial, no ruling on the trial can be reviewed on this appeal unless it was within the scope of the motion for a new trial. On the other hand, all rulings made on the trial are subject to review if they were fairly included within the grounds of motion for a new trial. The motion for new trial conformed to the statute, as to grounds stated. These grounds were somewhat formal, and not very specific. The first and second grounds were that "the verdict is not sustained by sufficient evidence and is contrary to the evidence and is contrary to the law." This was in compliance with Subdivision 6 of Section 3755, Code, 1897. The sixth ground of the motion charged error in overruling the plaintiff's motion, at the close of the evidence, for a directed verdict, reference being made to the grounds of such motion as appearing in the record. This was in purported compliance with Subdivision 8 of Section 3755.

Specific objections and exceptions were made during the trial to each of twenty instructions. These were made regularly, in advance of their submission to the jury. The seventh ground of motion for a new trial charged error in submitting such instructions to the jury, specifying the same by number, "for the reasons set out in defendant's objections and exceptions now on file herein, which are hereby referred to and made a part of this motion." This was in purported compliance with Subdivision 8 of Section 3755. Other grounds were alleged, but we need not consider them. As to the grounds here set forth, we think the motion for a new trial was sufficient in form as a motion for a new trial. They fairly called in question before the trial court the rulings there complained of. If so, then such rulings are subject to review on this appeal, even though the rules of this court require greater specification of error in appellant's brief than appears from the mere statement of the motion for new trial. Inasmuch as the motion for a new trial is adequate to subject such errors to review, the appellant may, of course, resort to the record of the original proceedings for a more specific statement of the error complained of. This the appellant has done. *Mueller Lbr. Co. v. McCaffrey*, 141 Iowa 730; *Williams v. Clarke County*, 143 Iowa 328. It is true that, in his original assignment of errors, the plaintiff made no reference, in terms, to the motion for a new trial; but this omission has been corrected by an amended brief.

Of course, if the instructions had not been excepted to on the trial, and in advance of their submission to the jury, quite a different question would be presented. In such event, the appellant would have no exceptions to the instructions, because the motion for a new trial was insufficient for that purpose. It is urged by the plaintiff that the defendant waived its motion for a directed verdict, for failure to renew the same after the evidence was fully

2. TRIAL: waiver of error in declining to direct verdict.

closed. It appears from the record that the defendant made its motion for a directed verdict, in the first instance, after both parties had fully rested. The motion was overruled. Thereafter, the plaintiff introduced brief testimony from one witness. Thereafter, the motion for a directed verdict was again overruled. Thereupon, the plaintiff amended his petition, presumably to conform to the testimony. The plaintiff was also called as a witness, and testified to his failure to find a letter. Thereupon, the defendant introduced a copy of the letter, which had been previously offered and rejected. It is the contention of appellee that, in order to prevent a waiver of its motion to direct, the defendant should have again renewed it. This would be making a very technical requirement. The substance of the evidence was closed before the motion was made in the first instance. It is not unusual for the trial court to permit counsel to supply oversights, both of evidence and pleadings. If every such grace extended by the court must be deemed to have the effect of overturning or waiving rulings already made, it would be an unwarranted burden upon the patience of the court. There was nothing in the additional testimony introduced which would have warranted a reconsideration by the court of the ruling already made on the defendant's motion. The failure of the defendant, therefore, to make a further formal renewal of its motion did not waive it. We shall confine our consideration of the case, therefore, to such rulings upon the trial as come fairly within the grounds of the motion for a new trial here stated. We may note in passing, also, that the plaintiff, as appellee, has little to gain at this point if our holding were otherwise. Though a judgment for costs was rendered against the defendant on the date the verdict was received, through some oversight no judgment was rendered on the verdict for the damages found therein. The judgment for costs was, of

course, appealable. But a later judgment on the verdict for the amount thereof would also be appealable.

II. It is the theory of the plaintiff, appellee, that the provision of the bill of lading pertaining to measure of damages on the basis of the value of the shipment at "the place and time" of origin has no application to a

3. CARRIERS: in-  
terstate bill  
of lading limit-  
ing damages.

case of delay where no physical damage is claimed. This, in a general way, is the the-

ory upon which the case was submitted to

the jury, and damages were allowed accordingly as for the fall of market values. The holding of the United States Supreme Court is to the contrary. *New York P. & N. R. Co. v. Peninsula Produce Exchange*, 240 U. S. 34. Concededly, this case is governed by the Interstate Commerce Act and the Carmack Amendment. In this class of cases, we are not the court of last resort, nor are we permitted to be guided by our own previous cases. Our only responsibility and concern are to conform to the holdings of the higher court. Under the holdings of that court, it is competent for the carrier to stipulate for a limited liability and a reduced rate. The terms of the bill of lading, therefore, should have been regarded on the question of measure of damages. The bill of lading provided "that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading." Under the foregoing provision, a total loss or damage of any part of the shipment would be measured by such value at the place and time of shipment, plus freight and expenses necessarily incident to the shipment; whereas a partial loss or damage would be measured by such value less the salvage value. The effect of such provision was to fix the basic liability of the carrier by the value at the place and time of shipment,

and thereby to disregard the subsequent oscillations of the market pending the transportation. Suppose, for instance, that, after the delivery of the shipment to the carrier, and pending the reasonable time of transportation, there had been a drop in the market, and thereafter a loss of the shipment, then the liability of the carrier would still be predicated upon the value at the time and place of shipment, and not upon the reduced value resulting from a later drop in the market. On the other hand, suppose that, instead of a drop in the market, there had been a rise therein, the basic liability of the carrier would still rest upon the value at the "place and time of shipment." By Paragraph 29 of the instructions, the jury was instructed in terms that this provision of the bill of lading was binding upon the parties. Its binding character, however, was not recognized in the introduction of testimony, nor by the later instruction, Paragraph 32. This paragraph indicates concisely the general theory upon which the case was tried and submitted as to the measure of damage. By this paragraph, the jury was instructed that plaintiff's measure of damage would be "the difference between the market value of such poultry at the point of shipment on the day such poultry should have arrived at its destination if it had been transported there within a reasonable time, and the market value of such poultry at the point of shipment on the date of the first market day after the arrival of said poultry at destination."

It will be noted that, by this instruction, the trial court adopted as the basis of liability the value of the poultry at the place of shipment, but not such value at the time of shipment. The measure thus stated was contradictory to the terms of the bill of lading.

In proof of his measure of damages, the evidence introduced by plaintiff conformed to the rule laid down by the court in this instruction; nor was any evidence introduced of a measure of damages conformable to the terms of the



bill of lading. Not only was it erroneous to admit such evidence, but it was also erroneous to submit the case to the jury without any evidence in support of the proper measure of damages. For want of such evidence, the defendant was entitled, upon the record, to a directed verdict, at the close of the evidence. For the same reason, its exceptions to Instruction 32 should have been sustained.

III. The plaintiff did not, within four months, make to the carrier any claim of loss or damages for delay, as required by the provision of the bill of lading above quoted.

That this requirement of the bill of lading

4. CARRIERS: limitation on filing claims: waiver. was enforceable, is not here disputed. *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190; *St. Louis, I. M. & So. R. Co.*

*v. Starbird*, 243 U. S. 592; *Chesapeake & Ohio R. Co. v. McLaughlin*, 242 U. S. 142. The plaintiff pleaded a waiver of this provision, and introduced evidence in support of his pleading. The question argued at this point is whether the carrier could waive this provision. The cases last cited held to the negative. It is urged for appellee that these cases so held by way of dictum only. Strictly speaking, this is true. But, in view of its consistency with the recognition which has been given in other respects to the limited liability provisions of the bill of lading, the dictum so clearly foreshadows the views of the court that we are constrained to recognize the same as authority.

5. PLEADING: orders, etc., of Interstate Commerce Commission. The plaintiff's special reliance at this point in argument is put upon a ruling of the Interstate Commerce Commission under date

of February, 1914, pertaining to the subject of waiver of this particular provision of the uniform bill of lading, and recommending that such waiver be made, in the interest of uniformity of practice. The appellee brings this ruling before us purely as a citation in his brief. He did not plead it nor introduce it in evidence. It was recently held

by the Missouri Court of Appeals in *Banaka v. Missouri Pac. R. Co.*, 193 Mo. App. 345 (186 S. W. 7), that no recognition could be given by the appellate court to an order of the Interstate Commerce Commission unless it were made to appear in the record on appeal that such order was properly brought to the attention of the trial court. There is substantial reason for such a holding where the appellate court is confined to a review of the rulings of the trial court. That such a rule may be invoked against an appellant who is seeking a reversal of the judgment below, seems clear. Whether it should be invoked as against an appellee who is sustaining the judgment below is not so clear. We have frequently held that, where reliance is had upon the statutes or decisions of another state, as affecting the rights of parties to a litigation in the courts of this state, the statutes and decisions so relied on must be pleaded and put in evidence. Our holding in that class of cases bears some analogy to the holding of the Missouri court in relation to the order promulgated by the Interstate Commerce Commission. In view of the necessary reversal of the case on the grounds stated in the second division hereof, we have no real occasion to pass upon this question now. In the event of a new trial, it can be wholly eliminated from the case, without undue burden to the appellee.

We had occasion to consider the effect of such ruling of the Interstate Commerce Commission in the recent case of *Emery & Co. v. Wabash R. Co.*, 183 Iowa 687. In that case, there was both pleading and proof. For the reason indicated, the judgment below must be reversed.—*Reversed and remanded.*

PRESTON, C. J., LADD and SALINGER, JJ., concur.

MERCHANTS TRANSFER & STORAGE COMPANY, Appellee, v. EMERSON-BRANTINGHAM IMPLEMENT COMPANY, Appellant.

**CONTRACTS:** Expiration of Written Contract—Continuance of  
1 **Business—Presumption.** The *presumption* that a continuance of business relations between contracting parties after the expiration of a written contract is on the terms of the old, expired contract, does not prevail on a record which presents a jury question on such issue of fact.

**EVIDENCE:** Burden of Proof—Expiration of Express Contract—  
2 **Continuance of Business—Effect.** He who pleads that the terms of an expired written contract control subsequent business relations has the burden to so prove.

*Appeal from Polk District Court.*—WILLIAM S. AYRES,  
Judge.

MAY 7, 1918.

ACTION at law to recover the reasonable value of storing and transferring machinery repairs for defendant. There was a trial to a jury, and a verdict and judgment for the plaintiff for \$567.72. Defendant appeals.—*Affirmed.*

*Strock & Wallace*, for appellant.

*R. L. Parrish*, for appellee.

PRESTON, C. J.—The parties had been doing business for a number of years, making a renewal contract each year. The last one expired by its terms December 31, 1912. Before the expiration of the 1912 contract, plaintiff presented to defendant's agent in charge of the business at Des Moines a proposed contract for the year 1913. The provisions in the proposed contract as to charges for some of the items were the same as the prior contract, but as to others, a different compensation was

1 **CONTRACTS:**  
expiration of  
written contract:  
continuance of  
business: presumption.

fixed. There were negotiations between the parties, but the new contract was never signed. Plaintiff sued upon a *quantum meruit* for storage and transfer charges for the year 1913, alleging that it had stored and transferred for the defendant certain machinery repairs, and that the reasonable value of the services was \$2,088.86. Defendant alleged that, by express agreement with plaintiff, plaintiff and defendant continued to do business for the year 1913 under the terms of the contract for 1912; and that, because of the plaintiff's demand that defendant enter into a contract for 1913, and the defendant's refusal to execute said contract, or continue placing its goods with the plaintiff for storage and transfer, except under the terms of the 1912 contract, and on account of plaintiff's acquiescence, the plaintiff is now estopped from claiming any other, further, or different amount than that stipulated in the 1912 contract; and that it had paid plaintiff under a stipulation, at the rate covered by the 1912 contract. It appears that, after this suit was brought, it was stipulated by the parties that defendant was indebted to plaintiff in the sum of \$760.56, if the provisions of the 1912 contract governed, but that, if the rate or charge for storage and removal of repairs was not governed by the 1912 contract, and it should be established that the reasonable value of the storage and transfer charges for repairs was in excess of such amount, then defendant was to receive credit for the amount paid upon the amount found due. Plaintiff admitted that it had received the \$760.56, and asked judgment for the difference between that and its original claim. For reply, it denied each affirmative allegation of the answer. It will be observed that defendant pleads an express agreement that the terms of the 1912 contract should govern, but concedes in its reply argument that it may not have established that there was such an agreement.

Appellant's real contention seems to be that, because

the parties continued to do business for the year 1913, without any new contract, there is a presumption that it was according to the terms of the 1912 contract. Appellee concedes that this is the rule in some cases, but says that, under the circumstances of this case, the presumption does not obtain. It is conceded that there is a conflict in the testimony as to what occurred at the time plaintiff or its agents presented the proposed new contract to the defendant or its agent. It is appellee's contention that the question in the case is narrowed to this one question of fact, which the trial court submitted to the jury, whose finding was in its favor.

Evidence on behalf of plaintiff as to this transaction is, substantially, that, about November, 1912, plaintiff's agent, Johnson, acting for plaintiff, took the proposed contract for the year 1913 to Mr. Ruhl, defendant's agent; that Mr. Ruhl looked it over, and said that he would never sign that contract, but would submit it to the house, and they could do just as they pleased about it; that Johnson left the contract with Ruhl, and had not seen it since; that he had a talk with Mr. Ruhl afterwards, and asked what the company had done with that contract, and was told by Ruhl that he had sent it to Rockford, Illinois, and he supposed it was buried there with a lot of other papers that he had sent down; that another of plaintiff's employees, Halleck, was with Johnson; that subsequently, in January, or in the spring of 1913, Johnson told Ruhl that they ought to have the contract, because they had taken on a lot more of their goods, hay tools, etc., and that he did not specify any amount in the former contract and he ought to have something to go by; and that, therefore, he (Johnson) insisted on that contract. Testimony on behalf of defendant on this point is that he executed the contract for the year 1912; that Mr. Johnson presented the proposed 1913 contract for signature; and that, after looking it over, he

(Ruhl) told Johnson he would not accede to it, and said to him:

"Now if you are not willing to do business under the old contract, or a similar one, we will move now, and you may go back to the plaintiff company and tell them so."

It is further testified that Mr. Schrader was present. He thinks no one spoke about the 1913 contract after that; he thinks he never sent the contract to his company; but correspondence seems to show that he did, during the year 1913; and on October 16th, plaintiff wrote a letter to defendant at Rockford, which states, among other things:

"Last spring (fall), we sent you a contract to sign; but, as you did not return the same, therefore you have no contract for 1913."

April 7, 1914, plaintiff sent defendant its bill, and in the letter, stated, among other things:

"As there was no contract between us for the year 1913, we have based our prices upon the contract which was submitted to Mr. Ruhl early in the season, and which contract for some reason was not signed by you."

April 16, 1914, defendant wrote plaintiff:

"You say there was a new contract submitted by you in the year 1913. We do not deny that such contract was submitted, but we do deny that such a contract was ever accepted or signed, and we continued to do business with you under the contract of January, 1912," etc.

Later, in the same month, plaintiff wrote defendant, in response to the last letter:

"We note what you say concerning the continuance of the 1912 contract after it had expired—but we take exceptions to working under an expired contract without consenting to such an arrangement. It is true the transfer prices are similar, and the difference between the 1912 contract and the new contract which we submitted to you is in the terminating clauses. \* \* \* We think when you con-

sider that you gave us no reason to know that the new contract was not satisfactory to you, that you had no right to think we would be willing to renew the 1912 contract, and your failure to advise us gave us the right to assume that the new contract was satisfactory. If the new contract was other than the ordinary prevailing prices for the period it covered, we would expect you to take exceptions, but under the circumstances, we think you should remit in full."

As stated, these letters were written after the expiration of the year 1913, and may not be controlling; but they cast a side light on the situation and what was in the minds of the parties. As before stated, defendant was relying upon the 1912 contract, either because of an express agreement, or the acquiescence of plaintiff, or because of a presumption. Plaintiff seems to have thought, at least at first, as shown by the correspondence, that the 1913 contract, though not signed, was binding; but when it brought suit, it was done on the theory that there was no contract and no presumption, and that, therefore, it was entitled to recover for the reasonable value of the services.

Defendant offered two instructions, which were refused; which refusal, together with the giving of certain instructions by the court, is relied upon by appellant as erroneous. The first offered instruction is:

"It will be presumed, in the absence of proof that a new or different contract was entered into, where services for a definite term were to be rendered at a fixed price, and the party continues to render services after the term without any new contract, that the parties intended that the same prices were to be paid as under the original contract."

And the second:

"If you find from the evidence that the plaintiff submitted to the defendant a contract for the year 1913, and the defendant refused to enter into the proposed contract,

and you further find that the plaintiff, after such refusal, continued to render for the defendant the same or similar services as were under the 1912 contract, that then the defendant is liable to the plaintiff for the charges as fixed by the 1912 contract, which having been paid, your verdict will be for the defendant."

In the instructions by the court, the jury was told, substantially, that the only issues submitted are: First, whether or not such services were rendered under the terms of the 1912 contract; second, that, if the jury should find that such services were not to be rendered under said contract, then it should determine the reasonable value of such services; and further, that, the contract for the year 1912 having expired by its terms, and a demand or request for a new contract of different terms having been made by the plaintiff on the defendant, the burden of proof was upon the defendant to show, by a preponderance of the evidence, that said services were rendered under the terms of the 1912 contract.

"And if you find that the defendant, through its agent Ruhl, at the time the 1913 contract was presented to him by Johnson, advised the plaintiff that it would only remain under the terms of the contract of 1912, then, in that event, you will return your verdict for the defendant."

But that, if the jury should find that the 1912 contract was not extended, or said services rendered under its terms, then, in that event, the plaintiff would be entitled to recover for such services the reasonable value thereof, as shown by the evidence; and that the burden of proof was upon the plaintiff to show, by a preponderance of the evidence, the reasonable value of such services; that, if the jury should find plaintiff entitled to recover the reasonable value of the services, and not under the terms of the 1912 contract, and that the reasonable value of such services exceeds the sum of \$750.56, it should return a verdict for the plaintiff for such additional amount; but that, if it should be found that



such reasonable value is equal to or less than \$760.56, the verdict should be for the defendant.

1. On the question as to whether there is a presumption that the services sued for were continued under the contract of 1912, both parties cite cases arising, for the most part, between employer and employe; and there is no claim by either side that such cases do not apply to a transaction such as that in controversy in this case. The cases relied upon by both parties are the same,—at least some of them. Appellant cites *Labatt on Master and Servant* (1913 Ed.), Sections 230 to 239; 26 Cyc. 976, 1038; *Wood on Master and Servant* (2d Ed.), Section 96; *Hahnel v. Highland Park College*, 171 Iowa 492; *Laubach v. Cedar Rapids Supply Co.*, 122 Iowa 643; *Curtis v. Dodd & Struthers*, 172 Iowa 521; *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (60 L. R. A. 927); and other cases.

On the other hand, it is contended by appellee that the presumption as to the application of the price fixed by the expired contract does not apply where a new arrangement is shown, or where the facts rebut the legal presumption; and they cite the *Hahnel* case, *supra*; the *Laubach* case, *supra*; *Labatt on Master and Servant* (2d Ed.), Sec. 230; and *Spicer v. Earl*, 41 Mich. 191 (32 Am. Rep. 152).

They state it another way, by saying that the law is that, if an employe continues in his employment after the expiration of the former contract, with the knowledge and consent of his employer, and without any objection or protest from the employer, the employer is liable for the services performed, and the contract, in the absence of other testimony as to the value of the services, furnishes the measure of recovery; and on this cite *Curtis v. Dodd & Struthers*, *supra*; and *Laubach v. Cedar Rapids Supply Co.*, *supra*; and further, that, where there is a mutual mistake or misunderstanding, each party supposing that the price is fixed by the contract, but in fact there is no contract, the reasonable value of the services may be recovered, citing

*Lannis & Merster v. Woods*, 4 Ky. L. Rep. 365. And they cite, further, *Tribune Assn. v. Eisner & Mendelson Co.*, 34 Misc. (N. Y.) 657, to the point that, for services rendered after the abandonment or termination of an express contract therefor, there may be a recovery upon a *quantum meruit*. They cite also *Jones v. City of New York*, 47 App. Div. 39, to the point that, when a party to a contract repudiates it, the other may accept this as an abandonment of it, and may recover for the value of the work already done.

In the instant case, had the parties continued their business relations with each other for the year 1913 without anything said, then the presumption would arise that the con-

2. EVIDENCE:  
burden of  
proof: expir-  
ation of ex-  
press contract:  
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fect.

tract of 1912 would govern. In fact, as we understand it, counsel so concede. But, under the circumstances of this case, before set out, we are of opinion that the presumption does not obtain. The contract of 1912 ex-

pired, by its terms, on December 31st of that year, and before that time, the parties began negotiations for a new contract, on different terms, for 1913. It cannot be claimed from the record that the minds of the parties met, and that plaintiff assented to continuing under the old contract,—at least, it was a question for the jury whether there was such assent, and this question was submitted to the jury. Furthermore, plaintiff was objecting to defendant's remaining under the terms of the old contract. True, defendants said they would not stay on any other terms, but would move out. They did not move out. Whether plaintiff assented to such proposition was for the jury. If plaintiff did not so assent, then clearly there was no contract between the parties; and we think, too, that, under the record, unless plaintiff did assent to defendant's proposition, there was an abandonment or repudiation of the old contract. As before stated, the plaintiff, either by mistake or intentionally, was claiming that the proposed new contract was in force; that defendant, in place of re-

fusing to do business under the new contract, accepted the new contract and took it under advisement, sent it to the home office for signature, and put plaintiff off, from time to time, and delayed final answer until the year 1913 had nearly expired, accepting all the while plaintiff's services, with knowledge that the plaintiff was refusing to do business under the terms of the 1912 contract. This being so, there was no presumption, and no contract. In that case, plaintiff would be entitled to recover the reasonable value of the services.

Plaintiff had the right to refuse to go on under the 1912 contract after its expiration, and the evidence shows that it did so refuse, unless, as claimed by defendant, plaintiff assented to defendant's proposition. The jury would be justified in finding from the record that the original contract was terminated, not only by its terms, but by the negotiations of the parties. We think it cannot be true that the mere fact that no new contract was made, or that there is dispute or misunderstanding as to the new arrangement, calls into effect the presumption claimed. There was some evidence of a new arrangement, indicating a new status between the parties for the year 1913, which excludes the presumption that the arrangement of 1912 should continue.

There may be other circumstances bearing upon this question; but, under the whole record, we are of opinion that there was no presumption, and that the court did not err in failing to instruct the jury with reference to presumption. This disposes of the error predicated upon the refusal of the court to give defendant's offered instructions, even if it be conceded that they correctly state the law. It also disposes of the appellant's claim that the court erred in admitting evidence as to the value of the services performed.

2. It is thought by appellant that the court erred in placing the burden of proof upon the defendant as to its claim that the 1912 contract governed, appellant's conten-

tion being that the burden was upon plaintiff to show that the 1912 contract was terminated, or a new contract made. But we think there was no error at this point. Had the plaintiff sought to recover under the 1913 contract, it would have the burden to show that such contract was in force; but instead, plaintiff sued upon a *quantum meruit*, and the burden was upon it to prove the issues tendered by it, and they were only that the service was performed, and the value of the service. Defendant did not rest upon its general denial, but pleads affirmatively that the provisions of the 1912 contract govern. It would not be enough for it to set up the 1912 contract, and show that there was such a contract in 1912. It alleges that such contract continued, and that it was in force. As to this defense, then, the burden was upon it.

It is our conclusion that there was no prejudicial error, and the judgment of the district court is, therefore,—*Affirmed.*

LADD, EVANS, and SALINGER, JJ., concur.

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LYDIA O'NEIL, Appellant, v. C. H. STUBER et al., Appellees.

**MANDAMUS: Controlling Township Trustees in Repair of Highway.**

- 1 Mandamus will not lie to *control* the statutory discretion of the township trustees to "equitably and judiciously" expend the township road funds, even though it be conceded that ample funds are on hand. (Sec. 1533, Code Supp., 1913; Sec. 4341, Code, 1897.)

**MANDAMUS: Controlling Road Supervisors in Repair of Highway.**

- 2 Mandamus will not lie to compel a township road supervisor or contractor to put a highway in a passable condition, in the absence of allegation and proof that road funds are on hand, and have been actually apportioned for that purpose by the township trustees.

*Appeal from Wapello District Court.*—FRANCIS M. HUNTER,  
Judge.

MAY 7, 1918.

ACTION in mandamus to require the trustees of a township to cause a certain highway to be put in passable condition, and to require an equitable apportionment of the road funds to be made for that purpose. On motion, the petition was dismissed. The plaintiff appeals.—*Affirmed.*

*Elmer K. Daugherty*, for appellant.

*Roberts & Webber*, for appellees.

LADD, J.—This is a suit in mandamus, to compel the trustees of a civil township to make an equitable application of road funds, and put in passable condition a described highway. The petition was dismissed on de-

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controlling  
township trus-  
tees in repair  
of highway.

fendant's motion, for "that there is no provision in the statute authorizing mandamus proceedings against a township trustee or road contractor, either severally or jointly,

in a case like this." According to the petition, plaintiff was owner of "the NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Sec. 11, in Twp. 93 North, of Range 15 W." An established highway extends from the northeast corner of this land westerly three quarters of a mile, along the north line of it and beyond, thence south a half mile, and west and south into Eddyville. This road is alleged to be the only direct and practical outlet from this land to Eddyville, the nearest and most accessible market place. It is out of repair, and is impassable for loaded vehicles. Little or no work has been done thereon during the five years last past, and it has grown up to weeds, and gullies have been washed through it and remained for months. Those having business on the premises have been unable to reach them save on foot or through neighboring fields, and the tenant in possession is unable to market his crops, owing

to the impassable and dangerous condition of said road. Though plaintiff and others have frequently complained to defendants, who are the township trustees and road supervisor or contractor, about the condition of this highway, and requested that it be made passable, they have failed and neglected to comply, or to repair the same.

By way of amendment, she added:

"That said township trustees had ample funds in their hands or under their control, so that said road could have been placed in passable condition, and that they still have funds for that purpose, or will have as soon as the spring taxes are distributed, and that they have failed and neglected to cause the same to be equitably expended upon the highways of said township, including therein the highway complained of, and are still neglecting and refusing to cause said funds to be equitably expended upon said roads, including the road in question, but are refusing to cause, order, or direct the expenditure of any part of said funds upon the highway in question. That this plaintiff has no plain, speedy or adequate remedy at law."

The prayer was that a writ of mandamus be issued, requiring defendants to put said highway in a passable condition within a reasonable time, and that they make an equitable apportionment of the road funds of said township, and that they direct the expenditure of a sufficient portion thereof on the highway in question to put same in passable condition. An answer was filed, conceding said road not to have been in good condition, but alleging that "defendants were proceeding to work said road along with others as fast as they could, at the time this action was commenced, and that they have since worked said road and placed in a good traveling condition."

Later, after some rulings, defendants filed a general denial, and moved, as stated, that the proceedings be dismissed. The allegations that the particular highway was

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out of repair, or not in a passable condition, and that the trustees had refused to put the same in a passable condition, failed to state a case; for it is the duty of the supervisor or contractor to perform or cause to be performed the work on the roads, provided sufficient funds are provided therefor, and have been apportioned for that purpose, and this is not alleged in the petition. The petition did not allege any breach of or omission to perform any duty imposed on township trustees or road supervisor or contractor. But the amendment averred: (1) That the trustees had ample funds on hand or under their control, out of which the road could have been put in passable condition; (2) that they still have funds, or will have as soon as the spring taxes are distributed; (3) that they have failed to cause the same to be equitably expended on the highways, including that in controversy; (4) that they are still refusing to cause said funds to be equitably expended, including that under consideration, and are refusing to direct the expenditure of said funds on this particular highway.

Section 1533, Code Supplement, 1913, requires the board of trustees to "cause both the property and poll road tax to be equitably and judiciously expended for road purposes in the entire road district; shall cause at least 75% of the township road tax locally assessed to be thus expended by the 15th day of July in each year." It is not alleged that this had not been done, nor that the funds on hand had not been set apart for other purposes, such as the destruction of noxious weeds, dragging the roads, or even for the repair of other roads in the township. The mere fact that funds are on hand is not controlling; for these may have been, or in the future may be, in the discretion of the trustees, devoted to other objects; and the statement in the alternative that there are funds, or will be later, for the particular purpose, adds nothing; for the trustees could not well be

charged with avoiding their duty with reference to funds not collected nor available. In any event, the mere fact that there are funds, or will be in the future, to repair or improve certain highways, is not enough. Such funds are to "be equitably and judiciously expended for road purposes in the entire road district." The performance of this duty of determining where and how these funds shall be expended exacts the exercise of discretion, of the best judgment of the board of trustees. In other words, as said in *Theulen v. Township of Viola*, 139 Iowa 61, "The duties of trustees of a township, save that of levying taxes, are quasi judicial;" and, later on, with reference to a statute like that from which we have quoted:

"The duty of the board of trustees is to determine for which of the several purposes enumerated in the section with reference to the tax levy, and how much for each, the money raised shall be expended, how much of that devoted to roads shall be set apart for each, whether the work shall be done by contract or through employment of superintendents; but it does not devolve upon them to perform the duty of keeping the roads in repair. That is the duty of the contractor or superintendent, and he alone is liable under the conditions defined by statute for damages consequent upon omission of such duty. In short, all the duties of the board of trustees in such matters are quasi judicial, and no liability attaches because of mere error or mistakes even negligent alone in their performance. See *Nolan v. Reed*, 139 Iowa 68."

Section 4341, Code Supplement, 1913, provides that:

"Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion."

It is not pretended that the board of trustees have not acted, or have refused to act, as exacted in the excerpt from the statute quoted. All contended or alleged is that it has



not acted as plaintiff thinks it should have in putting the particular highway in which she is interested in a passable condition. The relative situation of the road supervisor, superintendent, or contractor is pointed out in *Sells v. Dermody*, 114 Iowa 344, where the court quotes from *Shearman & Redfield on Negligence* (3d Ed.), 156, as follows:

"The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty of which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task,—in other words, is simply ministerial,—he is liable in damages to anyone specially injured either by his omitting to perform the task or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority."

See also *Patterson v. Vail*, 43 Iowa 142, *Larkin v. Harris*, 36 Iowa 93, *Myers v. Priest*, 145 Iowa 81, *Ford v. Doolittle*, 157 Iowa 210, with reference to the powers and duties of a road supervisor or officer, exercising like functions. Here, the issuance of a writ of mandamus would involve a command to the board of trustees to repair a particular road so as to render it passable, and a holding that it had not or was not about to "equitably and judiciously" expend the funds in caring for the roads. We have no hesitation in saying that these are matters of discretion, and may not be controlled by mandamus. Any other conclusion would render the office of township trustee all but intolerable; for he would be subject to suit at the instigation of everyone disappointed in the distribution of funds for the care of the

highways,—not to mention the diversion of such funds in petty litigation, the consequent delays where promptness is important, and the superior qualification of the trustees, because of local conditions and the topography of the township, not possessed by the courts. We have no hesitation in approving the ruling of the trial court that the action of mandamus will not lie in such a case, for that the acts complained of are those of official discretion.—*Affirmed.*

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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STATE OF IOWA, Appellee, v. C. C. TAFT COMPANY, Appellant.

**COMMERCE:** "Original Packages." An "original package" of interstate commerce ceases to be such when, after completed delivery to the consignee at the point of destination, said consignee holds the same with *intent* to break such package, as his customary business may require, and sell the separate contents thereof at said point of destination, or within the state thereof.

GAYNOR and SALINGER, JJ., dissent.

*Appeal from Polk District Court.*—CHARLES HUTCHINSON,  
Judge.

MAY 7, 1918.

A search warrant was issued under the authority of the district court of Polk County, directed to the sheriff, under which, on April 28, 1917, he seized a quantity of cigarettes. The defendant, appellant, appeared, and claimed the ownership of the property, and asked the release of the same on the ground that the cigarettes were contained in the original packages, and had not lost their identity as interstate commerce; and were, therefore, not subject to seizure under the state law. After a hearing, the court ordered the condemnation and destruction of the property, and rendered

judgment for costs against defendant. Defendant appeals.

—*Affirmed.*

*Dunshee, Haines & Brody*, and *Charles F. Maxwell*, for appellant.

*H. M. Havner*, Attorney General, *H. H. Carter*, Assistant Attorney General, and *Arthur T. Wallace*, for appellee.

PRESTON, C. J.—As to part of the cigarettes seized and described in the return of the search warrant, no claim was made by any person, and such were found by the court to be subject to condemnation and destruction. There is no contention as to such part of the property.

On the trial, it was stipulated as follows:

"It is hereby stipulated between the parties, the attorney general, representing the state of Iowa, and the counsel for the claimants, that 27 cases of cigarettes: that is, three cases of 10,000 cigarettes each, Omars; 14 cases 5,000 cigarettes each, Camels; 7 cases 5,000 cigarettes each, Fatimas; 1 case 25,000 cigarettes, Nebos; and two cases containing an assorted lot of Egyptian Deities, plain and cork, Murads, Egyptian Luxuries, Moguls, plain and cork,—the contents of each case being made up of cartons containing small boxes of individual cigarettes,—now in the possession of the sheriff of Polk County, are the original packages shipped to the claimant in the ordinary course of interstate commerce from outside the state of Iowa, and at the time the same were seized, the same were in an unbroken condition, and in the same condition as handled in the ordinary course of interstate commerce, and were the usual and ordinary packages of interstate commerce. It is further stipulated that the said cases were kept by the claimant with the intention, as its business demanded, to open the same and remove the contents therefrom and to sell the cigarettes to its customers at retail and wholesale within the state of Iowa, and for the further purpose of placing the same in re-

tail stores owned by the corporation in the city of Des Moines for sale at retail in broken packages. It is further stipulated that the said packages and cases were seized at the claimant's wholesale place of business in the city of Des Moines. It is further stipulated and agreed that the custom as above described had been the method of handling the business for at least a year; and that the certain broken packages in the possession of the sheriff are not in the original packages as they were received in the course of trade, and that these cigarettes were being kept in retail stores for sale."

Thereupon, claimant moved for an order directing the sheriff to return the property, which motion is as follows:

"Upon the facts stipulated, the claimant moves the court to make and enter an order directing the sheriff of Polk County to return and deliver over all of the original packages described in the foregoing stipulation, for the reason that the state of Iowa is without power, under the Federal Constitution, to authorize the seizure of goods shipped in the course of interstate commerce in original packages, and such goods have not become a part of the property of the state."

1. Appellant's first contention is that articles of interstate commerce, contained in the usual and ordinary packages of interstate commerce, do not lose their character as such until they have in some manner been commingled with the goods of the state. They cite *Brown v. State of Maryland*, 25 U. S. 419; *Low v. Austin*, 80 U. S. 29; *Leisy v. Hardin*, 135 U. S. 100; *Rhodes v. Iowa*, 170 U. S. 412; *Vance v. Vandercook Co.*, 170 U. S. 438; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *McGregor v. Cone*, 104 Iowa 465; *State v. Eckenrode*, 148 Iowa 173. They contend, too, that the intent of the owner with reference to the future disposition of goods does not change the status of the property, and that, therefore, Sections 5006 of the Code and 5007-a of the Supplement to the Code, 1913, are unconstitutional, in so far as they affect interstate commerce.

Some of the cases cited are liquor cases, decided before the enactment of the Wilson bill, and like legislation, the principles of which are followed in the other cited cases. The language used in the cases is in regard to the point which is being decided in each particular case, and it is claimed that these principles are applicable to the instant case. There is no particular difficulty with the rule, and we do not understand counsel to differ materially in regard to the rule as applied to the facts in the cases cited.

Appellee cites the following provisions of the Federal Constitution, which they say are involved, to some extent, in this action:

"The congress shall have power \* \* \* To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Constitution of the United States, Art. 1, Sec. 8, Par. 3.

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Amendment IX, Constitution of the United States.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Amendment X, Constitution of the United States.

They contend that goods which have reached their destination after shipment from another state, though they may be still in original packages, may be taxed by the state, provided no discrimination is made between domestic and non-domestic goods (citing *Woodruff v. Parham*, 8 Wall. [U. S.] 123, *American Steel & Wire Co. v. Speed*, 192 U. S. 500, *Brown v. Houston*, 114 U. S. 622, *Pittsburg & So. Coal Co. v. Bates*, 156 U. S. 577, *May v. New Orleans*, 178 U. S. 496, *Cook v. Marshall County*, 196 U. S. 261, *Hodge v. Muscatine County*, 196 U. S. 276); and further, that the Supreme Court of the United States has shown a disposition to uphold the police power of the state, even

where original packages are involved (citing on this *Plumley v. Massachusetts*, 155 U. S. 461, *Cook v. Marshall County*, supra, *Savage v. Jones*, 225 U. S. 501, 525, *Hennington v. Georgia*, 163 U. S. 299, 317); and that a state may, in the exercise of its police powers, impose inspection restrictions which affect interstate commerce (citing again *Savage v. Jones*, supra).

We are not disposed to review the cases cited, nor discuss the propositions so far advanced, for the reason that it is stated by appellant that the sole issue in this case is as to whether or not the original packages of cigarettes had lost their identity as articles of interstate commerce, and were, therefore, subject to seizure and destruction under the state law, by reason of the fact that the appellant, at the time of seizure, held the cigarettes with intent thereafter to break the packages and offer the contents for sale within the state, in violation of Section 5006 of the statute, under the conceded facts shown by the stipulation; and this is the point most strongly relied upon by appellee.

2. Counsel for appellant say that they have failed to discover any case which has arisen under a state of facts like those in the instant case; but they claim that the case of *Coe v. Town of Errol*, 116 U. S. 517, sustains the principle they are contending for. They concede, however, that the proposition there considered was not with reference to the effect of an intent in transforming articles of interstate commerce into domestic property, but, on the contrary, the question was as to the effect of the intent of the owner to transform domestic property into an article of interstate commerce. The facts of that case, stated as briefly as may be, are, substantially, that Coe had cut and piled certain logs upon the banks of a stream, for the purpose and with the intent of transporting them from the state of New Hampshire into the state of Maine. The defendant, the town of Errol, caused the logs to be assessed, under the authority of the state law. The logs had not been actually

started in the course of transportation to another state, nor delivered to a carrier for such transportation. The action was brought to set aside the assessment and to exempt the property, on the ground that it was within the protection of the interstate commerce clause of the Federal Constitution. The inquiry, as stated by the court in the course of the opinion, was as to whether the owner's state of mind in relation to the goods,—that is, his intent to export them, and his partial preparation to do so,—exempted them from taxation. The court further stated that there must be a point of time when they ceased to be governed exclusively by the domestic law, and began to be governed and protected by the national law of commercial regulation, and that moment seems to be a legitimate one for this purpose in which they commence their final movement for transportation from the state of their origin to that of their destination.

“When the products of the farm or the forest are collected, and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports; nor are they in process of exportation; nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then, it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property in that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed, without any discrimination, in the usual way and manner in which such property is taxed in the state. \* \* \* What we have already said, however, in relation to the products of a state intended for exportation to another state, will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the

state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

The court further says that, until the property is actually started, it may be sold or otherwise disposed of within the state. In that case, there was the intention alone, and the property had not started on the transportation. The case holds only that the right of a state to tax property originating within it continues until such property is actually started upon its interstate transportation. Mere intent is not enough, but the intention must concur with an act of transportation, in order to terminate the jurisdiction of the state. This is not inconsistent with our holding that interstate commerce ceases when property which has been in course of interstate transportation comes to rest in the hands of its owner, and there is the intent of the owner to break the original packages and to sell the same then and there. Any other holding would be inconsistent with a claim that the transportation has not ceased, or that the ultimate destination has not been reached. The intent of the owner and his act in holding the property at rest concur. Under the stipulated facts of the instant case, the property would be a part of the general mass of property in the state at its destination when, as here, the transportation had entirely ended, and defendants intended to break the packages and sell their contents, contrary to the laws of Iowa. The stipulation shows, not only that it was the intention of appellant to open the original packages, as its business demanded, and remove the contents therefrom, and sell the cigarettes to its customers at retail and wholesale within the state of Iowa, and to place the same in retail stores owned by plaintiff, for sale at retail in broken packages, but also that such had been appellant's custom and



method of handling the business for at least a year, and that the broken packages in the possession of the sheriff are not in the original packages as they were received in the course of trade and were being kept in retail stores for sale. The property had been delivered to the importer, appellant. There is no claim, and there could not be, under the stipulation upon which the case was tried, that the original packages were being held for further transportation to any point of original or ultimate destination, or that they were being held for sale only in the form in which they were received. Any such intention is expressly disclaimed by the stipulated facts. Counsel quote from Shakespeare. As we recall it, there is a passage somewhere that, if a man lusteth, he is already guilty,—or something to that effect.

Counsel for appellant argue that a mere intent may be changed. But it has not been changed. The presumption is that the intent will continue, and it did continue and existed at the time the packages were seized. Appellee cites on this proposition *State v. Blackwell*, 65 Me. 556; *Wasserboehr v. Boulter*, 84 Me. 165, 169; *Cook v. Marshall County*, 196 U. S. 261, 271; 7 Cyc. 431.

The *Blackwell* case seems to be in point. There, the defendant had imported liquors into the state of Maine, which were in the original and unbroken packages when seized. The jury was instructed that, if Blackwell had them in his possession for the purpose of breaking the packages, and with the intent to sell them in quantities less than an imported package, by breaking them, the liquors would be liable to forfeiture. The court said, at page 558:

"The precise point at which the Federal authority ceases and that of the state begins, has been defined in general terms by the Supreme Court of the United States. By these decisions it is declared that while a sale of the goods imported is the general object of importation, and the right

of sale is an inseparable incident thereto, still this incidental right is limited to a sale by the importer himself, and in the original package. And when by any act of the importer the thing imported has become a component part of the general mass of property in the state—as when the original package has been broken up for use or for retail by the importer, and also when the commodity has passed from his hands into the hands of a purchaser—it has then lost its distinctive character as an import and has become subject to the laws of the state. *Brown v. Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 574. To the same effect is *Pierce v. State*, 13 N. H. 536, 581, and *State v. Robinson*, 49 Maine 285. A sale in the original package only being authorized by the Federal statute, the breaking and selling in a less quantity is without that authority, and is within the prohibition of the state law; and a fixed intent that the package shall be broken and sold must place the liquors in the same category. It would hardly be considered reasonable that the Federal law should protect property until an actual unauthorized sale were completed, when the intent to make such a sale is avowed. Such ‘aid and comfort’ to violators of the internal regulations of a state is not within the spirit of the regulations of foreign commerce. \* \* \* We do not perceive any material difference in the two rulings made *a nisi prius*. The intent to break and sell is the same in each—a customer only being wanted in each. Whether a purchaser ever calls or not is immaterial—the intent to sell whenever an opportunity occurs being the material fact which works the forfeiture.”

That case was cited with approval in the *Wasserboehr* case.

It is our conclusion that, since the defendant has admitted that it intends to break these packages from time to time, and sell the contents to retailers, or distribute the contents among its own retail stores, these packages have ceased

to be articles of interstate commerce, and have lost their distinctive character as such.

We conclude that the judgment of the district court was right, and it is, therefore,—*Affirmed*.

LADD, WEAVER, EVANS, and STEVENS, JJ., concur.

SALINGER, J. (dissenting).—It is agreed there was a time when the appellant had the right to sell the cigarettes seized in this proceeding in the original packages in which it had imported them; conceded that, at one time, no law of this state gave the right to seize these goods, and this for the reason that they were protected by the interstate commerce clause of the Federal Constitution. See *State v. Eckenrode*, 148 Iowa 173; *McGregor v. Cone*, 104 Iowa 465; *Leisy v. Hardin*, 135 U. S. 100 (10 Sup. Ct. Rep. 681, at 689); *Low v. Austin*, 80 U. S. 29. This immunity still exists, unless the importer has done something which empowers this court to declare that these goods are no longer in interstate commerce. But one thing is asserted to have worked this change. The majority opinion concedes there is no change unless it be effected because "the appellant, at the time of the seizure, held the cigarettes with intent thereafter to break the packages, and offer the contents for sale within the state, in violation of Section 5006 of the statute."

As an abstraction, an unexecuted intention accomplishes nothing and changes nothing. In Shakespeare's words, speaking of an unknown sin, naked intention is "as a thought unspoken." The most perfectly formed plan to murder does not threaten the liberty of the intending murderer, so long as what exists rests merely in unexecuted purpose. A white house remains white, despite a completely formed intention to paint it red. As an abstraction, then, these cigarettes did not lose their status as being articles in interstate commerce, though their owner confesses an intention to do something later which, when done, will deprive these goods of that status. But, of course, the law can make the entertaining of a specific intent a material thing.

Statute may decree that whether liquors may be seized shall depend upon the intent with which they are kept. But this presupposes power to deal with the liquors. The Federal law creates the immunity. If the Federal law does not take away its protection because of the naked intention to sell in broken packages, an express state statute that the immunity shall end when such intent is formed would be void. What is true of an express statute to that effect is equally true of a decision to that effect on part of a state court of last resort. So, while I agree that *State v. Blackwell*, 65 Me. 556, does hold that intention may change a status created by Federal law, such holding is not controlling. It is surely no stronger than a statute declaring the same thing. When we come to terminating a protection created by Federal law, we must look for our warrant to Federal law alone.

I am of opinion that the Supreme Court of the United States has spoken in terms of exclusion on this point; that it has affirmatively declared what alone will remove the protection of the commerce clause; and that, as intention is not mentioned, under the rule that what is expressed excludes what is not named, the effect of it is a holding that intention will not remove this protection. But it is not necessary to rely wholly upon this rule of construction, or upon implication. It seems to me *Coe v. Town of Errol*, 116 U. S. 517 (6 Sup. Ct. Rep. 475), expressly holds that intent will not change the relation of property to being in interstate commerce. True, the *Errol* case declares what will put property under the protection of the commerce clause. But that does not change the principle involved, and what is there held is just as applicable when the question is whether intent will remove the protection of the commerce clause. If intent to do what will give property the Federal protection does not effect such protection, then an intent to do what, if done, will take property out of interstate

commerce, cannot destroy the protection. If the *Errol* case settles that an intent to put goods into interstate commerce will not oust the dominion of the state over property, it is not given to me to understand why this does not as well settle that no mere intention to do what, if done, will restore the dominion of the state, is operative to restore such dominion. As well say that, though an intention to leave this state will not destroy the right to vote therein, that an intention to live in the state gives the right to vote therein. The *Errol* case over and again declares it is dealing with what will create a status. It defines over and again what acts will put property within the protection of the commerce clause, and so end the dominion of the state. It decides nothing except whether intent can change a status. It is quite adventitious that the decision was invoked by a question of whether the state of New Hampshire might tax certain property. Whether it might so tax was a mere vehicle. Surely, the holding on the effect of mere intent would have been the same if, instead of whether property might be taxed by the state, the question had been whether the state might seize and condemn that property. The decision does not make tax law. It does not hold what it does because the collection of a tax is involved, but because specified facts do not make the commerce clause operative, and, therefore, maintain a status which authorizes state taxation. The vitals of the decision is not that goods may be taxed, but that this may be done because intention, short of execution, does not put goods into interstate commerce, and so change the power of a state to tax. Suppose an attempt to collect a poll tax, and a defense that the state may not collect it because the defendant intends to remove. I take it a decision that the defendant must pay, while deciding that one is liable for a poll tax, would hardly be classed as one making tax law; and all would agree that the decision was not poll tax law, but "intent" law. The decision would not be a precedent on

tax law as such. It would be cited only for ruling on whether an intent is effective to destroy an existing condition with reference to tax laws, or with reference to anything else, where it becomes material to determine the power of intent to affect status. This, and just this, is the effect of the *Errol* case. In my opinion, it controls this case, and we should hold that the cigarettes seized are still within the protection of Federal law.

GAYNOR, J., concurs in this dissent.

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BELLE COOLEY et al., Appellants, v. HORACE MAINE et al.,  
Appellees.

**JUDGMENT:** Judgments on Demurrer. A judgment sustaining a  
1 demurrer in an equity action, without further pleading over, is  
a final judgment.

**LIMITATION OF ACTIONS:** Second Action as Continuance of  
2 Former Unsuccessful One. The "failure" of an action which will  
authorize the rebringing of the same action within six months  
as a continuance of the former unsuccessful one must be a failure  
unaccompanied by a final judgment. (Sec. 3455, Code, 1897.)

*Appeal from Adams District Court.*—THOS. L. MAXWELL,  
Judge.

JANUARY 11, 1918.

REHEARING DENIED MAY 10, 1918.

THE question is whether appellant, whose petition was successfully demurred to on the ground that the cause presented was barred by limitations, was by such ruling wrongfully denied the benefits of Section 3455 of the Code, which authorizes the rebringing of an action where plaintiff has, for some cause other than his negligence, failed in the prosecution of an earlier action.—*Affirmed.*

*Mulvaney & Mulvaney, W. S. Hefling, C. C. Coyle, and J. H. Ritchey, for appellants.*

*A. Ray Maxwell, Meyerhoff & Gibson, and R. L. Parrish, for appellees.*

SALINGER, J.—I. The appellants took their chances in presenting the appeal in the manner that it is done. Their presentation fully justifies us in refusing to consider the merits of the appeal, should we elect to insist upon that right. We must say this much so that, once more, it may be emphasized that appellants must read the rules governing presentation here. We have elected to waive our privilege because of the character of the law question involved, and because it is somewhat easier to ascertain what they are and to pass upon them than it would be in some other cases having like presentation.

II. Appellants at one time began suit like the one now before us. A demurrer to their petition was sustained on the ground that the action was barred by limitation. We affirmed that ruling. See 163 Iowa 117.

1. JUDGMENT: judgments on demurrer. They rebrought the suit, filed a like petition, and like demurrer was interposed. The appeal is taken because this last demurrer was sustained. Appellants contend that the second suit was not barred by time, because they are within the provision of Code Section

3455, that, if a new action is brought within six months after a first has failed for any cause except negligence in prosecution, the second action shall, for certain purposes, be held a continuation of the first. As they do not and could not well urge that this statute saves them from the statute of limitations if the judgment in the first suit constitutes an adjudication, analysis shows that what they do urge is that a judgment sustaining a demurrer is not a final judgment. Elaborating, they say that all the court did was to dismiss

2. LIMITATION OF ACTIONS: second action as continuance of former unsuccessful one.

the petition because demurrer thereto had been sustained and plaintiff had not pleaded over; that, because of Code Section 3764, all that was effected was a dismissal without prejudice; that plaintiff had been guilty of no negligence in the prosecution of the first suit; that this made the second a continuation of the first suit; and that, because of said dismissal, no adjudication stands in the way of dealing with the last suit as a continuation of the first.

We agree that, under *Dunton v. McCook*, 120 Iowa 444, the affirmance of the first judgment adds nothing to the judgment affirmed. Neither does it take anything from it. So we have, as the sole question, Did the first judgment create an adjudication? If that be so, the appeal cannot be sustained.

The statute, Code Section 3764, has no provision that, when judgment is due on sustaining demurrer to a petition, that there shall be dismissal; consequently it does not provide for a dismissal without prejudice.

A presumption that all decisions are upon the merits, and Code Section 3765 decrees that they shall be so, except in the cases wherein Section 3764 expressly requires a dismissal without prejudice. It is quite elementary that dismissal of the petition in a suit in equity is a final decision, and with prejudice. This is a suit in equity. *Conner v. Long*, 63 Iowa 295, holds, by implication, that, where the trial is in equity, a dismissal is with prejudice. The exact holding is that, though it appears the trial was in equity, if the record shows the case was in fact decided, and the judgment rendered on a demurrer, *if there was error in ruling on the demurrer*, there must be a reversal. This, of course, is not a decision that a judgment on demurrer is not a final judgment, but only that, though a final judgment, it must be reversed if an erroneous one. *McDonald v. Jackson*, 55 Iowa 37, but settles that the continuation statute applies only where no judgment upon the merits



is rendered in the first action; therefore, has no bearing on what is a judgment on the merits. It seems to us that *District Twp. of Spencer v. District Twp. of River-ton*, 62 Iowa 30, cited by appellants, is against appellants. The case holds, first, that the statute of limitations applies to actions in equity as well as at law, and that the continuation statute, while it extends the time for commencing an action, does not extend the time for bringing into existence the conditions without which no action can be maintained, and that, accordingly, where a demand was necessary, and it was not made until after the time of the statute had run against the claim, that such claim was barred, notwithstanding it might otherwise have been saved, under the provisions of the continuation statute. *Dillavou v. Dillavou*, 142 Iowa 291, though relied on by appellants, also militates against their contention. It holds that a judgment on demurrer to a petition which goes to the merits of the case and affects all defendants, whether they join in the demurrer or not, is an adjudication as to all. We are unable to agree that, when it is decided that a cause of action pleaded is barred by the statute of limitations, that the decision is "not on the merits." *Gregory v. Woodworth*, 107 Iowa 151, holds squarely that if, on decision of a demurrer, the plaintiff fails to amend his petition, and appeals, that then, on affirmance of that judgment, it becomes a final adjudication, which bars another action for the same cause. It is held in *Lamb v. McConkey*, 76 Iowa 47, that, where a demurrer is sustained to a petition on the ground that, under the facts stated, that plaintiff is not entitled to the relief demanded, and on refusal to amend, judgment is rendered on the demurrer, such judgment is a final adjudication, not only as to all matters actually in issue then, but as to all other matters which might or should have been pleaded as entitling plaintiff to a relief demanded in that action, and that a subsequent action cannot be main-

tained on such other matters unless it is averred that they arose since the prior action was determined. The only semblance to a relevant holding to be found in *East Boyer Tel. Co. v. Incorporated Town of Vail*, 166 Iowa 226, is that the ruling on a first appeal from a decision of the trial court on demurrer governs on a subsequent appeal from the granting of a motion to strike certain portions of plaintiff's amended and substituted petition, where the legal questions involved in both appeals are the same.

We can find no relevancy whatever to anything involved here in *Wapello St. Sav. Bank v. Colton*, 143 Iowa 359.

Code Section 3461, cited, is that an assignment of a thing in action shall be without prejudice to certain defenses existing before notice of the assignment.

The point relied on in *Free v. Western Union Tel. Co.*, 135 Iowa 69, at 78, is but a statement of the statute provision that, if the facts stated by the petition entitled the plaintiff to no relief whatever, advantage may be taken of it by motion in arrest of judgment before judgment is entered; and that if, for failure of an allegation, a petition is demurrable, the judgment may not be attacked collaterally on that ground, nor so attacked for the first time on appeal.

*Kirk v. Litterst*, 71 Iowa 71, declares that want of evidence to sustain a verdict will not base a motion in arrest of judgment, because that is available only where the facts stated in the petition do not entitle the plaintiff to any relief.

*Johns v. Bailey*, 45 Iowa 241, but decides that failure to demur will not deprive an appellant to urge a legal objection to the judgment when the fact upon which the objection was based was not pleaded; and *Davis v. Bonar*, 15 Iowa 171, Point 2, page 172, is a decision that it is not a good ground of demurrer that a pleading is argumentative.

The judgment appealed from must be and is—*Affirmed*.

PRESTON, C. J., LADD, EVANS, and GAYNOR, JJ., concur.

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STEVE DENNIS, Appellant, v. WILLIAM GIBSON, Appellee.

**NEGLIGENCE: Custom Inducing Violation of Statute.** Reliance on

- 1 a custom will not justify the clear violation of a mandatory statute. So held with reference to the statutory prohibition against miners' passing "*across the shaft bottom*."

**PRINCIPLE APPLIED:** A mine shaft housed two cages, which were so constructed that, when one cage ascended to the tippie, the other cage descended to the bottom of the shaft. A custom grew up, however, to the effect that, when a cage did not go to the tippie, but only went to the surface for supplies, said particular cage would be returned to the bottom of the shaft before the companion cage was so returned. The statute positively forbade anyone from passing "*across the shaft bottom*," except employees working "*at the bottom of the shaft*." (Sec. 2486-j, Code Supp., 1913.)

On one occasion, when the north cage was at the tippie, the south cage ascended to the surface for supplies. Had the custom been followed, the south cage would have gone to the surface and stopped (thereby leaving the north cage suspended somewhere in the shaft), and would then have taken on supplies, and at once descended to the bottom of the shaft, thereby again raising the north cage to the tippie. *But the custom was not followed.* When the south cage started to ascend, and the north cage reached the surface of the ground, in its automatic descent, the defendant, superintendent of the mine, caused said north cage to stop, and he stepped thereon, and directed the engineer to take him to the bottom. The cager at the bottom of the shaft, supposing the custom would be observed, passed *across the north shaft bottom*, and was hit and injured by the descending north cage.

*Held*, the cager had no right to rely on said custom and thereby violate the statute,—that he was guilty of negligence *per se*.

**MASTER AND SERVANT: Contributory Negligence—Passing**

- 2 Along Known Dangerous Way. A servant who, in the ordinary discharge of his duties, rejects a concededly safe way of travel for one attended at all times by grave and impending dan-

ger, is guilty of contributory negligence. So held where a miner attempted to pass across the bottom of a shaft, and was hit by a descending cage.

**MINES AND MINERALS:** Negligence in Passing Over Shaft Bottom. The statutory declaration that the shaft bottom of a mine may be crossed only by employees who are necessarily working "at the bottom of the shaft," applies solely to those who are working in the sump—that part of the shaft which is below the cage when it comes to rest. (Sec. 2486-j, Code Supp., 1913.)

PRINCIPLE APPLIED: See No. 1.

**STATUTES:** Construction—Exceptions to Prohibitions. When a statute sweepingly prohibits the doing of a dangerous thing in a certain place of work, and then *excepts* certain persons from such prohibition, the grave and ever-impending danger of doing said act under any circumstances may furnish strong justification for a very strict and literal interpretation of said exception.

PRINCIPLE APPLIED: See No. 1.

*Appeal from Polk District Court.*—LAWRENCE DEGRAFF,  
Judge.

JANUARY 12, 1918.

REHEARING DENIED MAY 10, 1918.

ACTION for damages resulted in a directed verdict and judgment for the defendant. The plaintiff appeals.—*Affirmed.*

*S. B. Allen*, for appellant.

*Stipp, Perry, Bannister & Starzinger*, for appellee.

LADD, J.—The plaintiff, who had been employed by the Gibson Coal Mining Company about 6 years, and, after February, 1915, as a cager at the bottom of the shaft, was injured on September 21st of that year. He brings this action, not against his employer, but against the superintendent of the mine, and bases his action on the claim that defendant was negligent in that, without warning, he

violated the customs and rules of the mine, in coming down in the wrong cage, at a time when he should have known that plaintiff might be beneath it. It appears that the company had a double shaft, extending from the surface up to the tippie where the coal was dumped, and into the earth about 185 feet. Each shaft was  $4\frac{1}{2}$  feet wide and about 6 feet long, the one immediately north of the other. There was a cage in each shaft, operated by an engine, and so adjusted that, when one was being raised, the other was lowered. The excavation for the shaft extended about 6 feet below the floor of the mine, and this was called the sump. Usually, water settles there, and is pumped out. Cars loaded with coal from the entries were run on the cage at the bottom and raised to the tippie, where they were dumped, and the empty cars were taken down and returned through the entries to the miners. Supplies were taken down from the surface, and men were taken from there and returned. The main entries extended east and west from the shaft, and were laid with double tracks. The duties of plaintiff were to remove empty cars and those loaded with supplies from the cages at the bottom of the shaft, and to put cars loaded with coal on the cages to be carried to the tippie, and also to oversee loading and unloading the miners as they came from and returned to the surface. The cars were taken to and from the shaft in the main east entry by cable, operated by the engine. From 8 to 12 cars, called a trip, were brought at a time, and one of plaintiff's duties was to jerk a rope, and in that way disconnect the cars from the cable; and, when the cars were about 25 feet from the cage, to kick a latch, thereby switching the cars towards the cage on which to be loaded. The tracks in the entry gradually ascend to that point and descend towards the shaft. The rope must be jerked promptly, else the cars pile up. The trip rider, when the rope is jerked, throws sprags in the wheels to stop the cars until needed. The

empty cars are coupled together, the rope attached, and then they are drawn back by the cable to the places where required. In the west entry, the cars are hauled by mules, and it was a part of the plaintiff's duty to put the loaded cars from that entry also on the cage, and to remove the empties therefrom. A pump, at the bottom of the shaft and at the south side of the shaft and somewhat back therefrom, was operated by steam from the engine. Between the pump and the main shaft was what is known as a quarter shaft. At its narrowest place between the pump and main shaft, the space was less than a foot wide, and only this width for 18 inches, but the quarter shaft was about 6 feet long. This was the only passageway from one side of the shafts to the other, except a way around the cages in the opposite direction, estimated by plaintiff to be a distance of 150 or 200 feet. The latter was for the use of miners and mules, and was unobstructed.

The plaintiff testified that, at about 2:30 o'clock in the afternoon of September 21, 1915, plaintiff sent a car loaded with coal up on the north cage. Habelitz called from the ground landing and told him to clear the bottom of the south shaft, as he wished to send down a carload of ties. Clearing the bottom meant to take an empty car therefrom and ring the bell twice, thereby signaling that everything was ready for the cage to rise. Plaintiff then went to work at the pump, and, after being at that a while, noticed that the trip (train of cars) was coming in on the cable, and immediately climbed across the north shaft; and, as he did so, the cage came on him from above, injuring one arm severely, and pressing him part way in the water of the sump. This cage was descending from the tippie; and, as it reached the surface, defendant, wishing to go into the mine, entered the cage with the empty car, and directed Habelitz to let him down; and this was what was being done when the collision occurred.

Three questions are presented: (1) Was defendant negligent, and if so, did his negligence contribute to the injury? (2) Was plaintiff at fault in undertaking to cross the shaft? (3) Is defendant chargeable for damages due to the injury of a fellow servant, consequent on defendant's negligence; and if so, is he relieved by the Employers' Liability and Workmen's Compensation Act? For the purposes of the case, it may be conceded, without deciding, that the action may be maintained, owing to Section 2489-1a, Code Supplement, 1913; and evidence that defendant ignored a custom of the mine was for the jury, on the issue as to defendant's negligence. Was plaintiff at fault in what he did? To determine this, some additional evidence should be recited.

A person could pass from one side of the shaft to the other when the pump was not running; but when pumping, a stream of hot water fell from the exhaust pipe, and hot steam escaped, so that plaintiff could not pass through when the pump was being operated. The defendant knew this, and had promised repair; but none had been made, though a mechanic had been working at the pump, and on the day in question had directed plaintiff to start it and see if it would work. He could have stopped it and gone that way, but would have had to wait for the hot water to cease dropping, and the hot steam to dissipate. He could have gone by the other passageway. His excuse for doing neither was that, after hearing or seeing the approach of the trip (train of cars), prompt action was necessary in order to jerk the rope and kick the latch, and thereby prevent the cars from piling up, and he was compelled to cross the shaft to reach the east side in time to perform this duty, and had been so doing since February preceding.

Several witnesses testified that it was the custom of the mine that, when the bottom of one shaft had been cleared, and the cage taken to the *surface* for supplies or

1. NEGLIGENCE:  
custom in-  
ducing viola-  
tion of  
statute.

other purpose, it was returned to the bottom before the other cage was let down. But neither this custom nor the emergency of jerking the rope would excuse defendant for violating the statute prohibiting him from crossing the bottom. The place was one of manifest danger, and so described by plaintiff:

"When I was injured, I did not look upwards at any time to see if the cage was coming down, *because, if I had looked up there, there would be more danger than the way*

2. MASTER AND  
SERVANT:  
contributory  
negligence:  
passing along  
known danger-  
ous way.

*I was—more danger than climbing across the opening, because I would be liable to be cut in two in looking up the shaft.* I didn't look up. When I went to get across, I just started across. There was no way I could see the cage coming down until it got down. There was no way to tell when the cage was coming down until it comes down so low you can see it. Small chunks of coal or dirt fall off the cage only when the car is dumping, then lots of times it comes back. This is when it is on the top of the tippie. In the act of dumping, particles of coal will fall off and fall down."

Notwithstanding such situation, he had been crossing this bottom since February, and probably so did at this time, rather than in reliance on the custom. If so, he was negligent therein, as has been declared in numerous decisions. *McDonald v. Rockhill Iron & Coal Co.*, 135 Pa. 1 (19 Atl. 797); *Rush v. Coal Bluff Min. Co.*, 131 Ind. 135 (30 N. E. 904). See *Smith v. Kestner & Hecht Co.*, 157 Ky. 282 (162 S. W. 1133); *Powell v. Ashland Iron & Steel Co.*, 98 Wis. 35 (73 N. W. 573).

In *Contri v. Hollingsworth Coal Co.*, 143 Iowa 115, a miner was held to have been negligent in passing over the cage. The fact that what plaintiff did was in direct violation of an express prohibition of the statute, however, puts



the matter beyond debate. Section 2486-j of the Code Supplement, 1913, provides that:

"At the bottom of each hoisting shaft there shall be constructed a safe and convenient traveling way around the shaft for employes and animals, and it shall be unlawful for any person to pass across the shaft bottom in any other manner than by the traveling way herein contemplated; except such employes as may be necessary to perform the work at the bottom of the shaft or those engaged in making repairs."

3. MINES AND  
MINERALS:  
negligence in  
passing over  
shaft bottom.

The evident design of the lawmakers was to guard against injuries from the operation of the cages in the shaft. This is sought to be accomplished by providing a way around the bottom of the shaft. As another way is thereby provided, persons are prohibited from crossing the shaft at the bottom. The particular danger thereby to be obviated is that from a descending cage. Its descent cannot well be known until near, and therefore the only safety is in not exposing the person beneath it. This is, as we think, the reason for prohibiting anyone from crossing the shaft bottom, instead of going around. We experience greater difficulty in construing the exception.

4. STATUTES:  
construction:  
exceptions to  
prohibitions.

Are those actually employed in working or repairing at or in the shaft bottom excepted, or are the words "at the bottom of the shaft" employed in the larger sense, so as to mean "about, near to, or in connection with" that portion of the shaft resting on the floor of the mine?

Unless work is to be done or repairs made, there would seem to be no reason for making the exception; for crossing the shaft bottom would be quite as dangerous for those engaged in work about the bottom, such as a cager, as for miners generally. Familiarity with the situation would not shield from danger, where no one can see the

cage until practically upon the person attempting to cross, though some protection through signals might be possible. On the other hand, no necessity, reasonable or otherwise, appears for such a distinction.

There can be no occasion for others than those necessary to perform work at the bottom, or engaged in making repairs, to cross the shaft bottom; and this appears from the particularity in which a traveling way around the shaft is exacted. The bottom intended is that lowest down—beneath the cage. The plaintiff, in what he was assigned to do, was neither engaged in making repairs nor in performing work at the bottom of the shaft, and therefore was not within the class excepted from the operation of the statute. His duty to obey the law was not obviated by a custom the observance of which might have enabled him to do what he undertook in safety. Nor was he excusable in crossing, in violation of the statute because of the inconvenience of going around the shaft, or what might happen were the rope not pulled in time to avoid the piling of cars. His duty was to obey the law, as expressed in this statute; and in not so doing, he was guilty of such contributory negligence as to defeat recovery. The court rightly directed a verdict for defendant to be returned.—*Affirmed*.

PRESTON, C. J., EVANS, GAYNOR, and SALINGER, JJ., concur.

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PETER FRAHM, Appellee, v. PETER J. EGGERS, Appellant.

**APPEAL AND ERROR: Presumptions as to Finding of Verdict—**

- 1 **Supporting Fact.** A general verdict, on conflicting evidence, is accompanied by a presumption that the jury's unrevealed findings of fact were in perfect harmony with the verdict. In other words, it will not be presumed that the jury found in favor of a contention that would leave the verdict without any support.

**TRIAL: Quotient Verdicts.** A finding by the trial court, with fair support in the evidence, that a verdict was not a "quotient" verdict, will not be disturbed on appeal.

*Appeal from Crawford District Court.*—E. G. ALBERT, Judge.

JANUARY 11, 1918.

REHEARING DENIED MAY 10, 1918.

ACTION for damages for breach of a contract of guaranty in the sale of a stallion. There was a verdict for the plaintiff and the defendant appeals.—*Affirmed.*

*J. E. Williams* and *Harding & Kahler*, for appellee.

*Conner & Powers*, for appellant.

EVANS, J.—In March, 1913, the plaintiff purchased of the defendant a stallion at an agreed price of \$600. He alleges that the horse was purchased under an oral guaranty that he was a sixty per cent foal getter, and with a further agreement that, if the horse proved otherwise, the purchase money should be returned, together with all expenses incurred in the care and keeping of the horse. The defendant denies that the guaranty was oral, but avers that the same was in writing and conditional, and he sets out a copy of such writing. The defendant admits that no written guaranty was delivered at the time or prior to the delivery of the horse. The explanation is that the defendant had no blank forms of written contract on hand at the time. He testified, however, that he disclosed to the plaintiff the form of guaranty used by him and that the plaintiff assented to the same, and that he agreed with the plaintiff to send one of such written conditional guaranties as soon as he could procure a further supply, and that he did so on a later date. The plaintiff pleaded that the horse was a marked failure as a foal getter and that the alleged

oral guaranty was thereby breached, and he claimed damages therefor. This pleading was met with a general denial by the defendant.

Upon the trial, the plaintiff introduced evidence tending to support all the material allegations of his petition. The contradicting testimony on behalf of the defendant went mainly to the question of the form of the guaranty,—whether it was oral or in writing. Twenty-nine reversal points are specified in appellant's brief. The particular emphasis in argument, however, is laid upon two of them.

I. It is strenuously argued that the verdict was clearly contrary to the evidence, and that a new trial should have been granted on that ground. The contention here is that

1. APPEAL AND  
ERROR: pre-  
sumptions as  
to finding of  
verdict: sup-  
porting fact.

the evidence is conclusive that the parties had agreed upon the customary written guaranty, of which the defendant had a stereotyped form; that this guaranty imposed certain conditions and a restricted remedy; and that, under its terms, the plaintiff was not entitled to recover. If the first premise could be sustained, the second would follow. An examination of the record discloses a clear conflict in the evidence at this point. The concession of the plaintiff as a witness that the defendant agreed to put the guaranty in writing is not contradictory of his testimony as to what the guaranty was to be. It was not a concession that the terms of the guaranty were otherwise than as the plaintiff claimed them. If the guaranty was stated orally, an agreement that it should be put in writing would not authorize the defendant to supplant or modify it by such writing, except with the consent of the plaintiff. If the jury had found that the plaintiff had agreed to accept the written form of guaranty as claimed by the defendant, a verdict must have been rendered for the defendant under the instructions of the court. The jury must have found, therefore, with the plaintiff on that dispute. The verdict had support in plain-

tiff's testimony. This was the fighting point in the case.

II. The jury rendered a verdict for \$497.70. One of the grounds of the motion for a new trial was that the verdict was a quotient verdict. Several of the jurors were ex-

amined in open court on that question. It is

2 TRIAL: quo-  
tient verdicts.

undisputed that, in the course of their deliberations, some member of the jury added together the sum total of the proposed verdict of each juror and divided the same by 12, and that the quotient of such division was \$497.70. There was testimony of the jurors that this was agreed upon in advance; and a fair inference from such testimony was, perhaps, that they had agreed to make such quotient the verdict. Others testified that there was no agreement to that effect, but that the figuring was experimental and that they wanted to see what the result of such a computation would be. It was testified also, that, after the computation was made, the reasonableness of the sum was considered, and that they all agreed that the amount was about right. The record does not disclose how wide a range of difference there was in the figures of each juror in advance of such computation. For aught that appears, the figures of the different jurors may have been approximately equal. In any event, the testimony before the court would sustain a finding that there was no agreement to be bound by the quotient verdict, and that the amount fixed on was adopted conscientiously as the final judgment of the jurors. The most that can be said here is that there was a conflict in this evidence of the jurors. We would not, therefore, be justified in interfering with the finding of fact of the trial court.

III. As to the other reversal points stated in the brief, our foregoing conclusions necessarily dispose of many of them. Other points relate to the rulings on evidence. Illustrative of these are the following questions, objections to which by defendant were overruled:

"(1) What would you say would be the reasonable value of this horse Scott as a work horse on March 5, 1913?

"(2) Would you say the horse was too fat for normal condition?

"(3) Now, from your observation of the stallion Scott, his appearance, color, action, and assuming that he was 11 years old and a 60 to 65 per cent foal getter, what would you say would be his market value in the year 1913?

"(4) Now, Mr. Lensor, assuming that the stallion Scott, in the month of March, 1913, was in good flesh, and weighed about 1,900 pounds and was only a 10 per cent foal getter, what would you say would be his value on the market here in Crawford County?

"(5) Agreement: Subject to the right of counsel for defendant to object on the ground of the incompetency, irrelevancy, and immateriality, it is agreed that the market price of oats in the state of Iowa during the months of March, April, May, June, July, and August, ranged from 27½ to 33 cents per bushel for the year 1913. Defendant objects as immaterial, irrelevant, and incompetent."

The foregoing are fairly illustrative. We see nothing objectionable in any of the foregoing questions, upon the record before us. No particular reasons in support of the objections are stated in the argument. Certain instructions were requested by the defendant, and refused. The substance of some of these was given by the court on its own motion. Others are disposed of by our conclusions in Paragraph I hereof. We find no error in the record that would justify a reversal. The judgment below must, therefore, be—*Affirmed.*

PRESTON, C. J., LADD, GAYNOR, and SALINGER, JJ., concur.

JOHN McNAMARA et al., Appellees, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al., Appellants.

**CARRIERS:** Failure to Show Condition When Delivered to Carrier.

- 1 Failure of the evidence to show the condition of stock *when delivered to the carrier* is not fatal to recovery of damages, under pleadings distinctly alleging damages by reason of a specified act of negligence occurring *subsequent to receipt by the carrier*.

**APPEAL AND ERROR:** "Brief Points" as Limiting Scope of Review.  
 2 view. The propositions or "points" set forth by appellant in his brief and argument, and *not the abstract or assignments of error*, define the scope of appellate review.

*Appeal from Madison District Court.*—W. H. FAHEY, Judge.

JANUARY 10, 1918.

REHEARING DENIED MAY 10, 1918.

PLAINTIFFS seek to recover damages caused by an unduly delayed interstate shipment, and for an overcharge of freight. A verdict was directed for the defendants. From granting a new trial, the defendants appeal.—*Affirmed*.

F. W. Sargent, W. S. Cooper, and J. H. Johnson, for appellants.

J. P. Steele, for appellees.

SALINGER, J.—I. The jury could find that the shipment, hogs, was delivered by defendant in a damaged condition. If it so found, it had a basis in the testimony received for the allowance of some sum for damages. The court directed a verdict for defendant. It put the ruling on the sole ground "that the evidence on part of the plaintiffs fails to show the condition that the property was in at the time of delivery to the initial carrier." Plaintiffs

1. CARRIERS:  
failure to show  
condition when  
delivered to  
carrier.

moved for a new trial. The motion asserts that several errors were committed; but, in view of the expressed ground upon which the motion to direct rests, the propriety of sustaining the motion for new trial must be tested by whether the ground upon which the motion to direct was sustained, is valid. Even as the motion for new trial went beyond that question, so do some of defendant's "Assignment of Errors."

2. APPEAL AND  
ERROR: "brief  
points" as  
limiting scope  
of review.

Neither will avail to enlarge the review here; and in any view, such "assignments" do not define the scope of appellate review. That is done by the "points" provided for in the rules. We do not overlook that both appellant's abstract and argument reveal the question whether failure to give a notice required by contract was given, nor that it might be claimed that, if such was not given, it was error to grant a new trial because, though there be a new trial, plaintiff cannot win. But we are not concerned with this question, because no such "point" is made. The only proposition made in the "points" is that plaintiff was justly non-suited because he had no evidence of the condition of the hogs when delivered to the original carrier. If that contention is untenable, then the court erred in directing the verdict, and hence did not err in granting the new trial. Upon this point, the position of the appellant is well indicated by the authorities upon which it relies. First is *Sweetland v. Boston & Albany R. Co.*, 102 Mass. 276, which affirms that, where a shipment of apples is made, and there is no evidence of its condition when received from a connecting railroad, except that the weather was very cold when the apples reached the connecting carrier, and that they were frozen when delivered by it, there is no evidence that the apples were not frozen before they reached the last carrier, and it is not bound to make proof that they were frozen before they reached it. This is followed by citing the holding of *Kansas Stockyards v. Couch*, 12 Kan. 612, which is



no more than a statement of the rule that ordinary presumptions are not retrospective, and that showing the condition of a thing at one time is usually no evidence of its condition at an earlier time.

There cannot well be a controversy over the abstract proposition that the plaintiff may not recover unless he shows affirmatively that the property was in good order when received by the carrier, and that there is no presumption the goods were in good order when received by it. See 1 Moore on Carriers (2d Ed.) 568, 573; *Winne v. Illinois Cent. R. Co.*, 31 Iowa 583; *Swiney v. American Express Co.* 144 Iowa 342. The rule is merely an application of the presumption of continuity. See *Moore v. New York, N. H. & H. R. Co.*, 173 Mass. 335 (53 N. E. 816); *Charleston & W. Car. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597 (35 Sup. Ct. Rep. 715); *Bailey v. Missouri Pac. R. Co.*, 184 Mo. App. 457 (171 S. W. 44); *Silver Co. v. Wabash R. Co.*, 174 Mo. App. 184 (156 S. W. 830, at 832); *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412 (34 Sup. Ct. Rep. 790); *Boston & M. R. Co. v. Hooker*, 233 U. S. 97 (34 Sup. Ct. Rep. 526); *Beard & Sons v. Illinois Cent. R. Co.*, 79 Iowa 518, at 523; *Chicago, R. I. & P. R. Co. v. Harrington*, 44 Okla. 41 (143 Pac. 325, at 328). The question is not whether such a rule exists, but whether it controls this appeal. In effect, it is the position of appellant that, if no more appears than an allegation that the carrier was in some manner negligent, and that the shipment was delivered in bad order, there is no case for a jury; and that, therefore, there is no case for a jury here. The flaw lies in the premise. The plaintiff does not merely charge general negligence, and rest himself upon showing delivery in bad order, but charges specifically that, after the carrier got the hogs, they were damaged by reason of negligence in leaving them out in a storm without proper shelter, while in the course of transportation. He follows this up by showing that, upon delivery, the hogs were

in a condition from which a jury could find there had been such exposure to the storm. The rule that, when presumption alone is relied on, the delivery of the damaged goods makes no case, unless it be shown that the defendant received them when they were not damaged, certainly does not preclude the right to allege and prove that, whether the goods were in sound condition when delivered or not, something was done to them after receipt by the carrier impleaded which was calculated to damage them, and did so. Requiring the proof of good order at delivery operates, loosely speaking, to create for the last carrier a presumption that the goods were not in good order when delivered to it. Suppose it appeared affirmatively that this is so, and also that the carrier thereafter was so negligent as to enhance the defect or to create a new one. Would it be claimed that this last injury need not be compensated for because the goods were damaged when received? It seems to us the self-evident answer disposes of this appeal.

The motion to direct was grounded, among other things, upon the claim that failure to prove the condition of the hogs when shipped defeated the right of plaintiff to recover at all. The motion was sustained upon that ground. If there was any right to recover at all, the trial court erred in directing a verdict against the plaintiff. For whatever may have been the state of the hogs when received by the initial carrier, the jury could find that thereafter the defendant was negligent in its caring for them, and that this caused damages in some amount. It follows it was not error to grant plaintiff a new trial; wherefore, the judgment below must be—*Affirmed*.

PRESTON, C. J., LADD, EVANS, and GAYNOR, JJ., concur.

J. A. SCOVEL et al., Appellants, v. J. P. MONAGHAN, Appellee.

**BILLS AND NOTES: Fraud—Evidence—Sufficiency.** Evidence at-  
1 tending the giving of a promissory note for stock foods re-  
viewed, and held to justify a finding of fraud on the part of  
the payee.

**TRIAL: Instructions—Construction as a Whole.** A clear and ac-  
2 curate statement of the law, once given, need not be repeated.

**EVIDENCE: Declarations as to Possession.** On an issue whether  
3 one is in possession of property as owner, or as agent only, his  
declarations relative to the nature of such possession are admis-  
sible.

**APPEAL AND ERROR: Inconsequential Testimony.** The erroneous  
4 admission of immaterial but inconsequential testimony is harm-  
less.

**BILLS AND NOTES: Tainted Note—Burden of Proof.** Proof that  
5 a note was, in its inception, tainted with fraud, throws the  
burden of proof upon the holder to show that he is a holder  
"in due course."

*Appeal from Madison District Court.—W. H. FAHEY,*  
Judge.

OCTOBER 27, 1917.

REHEARING DENIED MAY 10, 1918.

SUIT upon an instrument, including a promise to pay. The defendant admitted his signature, but averred that it was obtained by the fraud of the payee and its agent, McCarty. The general nature of the fraud thus charged is that McCarty induced the defendant to believe that he was signing a receipt. It is further averred that the paper to which the defendant's signature was attached was a printed form in blank; that the blanks therein were afterwards filled in without authority, so as to make it appear as the present

note, and that there was, thereby, a fraudulent alteration of the paper signed by the defendant.

The plaintiffs deny the affirmative allegations of the answer, and plead the negligence of the defendant as an estoppel. Plaintiffs also aver that they were purchasers of the note in due course, without notice. There was a trial to a jury, and a verdict for the defendant. The plaintiffs appeal—*Affirmed*.

*M. J. Carey and W. S. Cooper, for appellants.*

*A. W. and Phil R. Wilkinson, and J. P. Steele, for appellee.*

EVANS, J.—I. The instrument sued on was as follows:

"P. O. Winterset, Ia., R. F. D. No.—

1. BILLS AND  
NOTES: fraud:  
evidence; suf-  
ficiency. July 10, 1914.

"Western Stock Remedy Co., Newton, Iowa.

"Please ship to M. James Monahan at  
Winterset, F. O. B. Newton, Iowa:

"Quantity	Price
15,000 lbs. Hog Powder	6
lbs. Horse Powder	
lbs. Sheep Powder	
lbs. Cattle Powder	
30 Self Feeders Free	
1 gal. can Stock Dip	
5 gal. cans Stock Dip	
Spray Pumps	

"On the first day of Nov., 1914, for value received, I agree to pay \$900.00 to the order of Western Stock Remedy Co., at Newton, Iowa.

"R. A. McCarty,

J. P. Monaghan,

"Salesman.

Purchaser."

McCarty was a capable and intelligent traveling agent for the payee of the instrument. He was canvassing Madi-

son County for the sale of stock food for his principal. The defendant was an intelligent farmer of Madison County, who resided in town, and who owned an automobile. McCarty procured his services to transport him from place to place, and to aid him thereby in the selling of stock food. A number of customers were visited in one day, and one or two sales were made. McCarty left on the 5 o'clock train, and carried with him the signature of the defendant to the paper which is in evidence. The circumstances of the signing, as detailed by Monaghan, were that they were much hurried to get to the depot at Patterson in time to enable McCarty to catch the 5 o'clock train. The train was pulling into the depot at the time they came up to it. McCarty had solicited Monaghan to purchase some of the stock food for the purpose of resale by Monaghan, but Monaghan had declined to do so. Thereupon, McCarty asked Monaghan to make deliveries for him, which Monaghan agreed to do. After arriving at the depot, while the train which McCarty was to take was standing there, and ready to start, McCarty took a book out of his pocket, and said to Monaghan, in substance, that he wanted him to sign a receipt for the deliveries, which he could show to his principal. Thereupon, Monaghan signed the same, believing it to be such receipt. The signature thus affixed is the signature to the present instrument sued on. About one week later, the goods were shipped to the address of Monaghan. Being notified of their arrival, he paid no attention to the notice. A week thereafter, Danford appeared. He was an agent, and perhaps manager, of the stock food company. While Danford was there, and under his directions, as Monaghan claims, he found a place for the storing of the goods, and employed a drayman to haul the same. He and Danford also drove out into the country for the purpose of making sales and deliveries. They took 300 pounds of this particular shipment with them. They made one sale at Macksberg. Later, McCarty came upon the scene,

and spent several days in canvassing the territory, Monaghan transporting him, as before. It is the claim of Monaghan that he repudiated the instrument as soon as he discovered that they claimed to have one. This first occurred in his conversation with Danford on the first trip.

The testimony of Monaghan is contradicted by that of McCarty. McCarty admitted in his testimony that the instrument was signed by Monaghan while the train was standing at the depot. He claimed, however, that the train stopped there ten minutes, and that Monaghan had abundant time to read the instrument. He also testified that Monaghan agreed to make the purchase, and that the price was the wholesale price, which was from one to two cents per pound lower than the retail price.

One of the grounds, urged with much vigor, for a reversal, is that the verdict is wholly unsupported by the evidence. Our first impressions on the submission were inclined to be adverse to the defendant. A careful reading of the entire record has changed our views in that respect. There are some infirmities in Monaghan's testimony, and doubtless some exaggerations. On the other hand, the testimony of McCarty is very unsatisfactory, and, to our minds, quite inconsistent. His testimony shows practically no negotiations with Monaghan for the purchase of such a large order. He admits, in effect, that, up to the moment of driving into the depot, while the train was standing there, there was not yet any oral understanding between him and Monaghan that Monaghan would make a purchase of any amount. It does not appear from the testimony of either McCarty or Monaghan that the *amount* of the order was ever mentioned. If McCarty understood that a bona-fide sale was made, no explanation is apparent why Danford and McCarty should spend their time later in that territory in the same manner as before. Danford's explanation is that he was simply following a custom of the house to as-

sist the wholesale men. Yet he admitted that, for the day which he traveled in Madison County with Monaghan, and for the sale which they made at Macksberg, he paid Monaghan \$10. McCarty denied in his testimony that he ever had agreed to pay Monaghan \$10 a day or any other sum, and denied that he had ever paid him. At this point, the testimony of Monaghan and that of McCarty are in direct conflict. McCarty's contention was that he split the commission with Monaghan. His explanation of his work subsequently to the signing of the instrument is that he was aiding Monaghan, and Monaghan was splitting commission with him. If Monaghan's compensation before the alleged purchase was a split commission on the sale, and was likewise a split commission thereafter, it is difficult to see a motive for an intelligent man to execute his note in advance for \$900 for the mere prospect of selling 15,000 pounds. It will serve no useful purpose for us to go into a detailed discussion of the evidence. It is sufficient to say that the state of the evidence is such as to sustain a finding by the jury that there was fraud or artifice on the part of McCarty in obtaining Monaghan's signature. The artifice which the evidence tended to show was that he had so timed the act that defendant could not take the time to read the instrument without endangering McCarty's opportunity to catch the train. True, Monaghan could have taken the time, and had a right to be indifferent as to whether McCarty caught the train or not; but the contrary mental attitude was quite natural, and it was for the jury to say whether, under all the circumstances, he acted as a reasonably prudent man.

II. The appellant has specified a large number of errors relied on for reversal, and has presented the same in argument with much force. There are 21 of these, and it

is not practicable for us to discuss them singly. They group themselves quite naturally about certain basic propositions, and we shall so consider them. Appellant points out some omissions in certain instructions. For instance, it is said that a certain instruction advised the jury that they must "find from the evidence," whereas it should have said, a "preponderance of evidence." The trial court gave an instruction upon the subject of preponderance that covered the ground fully, and we have frequently held that it is not necessary for the court to carry the word "preponderance" throughout the instructions, in making reference to the evidence. It is pointed out that one instruction ignored the duty of the defendant to "exercise ordinary diligence." And yet, in another instruction, the trial court laid down the rule of diligence as strongly as the appellant could wish. There was no inconsistency in the instructions where such reference was omitted. The foregoing is illustrative of the nature of the objections made to the instructions. We find, by a careful examination of the instructions, that each objection is fully met by other consistent instructions.

III. Some evidence of conversations was introduced on behalf of the defendant that was objected to on the ground that they were self-serving declarations. This evidence consisted of statements made by Monaghan, more particularly to drayman Hoots, who hauled the goods. These statements were to the general effect that the goods did not belong to Monaghan, but that Danford was the owner thereof. The first of these statements was made when Monaghan was notified of the arrival of the goods. The second was made in the presence of Danford himself. An issue arose on the trial as to whether Monaghan had waived his defense by accepting the goods. The actual taking of the goods from the depot

2. TRIAL: instructions; construction as a whole.

3. EVIDENCE: declarations as to possession.



occurred in the presence of Danford. Monaghan claimed that what he did, he so did at the request of Danford. Hoots testified that Monaghan introduced Danford to him, saying that he was the owner of the goods. Monaghan's contention was that he sustained the attitude only of an agent, and not that of owner. The possession of the goods was consistent with a claim of agency. We think the declarations complained of were competent, as bearing upon the nature of the possession—whether it was that of an alleged owner or that of an alleged agent.

IV. The trial court permitted the testimony of witness Condon, which purported to be impeaching testimony, in that he testified to a certain conversation with McCarty.

It is urged that this was erroneously received, particularly because there was nothing in the testimony of an impeaching nature. We think this point is well taken, and that the objection should have been sustained to the materiality of Condon's testimony. Such evidence, however, was so wholly immaterial and inconsequential that we cannot consider it as having carried any prejudice whatever.

V. It is urged, also, that the plaintiffs were purchasers of the instrument sued on, in due course and without notice. The defense being based upon fraud in the original transaction, the burden was upon the plaintiffs to

prove their foregoing allegation. The allegation seems to have been quite ignored in the testimony. It does not appear what

the entity of the payee was,—whether a partnership or a corporation. The evidence does tend to show that Scovel was president and Danford manager, at one time; and thereafter, Danford was president, and perhaps Scovel was manager. It also appears that Scovel and Danford sold the company to one De Bolt, and that De Bolt sold back to them the present cause of action without recourse. This is a suffi-

4. **APPEAL AND  
error: incon-  
sequential tes-  
timony.**

5. **BILLS AND  
NOTES: tainted  
note: burden  
of proof.**

cient indication of the record to show the absence therefrom of any debatable question of innocent purchaser.

Other minor details are discussed in the argument, none of which appear to us to be well taken. The instructions of the trial court were very full and fair, and were in line with the main contentions of appellants' argument here. The plaintiffs had a full and fair trial, and we are inclined to agree with the jury as to the fair preponderance of the evidence upon the larger merits of the case. The judgment below is—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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WILLIAM H. UPTON, Appellant, v. LUCY B. SMITH, Appellee.

**SPECIFIC PERFORMANCE: Defective Abstract of Good Title as**

- 1 **Defense.** An abstract of title sufficient to satisfy a contract calling for "good title" must show a fee—a marketable title, which can be again sold to a person of reasonable prudence. Record abstract of title reviewed, and held not good, because of (a) indefiniteness of title, (b) want of title (in part), and (c) an outstanding easement.

**VENDOR AND PURCHASER: Curing Substantial Defects by Means**

- 2 **of Affidavits.** A vendor, obligated to furnish an abstract of title showing "good" title, may not, *by means of recorded affidavits*, purge his title of *substantial* defects. (See Sec. 2957. Code, 1897.) So held where the vendor sought, by means of recorded affidavits, (a) to supply missing links of title, and (b) to establish adverse possession.

*Appeal from Henry District Court.*—JAMES D. SMYTH and OSCAR HALE, Judges.

FEBRUARY 8, 1918.

REHEARING DENIED MAY 10, 1918.

SUIT for specific performance of a contract of purchase

resulted in the dismissal of the petition. The plaintiff appeals.—*Affirmed.*

A. W. Kinkead, for appellant.

- No appearance for appellee.

LADD, J.—The parties hereto entered into a written agreement, September 9, 1914, by the terms of which defendant undertook to purchase "Blocks 3 and 4 of College 2d Addition to the city of Mt. Pleasant, together with the alley running east and west through said blocks, and the west half of the 60-foot street running north and south between the south half of said Block 3 and the south half of said Block 2 of said addition, for the price and sum of \$2,600. Said Upton is to furnish an abstract of title to said premises, showing good title in him and freedom from incumbrance, and on the 15th day of December, 1915, is to make and deliver to said Smith a good and sufficient warranty deed, when possession is to be given and said consideration paid."

1. SPECIFIC  
PERFORMANCE:  
defective ab-  
stract of good  
title as de-  
fense.

The plaintiff tendered a deed such as required by the contract, and with it an abstract of title; but defendant refused to perform, and, in a petition alleging the above facts and continuing the tender in the petition, the date of performance is sought to be corrected, and a decree of specific performance prayed.

The defendant interposed a general demurrer, and it was sustained. Thereupon, an amendment to the petition, with addenda added to the abstract, was filed, and motion of defendant to strike was overruled. A demurrer was sustained on the grounds of want of equity, that the abstract of title furnished was not such as stipulated, and that there had been unreasonable delay in the matter of performance by plaintiff; and, as plaintiff elected to stand on the ruling, the petition was dismissed. Only the ruling on the suffi-

ciency of the abstract of title need be considered. By good title is meant nothing less than an estate in fee, a marketable title, or one which can again be sold to a reasonable purchaser. *Fagan v. Hook*, 134 Iowa 381.

The term "abstract of title" has reference to the record title, and not to extrinsic evidence thereof and links lacking therein; and adverse possession may not be made or be supplied and made matter of record by the making and recording of affidavits. *Fagan v. Hook*, supra.

2. VENDOR AND  
PURCHASER:  
curing sub-  
stantial de-  
fects by means  
of affidavits.

William C. Stevenson became owner of the SW $\frac{1}{4}$  of Section 4 in Township 71 North, of Range 6, in Henry County, in 1841. Upon his death, title passed to his widow and son, who conveyed by warranty deed a tract of 44 acres to Thomas E. Corkhill and Austin Coleman, on November 6, 1854, under the following description:

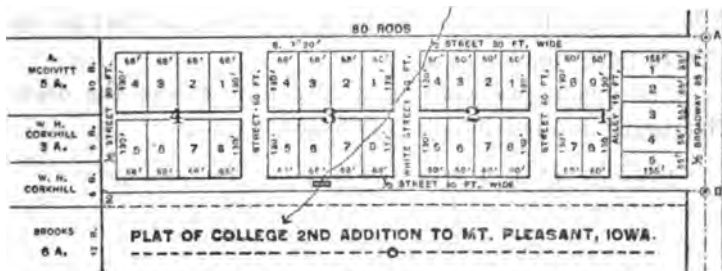
"Com. 20 Chains S. of NE cor. SW  $\frac{1}{4}$  Section 4-71-6, W. 40 chains, S. 11 chains, E. 40 chains, N. 11 chains to p. B., 44 a."

Coleman conveyed all his interest therein to Corkhill, and the latter, on March 1, 1856, deeded to William Kneen land described as "corn. Com. at NE cor. of 44 acres conveyed by James Putnam and wife and Diana Smith to T. E. Corkhill and Austin Coleman in Nov., 1854, S. 151 $\frac{1}{2}$  feet, W. 69.7 rods, N. 151 $\frac{1}{2}$  feet, E. 69.7 rods to p. b., 4 acres." A few days later, he conveyed to Hugh Gibson a tract of same dimensions, immediately south of the above, and Gibson transferred the same to Kneen. In the month following, Thomas E. Corkhill executed a deed to Kneen, with description following:

"About 1 $\frac{1}{4}$  acres lying next W. of and adjoining a tract of 8 acres sold by T. E. Corkhill to said Kneen and Hugh Gibson, in the NE corner of the tract of 44 acres purchased by T. E. Corkhill and A. Coleman from James Put-

nam and wife and others; the said  $11\frac{1}{4}$  acres lies E. of land sold to McDivitt and W. H. Corkhill. We convey this subject to right of way of William H. Corkhill, A. McDivitt and Joseph Brooks according to their several contracts in that respect. Also we quitclaim to said Wm. Kneen all our interest in the  $N\frac{1}{2}$  of a strip of land 60 feet wide lying S. of and adjoining the above mentioned 8 acres, and the above  $11\frac{1}{4}$  acres."

Kneen caused a plat known as College 2d Addition to Mt. Pleasant to be filed April 23, 1857, commencing at the NE corner of the  $SE\frac{1}{4}$   $SW\frac{1}{4}$  of the section marked A on



said plat. It will be observed that Kneen acquired of Corkhill and Gibson a strip of land 303 feet wide and 69.7 rods long, with the northeast corner corresponding with "A" on the plat, but about 10 rods longer than this strip. Does the last description quoted include such area? It will be noted that the "metes and bounds" are not given, nor its area stated any more certainly than "about  $11\frac{1}{4}$  acres." The section, township, and county in which located are not stated, nor is that of the 44 acres said to have been purchased by Corkhill and Coleman, nor that of the 8 acres sold to Kneen and Gibson. It cannot be assumed, in the absence of any showing to the contrary, that the conveyances previously mentioned were necessarily those intended. For all that appears, the conveyances mentioned may have had reference to others, and there may have been no more than a coincidence. Again, the conveyance was "subject to right of way" of the three persons

named, "according to their several contracts in that respect." This charged subsequent purchasers with notice of the reservation of a right of way, and nothing of record indicated its abandonment. For all that appears of record, this may still exist. In any event, title to any land west of the strip acquired by Kneen from Corkhill and Gibson is not shown to have been in Kneen; and therefore, in so far as the record indicates, Corkhill may still retain ownership of land designated as Lot 4 and considerably more, and the easement of the right of way may continue as a burden of the fee. This being so, it cannot be said that the abstract exhibited a good title in plaintiff, or that he tendered same, or that he was able to perform.

The demurrers were rightly sustained, and the decree dismissing the petition is—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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E. H. HOYT, Appellant, v. JOHN F. KEEGAN, Administrator,  
Appellee.

**TAXATION:** Collateral Inheritance Tax—Bank Deposits of Non-resident. Bank deposits, in resident banks, of a deceased non-resident, whether represented by a "pass book" only or by negotiable certificates, are subject to the collateral inheritance tax law of this state, even though such tangible evidence of the deposits are kept, at all times, by the nonresident owner in the state of his residence, and even though such holding may lead to double taxation, to wit, a tax in this state and a tax in the state where such nonresident resided. (Sec. 1481-a, Code Supp., 1913.)

*Appeal from Clinton District Court.*—A. P. BARKER, Judge.

MAY 13, 1918.

APPLICATION for an order in probate. The question involved was whether certain property of the state was sub-

ject to a collateral inheritance tax. The trial court held adversely to the claim of the treasurer of state for an assessment of such tax, and he has appealed.—*Reversed.*

*H. M. Havner*, Attorney General, *J. W. Kindig*, Assistant Attorney General, and *George Claussen*, County Attorney, for appellant.

*Wolfe & Wolfe*, for appellee.

EVANS, J.—Henry Breen was, at the time of his decease, an actual resident of Illinois. He died there on July 23, 1915, intestate. He left surviving him neither wife nor child nor parent. His estate, therefore, passed wholly to collateral heirs. The principal administration upon his estate was had in the state of Illinois. At the time of his death, and for some time prior thereto, he held a certificate of deposit, in the usual form, of one of the banks of Clinton, Iowa, for \$1,518. He also had on deposit in a savings bank at Clinton, Iowa, the sum of \$6,207, which was evidenced by a savings bank pass book. This pass book and the certificate were at all times kept by the deceased, in his lifetime, in his actual possession in Illinois. Because of these deposits, ancillary administration was had in the probate court of Clinton County, Iowa. An administrator was appointed by such court, who collected the funds in question and reported the same, and applied for an order authorizing him to pay the same to the Illinois administrator. In resistance to such application, the treasurer of state appeared, and claimed the statutory tax upon collateral inheritances, to the extent of five per cent of the fund thus collected by the ancillary administrator. The question, therefore, is whether these funds came within the jurisdiction of the courts of this state, within the meaning of Section 1481-a, Code Supplement, 1913, and became thereby subject to such tax, notwithstanding that the deceased was an actual resident of Illinois. The certificate of deposit is not set

out in the record, but it seems to be conceded that it was, in form, a negotiable instrument. The pass book was not a negotiable instrument.

In determining the actual situs of choses in action as personal property, some authorities distinguish between negotiable paper and the non-negotiable evidences of indebtedness. We shall, therefore, consider the two items involved herein separately, and will take up first the item evidenced by the pass book.

I. We have to do with Section 1481-a, Code Supplement, 1913. This section purports to subject to the collateral inheritance tax the "estates of all deceased persons, whether they be inhabitants of this state or not, and whether such estate consists of real, personal or mixed property, tangible or intangible, and any interest in, or income from any such estate or property, which property is, at the death of the decedent owner, within this state or is subject to, or thereafter, for the purpose of distribution, is brought within this state and becomes subject to the jurisdiction of the courts of this state. \* \* \*"

This statute appears to be identical with a corresponding statute of the state of New York, and is said to have been borrowed therefrom. *In re Estate of Adams*, 167 Iowa 382. It has been held repeatedly, in the state of New York, that bank deposits of nonresidents in the taxing state come within the operation of this statute. *In re Estate of Romaine*, 127 N. Y. 80 (27 N. E. 759); *In re Estate of Whiting*, 150 N. Y. 27 (44 N. E. 715); *In re Houdayer*, 150 N. Y. 37 (44 N. E. 718). The Supreme Court of the United States has held to the same effect. *Blackstone v. Miller*, 188 U. S. 189. The same holding has been announced by the courts of Illinois, Massachusetts, Maryland, and Minnesota. *People v. Griffith*, 245 Ill. 532; *Kennedy v. Hodges*, 215 Mass. 112; *State v. Dalrymple*, 70 Md. 294; *State ex rel. Graff v. Probate Court*, 128 Minn. 371 (150 N. W. 1094).



The general ground of the holding may be indicated by a few excerpts from the cases.

"The question then is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity, more or less, has obliterated the legal difference. [Citing authorities.] In view of these cases, and the decision in the present case which followed them, a not very successful attempt was made to show that, by reason of the facts that we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank. We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view. If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the state of New York, then New York may subject the transfer to a tax. [Citing authorities.] But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. \* \* \* What gives the debts validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. \* \* \* So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. \* \* \* Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizen than upon tangible chattels found within the state at

the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of the state conflict with a fiction due to historic tradition, the fiction must give way." *Blackstone v. Miller*, 188 U. S. 189.

"The decedent brought his money into this state, deposited it in a bank here, and left it here until it should suit his convenience to come back and get it. \* \* \* If he had deposited *in specie*, to be returned *in specie*, there can be no doubt that the money would be property in this state, subject to taxation. But instead, he did as business men generally do, deposited his money in the usual way, knowing that not the same, but the equivalent, would be returned to him upon demand. While the relation of debtor and creditor technically existed, practically he had his money in the bank, and could come and get it when he wanted it. It was an investment in this state, subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this state. The depository was a resident corporation, and the receiving and retaining of the money were corporate acts in this state. Its repayment would be a corporate act in this state. Every right springing from the deposit was created by the laws of this state. Every act out of which those rights arose was done in this state; in order to enforce those rights, it was necessary for him to come into this state; conceding that the deposit was a debt, conceding for all practical purposes and in every reasonable sense, that it was intangible, still it was property in this state, within the meaning of the Transfer Tax Act." *Estate of Houdayer*, 150 N. Y. 37.

The foregoing is quite in harmony with the utterances of this court in *Hunt v. Hopley*, 120 Iowa 695, *Heinz & Fisher v. Board*, 121 Iowa 445, upon an analogous question. It is urged that such a rule results in double taxation.

This is doubtless true, in a very practical sense. And yet it has uniformly been held that it is not double taxation in a constitutional sense. *In re Hartman*, 70 N. J. Eq. 664 (62 Atl. 560); *Hopkin's Appeal*, 77 Conn. 644 (60 Atl. 657); *In re Daly*, 182 N. Y. 524 (74 N. E. 1116).

It must be conceded, also, that there is a measure of inconsistency on the part of the taxing power, in the different rules applied as against the resident and the nonresident, in fixing the legal situs of intangible personal property. As against the resident, it attaches the personal property to his person, and fixes the legal situs thereof within the state, even though the actual situs be in another state. As against the nonresident, it separates the property from the person of the owner, and fixes upon the actual situs thereof as the legal situs, regardless of the domicile of the owner. As to this exercise of power and the method thereof, the Supreme Court of the United States has said:

"No doubt this power on the part of two states to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing, on the one hand, according to the fact of power, and, on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam*, and domicile governs the whole. But those inconsistencies infringe no rule of constitutional law." *Blackstone v. Miller*, 188 U. S. 189.

That personal property of the testator domiciled in New Jersey is located in New York, and is subject to the payment of a succession tax there, does not prevent the exaction of a succession tax with respect thereto by New Jersey. *In re Estate of Hartman*, 70 N. J. Eq. 664 (62 Atl. 560). The court said that it was apparent that, if the assessment of the tax in New Jersey be sustained, the result will be the requirement of the payment of two taxes of like character by the same legatees for the right of succession to

the gifts of the testatrix; but that this unfortunate situation cannot control the determination of the questions presented, for such a condition frequently arises, and, while its presence always induces most careful consideration on the part of the court to find some legal method to prevent it, it must be submitted to, unless it can be avoided under settled rules relating to the subject.

So it was held in *Hopkin's Appeal*, 77 Conn. 644 (60 Atl. 657), that payment of a transfer tax to the state in which the property is situated does not prevent the exaction of a similar tax by the state in which the testator was domiciled. See, also, note to *Mann v. Carter*, (N. H.) 15 L. R. A. (N. S.) 151.

We think it must be said that, under the clear weight of authority, the savings bank deposit was subject to the collateral inheritance tax, under our statute.

II. Does the same rule apply to the certificate of deposit as a negotiable paper? We held, in *Gilbertson v. Oliver*, 129 Iowa 568, that negotiable paper held by a non-resident in the state of his own domicile was not subject to the tax, even though the debtor resided within this state. In that case, Section 1467, Code, 1897, since repealed, was the statute under consideration. The present statute, Section 1481-a, is more comprehensive and searching in its provisions, and the question remains whether the same construction should be applied to it as was applied in the *Gilbertson* case to Section 1467. Clearly, it was not intended as a re-enactment of Section 1467. Clearly, also, it was intended to reach property which could not be reached under the provisions of the former section. The reason usually given for making a distinction between negotiable and non-negotiable paper on the question of situs of the property represented thereby is that negotiable paper is inseparable from the property right, and is, in a sense, the property entity; that its actual situs, therefore, determines

the actual situs of the intangible property itself; that, therefore, if a nonresident has negotiable paper in his own possession in the state of his own domicile, then the actual situs of the property itself is there. Some such distinction is recognized by the Supreme Court of the United States in *Blackstone v. Miller*, supra.

There is also a question of public policy involved, in that it imposes a burden upon the negotiable paper of the state which must, eventually and indirectly, be borne by the debtor residents of the state. The question of public policy, however, is one only for the consideration of the legislature.

The question confronting us now is whether a fair construction of the present statute will permit a distinction to be made as between intangible property represented by negotiable paper and that represented otherwise. The reason for holding that the savings bank deposit came within the jurisdiction of the courts of this state by the administration proceedings applies in the same manner and with the same force to the negotiable certificate of deposit. This precise question received the consideration of the Supreme Court of Minnesota in *State v. Probate Court*, 128 Minn. 371 (150 N. W. 1094), wherein it was held that a distinction was not permissible, in the application of a similar statute. It was therein said:

"Whether the right of succession to promissory notes held by nonresidents is taxable by the state having jurisdiction over the maker does not appear to have received much attention from the courts; but it is difficult to see why the reasoning which establishes the right to tax the transfer of an ordinary debt does not also establish the right to tax the transfer of a promissory note, which is merely an evidence of the debt. \* \* \* While there are decisions to the contrary, it is fairly well settled that debts evidenced by promissory notes are assets at the domicile of

the debtor, and are sufficient to confer jurisdiction for administration purposes upon the courts of such domicile. The Supreme Court of the United States says: 'The general rule of law is well settled that, for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor, and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable.' [Citing authorities.] Where the courts of the debtor's domicile have jurisdiction of the debt for purposes of probate administration, it goes without saying that they have jurisdiction for the purpose of enforcing a succession tax. It is said that bonds and commercial paper are something more than mere evidences of indebtedness, and it has been held that they may be subject to a succession tax by the state within whose jurisdiction they are found, although neither the debtor nor the creditor are residents of such state, and this is perhaps true; but if so, it does not divest the state having jurisdiction of the debtor of any power possessed by such state to enforce its own tax. It is unquestioned that the right to succeed to the ownership of the property of a decedent ought not to be burdened with a double tax, but it is equally unquestioned that, under some circumstances, both the state where the decedent resided and the state where his property is located or his debtor resides have power to impose such tax. Where the power exists, the extent to which it shall be exercised rests exclusively with the legislature. The determination of such questions is outside the domain of the courts. The case at bar involves no question of double taxation, however, for the tax now under consideration is the only tax sought to be imposed. The relator must in-

voke the law of Minnesota to obtain the possession and the beneficial enjoyment of the property in question. This is true as to all the sorts of property here involved, and we are of the opinion that the state has power, in respect to all such property, to tax the right to succeed to the ownership thereof."

The sweeping provisions of our present statute indicate an intent of the legislature to exercise the full taxing power of the state as respects all forms of property coming within the jurisdiction of the courts of the state. Under these provisions, we see no way to withhold the application thereof from negotiable paper.

We think, therefore, that both items involved in the controversy were subject to the tax claimed. The order of the trial court is, therefore, reversed.—*Reversed and remanded.*

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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STANKO PAPICH, Appellant, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee.

**RAILROADS: Measure of Duty to Trespasser.** A railway company

- 1 is under no obligation, before it suddenly or violently moves its cars, (a) to provide a guard to warn unknown trespassers who may be on or about the cars, or (b) to inspect its cars in order to discover such trespassers, or (c) to give warning signals in order that such trespassers may be apprised of their danger. Duty of care toward a trespasser arises only after his position of peril is *actually* discovered. So held where a six-year-old boy was crawling under a car which blocked his passage.

**RAILROADS: Temporary Withdrawal of License.** An implied li-

- 2 cense to cross a railway track is *ipso facto* withdrawn by the act of placing and maintaining cars on the track and across said licensed way.

**RAILROADS: Scope of License.** Long-continued practice of allowing children to play within railway yards and to pick up coal that was dropped upon and along the side of the tracks may not be construed into a license or invitation to a six-year-old boy to crawl under the cars in order to reach his home.

**RAILROADS: Licensees and Trespassers.** Bare licensees and trespassers stand on the same footing, as regards the care exacted in avoiding injury to them.

**RAILROADS: Trespasser's Freedom from Contributory Negligence.**  
 5 A child of tender years may be a trespasser, and dealt with accordingly, even though he is not guilty of contributory negligence.

*Appeal from Polk District Court.*—WM. H. McHENRY,  
 Judge.

MAY 13, 1918.

Suit by appellant to recover for injuries sustained by his minor son. Verdict was directed for defendant, and plaintiff appeals.—*Affirmed.*

A. H. Hoffmann and Guy A. Miller, for appellant.

Cook, Hughes & Sutherland and O. M. Brockett, for appellee.

SALINGER, J.—I. A boy something like six years old left ice whereon he was playing, to go home. He traveled a path which crossed the tracks of the defendant, and we may assume, for present purposes, this path was a licensed one. It is alleged that, when he reached the tracks, he found them blocked by cars placed there by defendant, and that he "thereupon attempted to crawl or pass under said empty coal car \* \* \* when the defendant backed a line of cars with an engine attached thereto down said side track and struck the said line of cars standing on said side track \* \* \* and set the same in motion;" and so he was injured. The evidence shows that there were cars

1. RAILROADS:  
 measure of  
 duty to tres-  
 passer.



across this path; and that the train moved upon and struck them at a speed of some six miles an hour, without ringing a bell or giving a whistle or any other signal, and that there was no watchman.

Eliminating from present consideration the alleged license; the absence of warning by bell, whistle, or other signal; that no watchman was present to drive the child from beneath the cars; and the claim that the backing against the standing cars was at excessive speed; and some other claims of appellant,—and we have the case of a six-year-old boy who was hurt while crawling under a freight car that was blocking his way across the track. To be sure, the petition adds the highly material claim that the employees of defendant saw him while venturing on this perilous undertaking. But there is no evidence to support the claim.

If the aforesaid eliminations are made, it will not meet the necessities of plaintiff's case if the evidence sustained the claim that, had reasonable diligence been used, the boy might have been seen in time to save him from injury. With said matters eliminated, defendant owed the boy no duty save to avoid injuring him wantonly,—to save him from injury if his attempt to go under the car was seen in time to save him. It is the settled law, as to infants as well as adults, that, if one is injured by going under cars which may be moved at any time, he must be dealt with as a trespasser. *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, 253; same case, 103 Iowa 657; same case, 114 Iowa 169, 173. The only duty owing such a trespasser is to refrain from wilfully injuring him after his peril is perceived, if there then be time to avoid his injury. From the vast number of cases supporting this proposition, we select a few. See *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, at 252; *Bourrett v. Chicago, M. & St. P. R. Co.*, 152 Iowa 579, 582; *Gregory v. Wabash R. Co.*, 126 Iowa 230; *Chrystal v.*

*Troy & B. R. Co.*, 105 N. Y. 164 (11 N. E. 380). In *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa 602, it is said:

"But the plaintiff contends that the boy might and should have been discovered sooner. It seems not improbable that he might have been discovered a little sooner, but no locomotive engineer is bound to watch out for trespassers upon the track. The company does not owe trespassers that kind of care,"—and that this has been settled by repeated adjudications, citing them.

An infant may not recover unless the negligence of the owner was wanton, or evinced an indifference to the plaintiff's safety after his position of peril is discovered. *Gwynn v. Duffield*, 66 Iowa 708, 713. In some way, it must appear there was actual knowledge, not merely that there was means of knowledge. *Dale v. Colfax Cons. Coal Co.*, 131 Iowa 67. It is not enough to show the trespasser ought to have been seen. It must appear he actually was seen, and that his peril was appreciated long enough before the accident to have enabled the defendant to avoid injuring him. *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa 667; *Earl v. Chicago, R. I. & P. R. Co.*, 109 Iowa 14.

Since no duty to the trespasser arises until he is actually seen, it follows of necessity no care is due him before his peril is known. On that theory, the general rule has been worked out that an owner of property trespassed upon is not liable for an injury resulting from the trespass merely because care might have successfully guarded against such injury. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Hargreaves v. Deacon*, 25 Mich. 1; *Gavin v. City of Chicago*, 97 Ill. 66, 68; *Bishop v. Union R. Co.*, 14 R. I. 314, at 318. Therefore, we held in *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, at 252, that the company is not required to keep a lookout for trespassers. It was said in *Bishop v. Union R. Co.*, 14 R. I. 314, at 318, that one is not bound to

employ a watchman to guard cars from an intrusion during transit which is the result of a momentary impulse on part of a child; and that, ordinarily, one who is using his property in a public place is not obliged to employ a special guard to protect same from the intrusion of children, merely because an intruding child may be injured by intruding. See also *Lygo v. Newbold*, 9 Ex. Rep. 302; *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442, 446. In a very large number of cases, including cases in this jurisdiction, it is held the company is not bound to have safeguards, say fences, to keep children off of its tracks and cars. A property owner need not guard against injury to a venturesome boy, merely because it is possible for him to get into the zone of danger. *Anderson v. Ft. Dodge, D. M. & S. R. Co.*, 150 Iowa 465; *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa 602; *Merryman v. Chicago, R. I. & P. R. Co.*, 85 Iowa 634; *Carson v. Chicago, R. I. & P. R. Co.*, 96 Iowa 583; *Keefe v. Narragansett Elec. L. Co.*, 21 R. I. 575 (43 Atl. 542); *Sullivan v. Boston & A. R. Co.*, 156 Mass. 378 (31 N. E. 128). It is held in *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265, that it is no part of the duty of the railroad to maintain a guard over cars left standing upon its tracks, in order to keep children playing about them from getting upon or under them. It is not negligence for a railroad company to omit keeping a lookout to prevent boys from swinging on ladders on its slowly moving freight trains. *Catlett v. Railway Co.*, 57 Ark. 461 (21 S. W. 1062).

It follows that there was here no duty to give warning that the cars were about to be moved. *Brackett v. Louisville & N. R. Co.*, (Ky.) 111 S. W. 710; *Schmidt v. Pennsylvania R. Co.*, 181 Fed. 83; *Pennsylvania R. Co. v. Martin*, (C. C. A.) 111 Fed. 586. As to adults who attempt to go under cars, and the like, it is the rule that there is no duty to signal by bell, whistle, or to give warning in any other way. See *Smith v. C., R. I. & P. R. Co.*, 55 Iowa 33; 3 Elliott on Railroads (2d Ed.), Section 1169; *Gulf, C. & S. F.*

*R. Co. v. Dees*, 44 Okla. 118 (143 Pac. 852); *Platt v. Vicksburg, S. & P. R. Co.*, 134 La. 444 (64 So. 282); *Brackett v. Louisville & N. R. Co.*, (Ky.) 111 S. W. 710; *Schmidt v. Pennsylvania R. Co.*, 181 Fed. 83; *Pennsylvania R. Co. v. Martin*, (C. C. A.) 111 Fed. 586; *Wherry v. Duluth, M. & N. R. Co.*, 64 Minn. 415 (67 N. W. 223); *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265. And the rule applies to infant trespassers. See *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Brown v. Lynn*, 7 Casey (Pa.) 510; *Reeves v. Delaware, L. & W. R. Co.*, 6 Casey (Pa.) 454. It will not create liability that the standing cars were approached by a train moving at the rate of some six miles an hour (*Barry v. Burlington R. & L. Co.*, 119 Iowa 62, at 63), nor that such train was moved violently (*Dillon v. Iowa Cent. R. Co.*, 118 Iowa 645). Nor does it matter that our statutes prohibit the obstructing of public roads, private ways, commons, and landing places. He who attempts to pass between cars coupled to an engine that is standing still cannot recover on the ground that the train was blocking a street or passage way for an unreasonable length of time. *Platt v. Vicksburg, S. & P. R. Co.*, 134 La. 444 (64 So. 282).

There is dispute as to which of the parties has the burden of proof on whether inspection was made. What we have already said settles that this is an immaterial dispute, because the company was under no duty to make an inspection. We have to add to what has been said that the duty to look out does not exist as to looking under cars or into openings between cars. See *Hebard v. Mabie*, 98 Ill. App. 543; *Peters v. Bowman*, 115 Cal. 345 (47 Pac. 598, at 599); *Garner v. Trumbull*, (C. C. A.) 94 Fed. 321; *Teakle v. San Pedro, L. A. & S. L. R. Co.*, 32 Utah 276 (90 Pac. 402).

1-a.

We now reach whether any matters thus far eliminated from consideration make for plaintiff a case for a jury.

Appellant cites cases that there is liability where there is sufficient invitation of the action of the child by means of tempting his childish instincts. *Bishop v. Union R. Co.*, 14 R. I. 314, at 321. And he cites other cases, of which *Lynch v. Nurdin*, 1 Adolphus and Ellis (N. S.) 29, *Louisville & N. R. Co. v. Popp*, 96 Ky. 99 (27 S. W. 992), *Cleveland, etc., R. Co. v. Means*, 59 Ind. App. 383 (104 N. E. 785), are fair samples. On analysis, these cases involve "attractive nuisances." But appellant does not claim to be, in strictness, within the attractive nuisance and turntable cases. And an analysis of his argument discloses he concedes that the mere placing of an empty coal car on a side track does not bring his case within those cases. The digests overflow with cases holding with this concession, and that things like an empty coal car placed on a track are not an attractive nuisance.

To be sure, it is alleged that, when the boy was attempting to crawl under the empty car, he stopped to play with an air brake apparatus attached to the same. Now, it is confessed that the record does not disclose what the boy was doing at the time when he was injured, or whether he was playing with the air brake; that there was an attempt to show by him just what he was doing when hurt; but that his testimony was excluded because of his incompetency as a witness. In addition, the petition excludes attraction by the apparatus by declaring that the purpose of going under the car was to get home.

1-b

Appellant concedes that a license to use the path was not a license to go under the car; and the law so says. And whatever license there was to cross the tracks on the path

2. RAILROADS :  
temporary with-  
drawal of  
license.

was suspended for such time as the railroad company obstructed such path by using it for standing cars. *Wagner v. Chicago & N. W. R. Co.*, 122 Iowa 360; *Central R. Co. v. Rylee*, 87 Ga. 491 (13 S. E. 584). In the last case, it is held that nothing but an express license to go under a car or the like will avail, because it is unreasonable to hold the company bound by an implied license while it is occupying the track with its own cars; that it would be unreasonable to hold it had agreed others might have a joint occupancy of the track during the time the company was using it for its own purposes. It is added the practice of going under cars is so dangerous that there can be no implied license to do so. There is still no case for a jury.

3. RAILROADS :  
scope of  
license.

II. We do not understand appellant is denying any of the pronouncements we have thus far made. His argument is a confession and avoidance, to the effect that certain past conduct permitted and invited by defendant makes the aforesaid rules inapplicable. For one thing, he claims that, for years past, children played and gathered coal beneath the cars of the defendant; that this was known, and that the children had been driven out many times; that persons generally facilitated journeys toward their homes by passing under cars standing at the point where the boy was hurt, and at other points on the tracks. It suffices to say there is no evidence to sustain either of these claims.

But we may assume there was sufficient evidence to justify a jury in finding that children had for years played around and in cars, and congregated, loitered, and played in the yards, to pick up coal around cars; that they were in the habit of dumping hoppers on cars, and then picking up the dropped coal; that they picked coal found on the side of the cars and took it home; that for years coal has,

in various ways, dropped upon the track, and was allowed to remain there for children to pick up; that, while they were at times driven away, the very crew who injured this boy knew that, in the past, children had been permitted, and invited to pick up dropped coal and to play about the cars; and that this very crew and others had, in the past, invited children to pick coal, either out of the cars or from where it had been dumped from the cars and beside the track. What is the effect if all this be so? Assume all this constituted an attractive nuisance. This nuisance did not injure this boy. None of these attractions were present when he crawled under the car, and the petition itself alleges that the inducing motive was to reach home.

• Standing alone, these past practices amount to a course of long-permitted use which does not include going under cars. It is doubtful whether the knowledge that such practices had been indulged in could, under any circumstances, constitute either a license or an invitation to go under cars at a future time. In effect, *Central R. Co. v. Rylee*, 87 Ga. 491 (13 S. E. 584), holds there can be no license to indulge in such a dangerous joint use of the track. Be that as it may, it is clearly settled that these past practices constituted no such license, and gave no invitation for the boy to go under the car. The most that has been said for the side of the plaintiff is an implication in *Morrissey v. Eastern R. Co.*, 126 Mass. 377, that either inducement or implied invitation may suffice as to an infant who is using the track as a playground. Be that as it may, these past practices constituted neither inducement nor implied invitation to crawl under the car for the purpose of reaching home. That an opening is made by the cars and used by employees, and that plaintiff himself has used it, constitutes no sufficient invitation to go into such opening. *Furey v. New York Cent. & H. R. R. Co.*, 67 N. J. L. 270 (51 Atl. 505). In effect, it is held in *Elie v. Lewiston, A. & W. S. R.*

Co., 112 Me. 178 (91 Atl. 786), citing *Barney v. Hannibal & St. J. R. Co.*, 126 Mo. 372 (28 S. W. 1069), and *Chicago, R. I. & P. R. Co. v. Eining*, 114 Ill. 79 (29 N. E. 196), that these past practices constitute neither license nor invitation to go under cars at some future time. It needs some assurance by someone in authority, made to the person attempting to go under a train, that it is safe to do so. *Gulf, C. & S. F. R. Co. v. Dees*, 44 Okla. 118 (143 Pac. 852). Nothing but an express invitation by those authorized to extend it can avail the plaintiff. *Brackett v. Louisville & N. R. Co.*, (Ky.) 111 S. W. 710; *Richards v. Chicago, St. P. & K. C. R. Co.*, 81 Iowa 426, at 430; *Central R. Co. v. Rylee*, 87 Ga. 491 (13 S. E. 584); *Phillips v. Library Co.*, 55 N. J. L. 307 (27 Atl. 478); *Cleveland, etc., R. Co. v. Means*, 59 Ind. App. 383 (104 N. E. 785).

The utmost all comes to, then, is such use of the defendant's property as makes the user a bare licensee in doing what he did before he went under the cars. *Herzog v. Hemphill*, 7 Cal. App. 116 (93 Pac. 899); *Redigan v. Boston & M. R. Co.*, 155 Mass. 44 (28 N. E. 1133); *Phillips v. Library Co.*, 55 N. J. L. 307 (27 Atl. 478). Had he been injured while indulging in the aforesaid practices, and were he suing for that injury, there would still be no practical difference between him and a trespasser; because, in either case, the only duty owing was to avoid injuring him after he was actually discovered in a position of peril. *Anderson v. Fort Dodge, D. M. & S. R. Co.*, 150 Iowa 465; *Richards v. Chicago, St. P. & K. C. R. Co.*, 81 Iowa 426, 430; *Rutherford v. Iowa Cent. R. Co.*, 142 Iowa 744, 754; *Hall v. Cleveland, etc., R. Co.*, 15 Ind. App. 496 (44 N. E. 489); *Norris v. Hugh Noun Contracting Co.*, 206 Mass. 58 (91 N. E. 886); *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301; *Pennsylvania R. Co. v. Meyers*, 136 Ind. 242; *Wright v. Boston & A. R. Co.*, 142 Mass. 296 (7 N. E. 866); *St. L., I. M. & S. R. Co. v.*

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licenses and  
trespassers.



*Fairbairn*, 48 Ark. 491; *Central R. Co. v. Brinson*, 70 Ga. 207; *Herzog v. Hemphill*, 7 Cal. App. 116. (93 Pac. 899); *Redigan v. Boston & M. R. Co.*, 155 Mass. 44 (28 N. E. 1133); *Phillips v. Library Co.*, 55 N. J. L. 307 (27 Atl. 478); *Gulf, C. & S. F. R. Co. v. Dees*, 44 Okla. 118 (143 Pac. 852). As to such licensee, there is no duty to warn that the cars are about to be moved. *Brackett's Admr. v. Louisville & N. R. Co.*, (Ky.) 111 S. W. 710; *Pennsylvania R. Co. v. Martin*, (C. C. A.) 111 Fed. 586; *Schmidt v. Pennsylvania R. Co.*, 181 Fed. 83. And in the absence of express invitation by one authorized to extend it, this rule applies to infants. *Schmidt v. Pennsylvania R. Co.*, 181 Fed. 82; *Myers v. Boston & M. R. Co.*, 209 Mass. 55 (95 N. E. 76); *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 347; *McEachern v. Boston & M. R. Co.*, 150 Mass. 515 (23 N. E. 231); *Kau-meier v. City Elec. R. Co.*, 116 Mich. 306 (74 N. W. 481).

III. But one theory is left upon which these practices might become material. To deal with that theory, we must go beyond stating the rules as we have, and go into the reason underlying these rules. To do this

5. RAILROADS:  
trespasser's  
freedom from  
contributory  
negligence.

involves dealing with cases that differ from our own, and from what we think is the great weight of authority, in that they hold an infant cannot be treated as a trespasser. See *Erie v. Swiderski*, 197 Fed. 521; *Snare v. Friedman*, 169 Fed. 1. All the cases of this class are at fault, because they claim from a sound law rule what such rule does not effect. It is unquestionable that a pedestrian who attempts to go between or under cars is guilty of contributory negligence, as matter of law. *Helback v. Northern Pac. R. Co.*, 125 Minn. 155 (145 N. W. 799); *Carey v. Chicago, R. I. & P. R. Co.*, 84 Kan. 274 (114 Pac. 197); *Mitchell v. Chicago, R. I. & P. R. Co.*, 105 Ark. 364 (151 S. W. 520); *Sikorski v. Great Northern R. Co.*, 127 Minn. 110 (149 N. W. 5); *Magoon v.*

*Boston & M. R. Co.*, 67 Vt. 177 (31 Atl. 156); *Rumpel v. Oregon Short Line & U. N. R. Co.*, 4 Idaho 13 (35 Pac. 700); *Wherry v. Duluth, M. & N. R. Co.*, 64 Minn. 415 (67 N. W. 223); *Smith v. C., R. I. & P. R. Co.*, 55 Iowa 33; 3 Elliott on Railroads, Sec. 1169; *Gulf, C. & S. F. R. Co. v. Dees*, 44 Okla. 152 (143 Pac. 852); *Platt v. Vicksburg, S. & P. R. Co.*, 134 La. 444 (64 So. 282). Cases like that of *Swiderski*, supra, argue that, since a child of tender years cannot be guilty of contributory negligence, therefore it cannot be dealt with as a trespasser. If a trespasser were denied protection until his peril was discovered, because he is guilty of contributory negligence, this deduction would be sound. Now, one may assume that every trespass by an adult exhibits contributory negligence. And one who is guilty of contributory negligence can recover only if he is wantonly injured after such negligence is known. But though trespass by an adult involves contributory negligence, and though the care due a trespasser and that due one who is guilty of contributory negligence is the same, it does not follow that the rule as to care due a trespasser rests on his being guilty of contributory negligence. And a reading of the case law demonstrates that the rule as to trespassers is not based on contributory negligence, but on the reasoning that one who injures a trespasser when he does not know one exists is *not guilty of negligence*, since he is under no duty to anticipate that anyone will commit a trespass, and upon the amplification that it is not negligence to assume that even a child of tender years will not commit some kinds of trespass. It is expressly held there is no liability, because there is no duty to anticipate certain acts. *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, at 255; *Dillon v. Iowa Cent. R. Co.*, 118 Iowa 645; *Bishop v. Union R. Co.*, 14 R. I. 314, at 321. And passing under cars is one such act. *Brackett's Admr. v. Louisville & N. R.*

Co., (Ky.) 111 S. W. 710; *Platt v. Vicksburg, S. & P. R. Co.*, 134 La. 444 (64 So. 282); *Gulf, C. & S. F. R. Co., v. Dees*, 44 Okla. 118 (143 Pac. 852). The fact that children are doing these acts does not create a duty to anticipate. *Morrissey v. Eastern R. Co.*, 126 Mass. 377; *Gavin v. City of Chicago*, 97 Ill. 66, 71; *McAlpin v. Powell*, 55 How. Pr. (N. Y.) 163; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Zoebisich v. Tarbell*, 10 Allen (Mass.) 385. The law does not require anyone to presume that another may be negligent, much less to presume that he may be an active wrongdoer. *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375. In *Brown v. Lynn*, 7 Casey (Pa.) 510, and *Reeves v. Delaware, L. & W. R. Co.*, 6 Casey (Pa.) 454, the like is declared to be elementary law. A railroad company may assume no children are playing about or under its cars. *Wagner v. Chicago & N. W. R. Co.*, 122 Iowa 360, 367. In *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265, it is held that an employee who mounts a car to loosen brakes need not anticipate that boys near the track will thereby be injured. In *Bishop v. Union R. Co.*, 14 R. I. 314, 320, it is said there are some risks in regard to which a child ought to be enlightened before he is committed "to the chances of the street." In *Hestonville Passenger R. Co. v. Connell*, 88 Pa. St. 520, a boy attempted to climb on the front platform of a horse car, while same was in moderate motion. It was held there was no liability, because injury resulted "from the sudden and unanticipated act of the child itself," and that "it may be assumed that a child old enough to be trusted to run at large has wit enough to avoid ordinary danger;" that, therefore, persons who have business on the streets may reasonably conclude that no child will voluntarily thrust itself under the feet of their horses or the wheels of their carriages; that *a fortiori*, they may conclude they are under no duty to provide against possible damages "that may result to the infant from its own wilful

trespass." It is said, in *McDermott v. Kentucky Cent. R. Co.*, 93 Ky. 408 (20 S. W. 380), that it would be unreasonable and oppressive to require those operating the railroad to take into consideration that children might be trespassing. Other cases declare that to require a lookout for this would interfere with the public duty to operate effectively.

Since a child of tender years cannot be charged with contributory negligence, there is but one way to explain the very large number of cases wherein such children have been held to be within the rule as to care due trespassers. Such cases must have proceeded on the theory that the question was not whether the injured child was negligent, but whether the injurer was; that the inquiry is not directed to whether the child contributed to negligence, but whether there was any negligence to contribute to. There is some language in *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, 255, which, in relieving from liability, assumes, in a way, that a negligent injurer is being relieved. But the real decision is that a trespasser cannot recover for injury inflicted, because the injurer "owes the trespasser no duty, and is not required to be on the lookout for him." The essence of the *Thomas* case is found in the statement that, on the question whether one shall be treated as a trespasser, "the better considered cases hold that it is entirely immaterial that the trespasser is an infant, idiot, or lunatic." To the same effect is *Brown v. Rockwell City Canning Co.*, 132 Iowa 631, 638. In the large number of decisions that dispense with all care until it is known that the trespasser is in peril, none proceed on the reasoning that the life and limb of the trespasser is of no value and entitled to no protection. That is proven by the fact that every care is held to be due him when it is once known he exists. And the reasoning underlying the dispensation from duty to care is wholly that no one is negligent for not anticipating or assuming that a trespass is being constantly committed.

Upon this reasoning, and this only, all the case law becomes harmonious. One illustration should make that clear. If an idiot was under a train, without its being known, and while there, deliberately put his fingers under moving wheels, there would be no liability. But that would not be because there was contributory negligence, for an idiot cannot be charged with such. But, though he be an idiot, and incapable of contributory negligence, the railroad company would be guilty of no negligence. In fewer words, the question is, When does the duty begin? not, What is it after it begins? *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, 255. There is no negligence until it is known there is a trespass. That being so, as said in the *Thomas* case and others, the mental capacity of the trespasser is of no consequence. For there is no greater duty to anticipate that a child or an idiot is somewhere trespassing in hiding than there is to assume that an adult is doing so. Plaintiff, then, has a case for a jury only if the nature of these past practices is such as that therefrom the defendant should have anticipated that a boy was crawling under the car at the time when he was injured. What is there in these practices that puts such a duty upon the defendant? That children had in the past been invited into moving cars to get coal, that they had been permitted to drop coal upon and beside the track, would be highly material if, at a future time, they were injured while doing these things. But permitting any and all of these did not suggest that, at all future times and places, children who were not playing and were not picking up coal would crawl under a car in order to reach home. Suppose that what had been permitted in the past constituted an attractive nuisance. That is not material, if these attractions were absent at the time the boy was injured. *Rushenberg v. St. Louis, I. M. & S. R. Co.*, 109 Mo. 112 (19 S. W. 216). Maintaining an attractive nuisance compels care as to it. But it does not suggest that a

child will crawl under a car which is not an attractive nuisance. No duty to anticipate is created by the fact that trespasses generally have been committed in the past. See *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, at 253; *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265. And that employees have been instructed to drive boys out does not raise a duty to be constantly on guard against them. See *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa 248, at 253; *Barney v. Hannibal & St. J. R. Co.*, 126 Mo. 372 (28 S. W. 1069); *O'Conner v. Illinois Cent. R. Co.*, 44 La. Ann. 339 (10 So. 678); *Hoover v. Detroit, G. H. & M. R. Co.*, 188 Mich. 313 (154 N. W. 94).

The acid test is whether anything found in this record suggested to a reasonably careful and prudent person that a little boy, in an attempt to reach his home, was under this coal car when the defendant backed down upon this car. We think there was no duty to anticipate the presence of the child, and that, therefore, the direction of the verdict for the defendant must be affirmed.

This makes it unnecessary to pass on the question whether the father of the plaintiff was chargeable with contributory negligence, as matter of law.—*Affirmed*.

PRESTON, C. J., LADD and EVANS, JJ., concur.

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OTTO SOHL, Administrator, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee.

**RAILROADS: Contributory Negligence.** Contributory negligence

- 1 *per se* results from the act of a mature man, in full possession of his senses, driving, on a clear day, upon a country railway crossing, with which he was perfectly familiar, and in front of a rapidly approaching train, of which he had, for a distance of 230 feet from the track, an unobstructed view for at least 1,000 feet.

**NEGLIGENCE: No-Eyewitness Rule.** The presumption "of due  
2 care in the absence of eyewitnesses" cannot prevail when the undisputed physical facts demonstrate that the said presumption was not true in fact. So held where a mature man, in full possession of his senses, and on a clear day, drove in front of a rapidly moving train, of which he had, for a distance of 230 feet from the track, an unobstructed view of 1,000 feet.

**RAILROADS: Rate of Speed at Country Crossings.** One may not  
3 rely upon any particular speed of trains at non-obscured, ordinary country railway crossings and will not be permitted to escape the consequences of his negligence in gambling on his ability to pass ahead of trains, of the approach of which he has ample notice and knowledge.

*Appeal from Scott District Court.*—A. J. HOUSE, Judge.

MAY 13, 1918.

ACTION for damages resulted in a directed verdict for defendant and judgment thereon. The plaintiff appeals.—*Affirmed.*

*Chas. B. Kuuffmann*, for appellant.

*F. W. Sargent and Cook & Balluff*, for appellee.

LADD, J.—I. A line of the defendant's railway extends from Davenport in a southwesterly direction through Rockingham and Nahant. Between these latter places is what is known as the Nahant crossing, where the highway, running north and south, passes over the railway.

1. RAILROADS :  
contributory  
negligence.

The angle is 115 degrees. Besides the west-bound, or north, track, and the east-bound track below it, there is a side track to the south. The railway is about 5 feet above the surface, the highway for a distance of 70 feet north of it having a 7% grade.

Shortly after 10 o'clock in the morning of March 30, 1915, Ernst Sohl was driving, in a southerly direction, an auto truck with beer for delivery at Nahant, and, as he reached the center or east-bound track, he was struck by

a passenger train coming from the southwest, and killed. The plaintiff, a brother, as administrator of decedent's estate, alleged in the petition that the defendant was negligent: (1) In operating the train at an excessive speed, (2) in failing to sound any warning of its approach, and (3) in not keeping a proper lookout. There was no evidence tending to support the last-named ground of negligence. A verdict was directed for defendant solely because of the court's conclusion that the evidence was insufficient to warrant a finding that decedent was without fault on his part.

He was 22 years of age, in full possession of all his senses, and entirely familiar with the crossing and its approaches. The day was clear, and, according to the evidence, he might have seen, had he looked, the approach of the train at a distance of 1,000 to 1,200 feet from the crossing. True, there were some willow trees north of the north right of way fence. There was a clump of these near the highway, and then none for nearly 200 feet west, and then trees. At that particular season, these were without leaves, and, as photographs disclose, interposed little or no obstruction to seeing a train approaching from that direction. These trees were 95 feet from the east-bound track. Another row of trees, close together, was 230 feet from the track, and still another, over 600 feet therefrom. Telegraph poles, with 5 cross-arms and numerous wires, extend along the right of way about 32 feet north of the tracks. The highway fences were about 60 feet apart. There was an icehouse near the track, 1,259 feet southwest of the crossing, and the whistling post, 1,526 feet. One could not see a train until past the second row of trees, 230 feet from the track; but, from that point on, the evidence is undisputed that a clear vision of a train when beyond the icehouse was available to anyone who looked. But two of the four witnesses who saw the col-



lision testified. Paulson, who was scraping a motor boat about 200 feet southwest of the crossing, was asked:

"Q. Now, that was not a solid row of trees, was it? A. No, sir. Q. There were some little willow trees in a separate cluster, then an open space? A. Yes, sir. Q. Then some little willow trees farther down along the fence? A. Yes, sir. Q. Then an open space? A. Yes, sir. Q. Then another cluster of little willow trees along the fence? A. Yes, sir. You can see plainly the icehouse there and the railroad track in front of it for a distance of 1,000 or 1,200 feet west of this crossing, and you can see that all the way from the time you are 250 feet north of the crossing, traveling down the highway. That would be looking in the direction from which the said train was coming the day this accident happened. At any point from a distance of 250 feet of the railroad, traveling down that highway towards the track, you could look towards the icehouse and railroad track and see the track there. You could see it perfectly plainly and conveniently, and you could see that track down at least 1,200 feet to the icehouse. As a matter of fact, you could see beyond that, after you got behind the second row of trees. After you passed that road, as a matter of fact, you could see plainly down there, I guess pretty nearly half a mile. It is straight track."

The other witness, Robert Jager, who was standing near a pigpen across the highway almost directly east from the second row of trees, testified that he saw the decedent driving the auto truck towards the railway track from about a half mile north until struck; that it was going 6 or 8 miles an hour; that he heard the rumble of the train as it approached; that he saw the train when beyond the icehouse, as it came in a northeasterly direction; that he was somewhat higher than the railway; that, when a person reaches the right of way, he can see down the track a long distance.

"There were some trees there that have been chopped

down since. I do not know if they would have obstructed the view much if they were there. I think you could see. That would be my best judgment. Q. After you got by that second row of trees, do you think at times you would have had a view of the track down there? A. I think you would,—yes, sir.”

The testimony of these witnesses is in harmony with conditions as shown by other evidence, including photographs, and leaves no doubt that the decedent, if he looked, must have seen the approaching train. The railroad crossing was a place of danger, and he was bound to look and listen before going upon the track. Had he done so, he must have seen the approaching train; and whether he looked or failed so to do, he was equally negligent in driving in front of the rapidly approaching train, which was in plain sight.

II. Counsel for appellant argue that, inasmuch as no witness undertook to describe what decedent did in the way of exercising ordinary care, he should be presumed to have been prompted by the natural instinct of self-preservation, and to have done so.

2. NEGLIGENCE :  
no-eyewitness  
rule.

Jager testified to having observed decedent from a half mile north of the track until struck. Whatever he did then, aside from looking or listening, this witness must have seen; and, according to his story, decedent drove, without stopping, in front of the approaching train. Of course, the decedent might have looked and listened without others' observing his doing so. His instinct of self-preservation could have prompted him to do no less than look out or listen for an approaching train, as he neared the railway tracks. The situation was such that, in looking out for his own safety, he must at least have looked or listened after passing the second row of trees; and, had he done so, he would have had ample warning of the approach of the train. Conceding that he did all that the promptings for his own safety required, the undisputed evidence discloses

that, notwithstanding this, he proceeded, in the face of warnings he must have had, directly into the perilous situation where he lost his life. No aid is to be derived from resort to the presumption of due care, if the facts are such that, had it been exercised, the collision must have been avoided.

Neither *Dalton v. Chicago, R. I. & P. R. Co.*, 104 Iowa 26, nor *Gray v. Chicago, R. I. & P. R. Co.*, 143 Iowa 268, is in conflict with this conclusion, nor are other cases which are relied upon. In the former decision, the collision occurred on a dark night, at 3:50 o'clock A. M., in the absence of any witnesses; and in the latter, there was evidence tending to show that the view of the track was obstructed, and there was no witness as to what plaintiff's decedent did, much of the way in approaching the crossing. For all that appears, he drove on heedlessly to his own destruction.

III. It is argued, however, that the evidence was such that decedent might, as an ordinarily prudent person, have concluded that he could pass over the tracks before the train reached the crossing. Paulson estimated that the train was moving 75 or 80 miles an hour, while Jager thought it going "about as fast as I ever saw." And Mueller, who was riding on the train, said it was going at a fairly good rate of speed. The track was level and straight. The topography of the land about the crossing was not such as to exact a limit on the speed. The crossing was in the open country, though between the village of Nahant and the town of Rockingham. Conditions were such that one about to cross the tracks might not rely on any particular speed of a through passenger train. *Hartman v. Chicago Great Western R. Co.*, 132 Iowa 582; *Bruggeman v. Illinois Cent. R. Co.*, 147 Iowa 187.

While a railway company may not operate its trains over highway crossings at such a speed as, in view of local

3. RAILROADS:  
rate of speed  
at country  
crossings.

conditions, will endanger the lives of those prudently making use of these, a traveler is not permitted to make nice calculations as to whether he will be able to pass over in front of a rapidly approaching train in safety. The latter is under the same duty of exercising ordinary care to avoid a collision as is the company. The degree of care to be observed by each is to be measured by the threatened danger, and the traveler is no more excusable for risking himself before an oncoming train than the company is in running him down, when it knows, long enough beforehand to enable it to avoid the collision, that he cannot or will not get out of its way. Both Paulson and Jager observed and heard the approaching train before it struck the auto truck. Because of the noise of the latter, decedent might not have heard; but, had he looked, he must have seen the train. With the auto truck under control, as it should have been in such a situation, he could have stopped in moving only a few feet. As said, he might not rely on any particular speed of the train, and therefore could not enter into nice comparisons as to relative speeds of the train and the auto truck, and as to whether he would be able to escape injury if he undertook to cross over ahead of the train. The train has the right of way, and he may wait until it passes; and, where the track is straight, clear, and level, and his view unobstructed, if he goes upon the crossing in front of an approaching train, he does so at his own risk. The law will not permit of such experiments with danger, at another's risk.

The case is readily distinguishable from *Burnett v. Chicago, M. & St. P. R. Co.*, 172 Iowa 704; as there, the night was dark, and the injured was deceived by the dimness of the headlight as to the distance of the train. Street car cases are distinguishable by the difference in situations. See *Adams v. Union Elec. Co.*, 138 Iowa 487.

The undisputed evidence disclosed that the day was clear and the sun shining, the railroad straight and level,

and the decedent's view was unobstructed, as he approached the east-bound track for a distance of 230 feet north therefrom. He must be assumed to have seen the approaching train; for, in the exercise of ordinary care, he was required to look, and had he looked, he must have seen, as did Paulson and Jager. The evidence also discloses that, though he saw the train coming at high speed, he drove in front of it and was killed; and, in the light of these findings, there is no escape from the conclusion that, in so doing, he was careless of his own safety, and therefore guilty of such contributory negligence as will defeat recovery by the administrator of his estate.

There was no error in directing the verdict for defendant.—*Affirmed.*

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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C. B. WHEELER, Appellee, v. C. C. SCHILDER, Appellant.

**NEW TRIAL:** *Specification of Error.* A motion for new trial is  
1 fatally lacking in certainty and definiteness which asserts "that the court erred in sustaining the objections of plaintiff to evidence offered by movent in each and every instance, as shown by the notes of the official shorthand reporter."

**APPEAL AND ERROR:** *Points Noticed Sua Sponte by Appellate*  
2 Court. Error in overruling motion to strike is waived by subsequently demurring and answering—a waiver which the appellate court will apply *sua sponte*.

**PLEADING:** *Pleading Over.* Adverse rulings on demurrer are  
3 waived by answering over, unless the demurrer point is again raised in said answer, or at some subsequent and appropriate time in the proceedings. Pleading reviewed, and held to represent the demurrer point in the answer.

**LANDLORD AND TENANT:** *Leases—Construction—Exterminating*  
4 *Weeds.* Provisions of a lease that the tenant "shall prevent the growth of noxious weeds on the cultivated parts of the land," and "will cultivate said land in good and husbandlike manner," are related clauses, and impose the obligation on the

tenant to make reasonable effort to keep both the cultivated and uncultivated portions free from such weeds.

**EVIDENCE: Parol as Affecting Writing.** The rule prohibiting the  
5 reception of parol evidence to vary, etc., the terms of a valid writing, is not available to one who is a stranger to the contract.

**EVIDENCE: Relevancy, Competency, and Materiality—Breach of**  
6 **Contract.** On the issue of damages for breach of contract to prevent the growth of weeds upon a farm, evidence as to the price at which the owner had contracted to sell the farm and the lesser price which he was compelled to accept, owing to the breach of said contract, is relevant, competent, and material.

**APPEAL AND ERROR: Briefs—Reference to Record—Necessity.**  
7,11 Assertions in argument of affirmative fact must be accompanied by appropriate reference to the record for the verification of such assertions.

**EVIDENCE: Conclusions—Lessened Value of Land.** Evidence by  
8 competent witnesses as to the relative value of land with and without noxious weeds thereon is an allowable conclusion.

**APPEAL AND ERROR: Untenable Objection to Objectionable**  
9 **Testimony.** It matters not, on appeal, whether the objections were tenable on which evidence was *excluded*, provided any ground exists which justifies exclusion.

**WITNESSES: Cross-Examination—Scope.** Testimony by a witness  
10 based on an *assumption* of fact, does not open the door, on cross-examination, to show by the witness that the assumption is not true. So held where an expert witness testified to the value of land, on the assumption that it was infested with noxious weeds.

**APPEAL AND ERROR: Briefs—Reference to Record—Necessity.**  
7, 11

**EVIDENCE. Extent of Breach of Contract.** On the issue whether a  
12 farm was infested with noxious weeds, evidence is admissible to show (a) the time necessary to cut and destroy such weeds, (b) the crops raised on the farm from year to year, and (c) the relative extent to which the farm was infested with weeds when the tenant took possession and when he relinquished possession.

*Appeal from Poweshiek District Court.*—HENRY SILWOLD,  
Judge.

MAY 13, 1918.

It suffices for the purpose of preliminary statement that this is a suit by a landlord, complaining of violations of contract provisions in the lease. The landlord had a verdict, and the defendant appeals.—*Reversed.*

*J. H. Patton*, for appellant.

*W. R. Lewis*, for appellee.

SALINGER, J.—I. Two error points are, respectively, that judgment should not have been entered on the verdict; that motion to set the verdict and said judgment aside should have been sustained; and that a new trial should have been awarded. The motion referred to has twelve grounds. Aside from a claim that the verdict was contrary to the evidence and to the instructions and excessive, the motion is, in the main, made up of statements such as that the court erred in sustaining the objections of plaintiff to evidence offered by defendant in each and every instance, and that this is shown by the notes of the official shorthand reporter. All this is too general for consideration.

II. A motion to strike parts of the petition was overruled. Thereafter, the appellant demurred, including in the grounds of the demurrer what was charged in the overruled motion to strike. Still later, appellant answered. The filing of such demurrer and the making of answer waived the ruling on the motion to strike, and it is our duty to disregard the assignment, though appellee does not urge such waiver of such ruling on the motion to strike. See *Heiman v. Felder*, 178 Iowa 740, and cases there-

1. NEW TRIAL:  
specification  
of error.

2. APPEAL AND  
ERROR: points  
noticed *sua*  
*sponso* by ap-  
pellate court.

in cited; *Jacobs v. City of Cedar Rapids*, 181 Iowa 407; and *Sloanaker v. Howerton*, 182 Iowa 487.

III. It is said to be error that the court admitted evidence in support of Count 3 of the petition. The complaint at this point is not that the testimony received was in itself improper, but that it should not have been received, no matter what it was, because *no* evidence was receivable in support of said count. This relieves us from investigating what such evidence was, which we would have to do by following out the directions of the brief of appellant to look at certain lines and pages of the abstract. The point presented is not an attack upon this testimony, but upon the standing of Count 3 of the petition. The attacks upon that count will be considered in another connection.

IV. When a demurrer is overruled, and the one interposing same thereafter answers, this waives the ruling on the demurrer, unless the matter presented by the demurrer is subsequently presented in some other manner. Under this rule, some questions remain for our consideration, though answer was made after the demurrer was overruled. What are these matters? In Count 3, the plaintiff declared that defendant should answer in damages because he had contracted in writing to destroy certain noxious weeds and rank grasses anywhere on the leased premises, and that, in addition thereto, he had promised orally to do this. One controlling thought of the demurrer is that Count 3 shows on its face that said alleged oral promise is without consideration, and constitutes no legal cause of action. The argument indicates the underlying reasoning to be that the written contract requires the destruction of weeds upon the cultivated part of the premises only; that, therefore, an agreement to destroy them on uncultivated parts of the farm is excluded by the writing, and an oral promise to do what the contract in effect says need not be done, cannot be en-

3. PLEADING:  
pleading over.



forced. Though the demurrer was overruled, and answer thereafter filed, we are of opinion that the point made by the demurrer may now be considered, because the allegation of the answer that the written contract was fully performed, without failure to comply with any of its provisions, presents the claim that appellant is under no liability for having failed to destroy weeds where not required to do so by the written contract. But though the point is reviewable, we think it is not well taken. It may be conceded there is no right to recover of appellant because of the alleged oral promise. But that is immaterial if the written contract, cor-

4. LANDLORD  
AND TENANT:  
leases: con-  
struction: ex-  
terminating  
weeds.

rectly interpreted, creates such liability. To be sure, the written contract obligates the appellant to prevent the cultivated parts of the premises from growing up in rank grasses and noxious weeds. It may be assumed that, if this provision of the writing stood alone, that it would limit the duty of the tenant. But it does not so stand. The writing contains a further provision that the tenant "will cultivate said land in good and husbandlike manner." We are of opinion that this is a written agreement to make every reasonable effort to keep *all* the land free from noxious weeds and grasses. The two provisions must be read together; and we are not prepared to say, since certain noxious weeds in any place on the farm would be bound to injure the cultivated part thereof, even if not themselves on such cultivated part, that this was an agreement that the cultivated part only should be cleared of such weeds and kept clear of them,—not merely an agreement to clear the cultivated part, but to do all else in reason possible to destroy anything that would make useless labor if the tenant stopped at merely removing weeds and keeping them down on the cultivated lands.

V. Another ground of the demurrer is that, on its face, Count 3 is a mere repetition of Count 2, and that Count 2

is based on a written contract only; wherefore, plaintiff is not entitled to the relief demanded in Count 3. This, in effect, does no more than to repeat the claim that the written contract creates no duty which has not been performed, and that the alleged oral promise creates no liability. This point has already been disposed of.

VI. Appellee was permitted to show that a contract between her and the purchaser of this land from her states the price she was to receive for the land. The court permitted her to follow this up by a statement

5. EVIDENCE: that she, in fact, received \$200 less than the  
parol as af-  
fecting writing. amount recited in said contract. The de-  
fendant unsuccessfully objected that the  
contract in question was not in evidence, and that the oral  
testimony was incompetent; that the matter was not  
proper redirect, and was irrelevant and immaterial. If  
the general objection of incompetency is to be of avail here,  
it must be strained into an assertion that this testimony  
constituted a variance of the written contract be-  
tween appellee and her purchaser. Assume this, and yet ap-  
pellant is not in position to make this objection, because  
he is not a party to that contract.

We think that the court did not abuse its discretion in  
permitting this testimony to be given on redirect examina-  
tion. Neither is the same immaterial and irrelevant. It was  
one theory of the appellant that whatsoever  
he had done had caused the appellee no dam-  
age, because the price recited in the contract  
aforesaid was the full value of the land, if  
clean; and that, therefore, the appellee sold  
her land without losing anything by the fact that appellant  
had not kept the land clean. Testimony that less than the  
amount recited in the contract was in fact paid, was ma-  
terial and relevant to meet this theory.

6. EVIDENCE: relevancy,  
competency,  
and material-  
ity: breach of  
contract.  
It is said in argument that taking this testimony was

error, because there is involved merely "a voluntary reduction of the purchase price by appellee from the amount stipulated in the written contract of sale."

7. **APPEAL AND ERROR:** briefs: reference to record: necessity.

We are not favored with any reference to any place in the abstract which gives support to this claim, and do not feel bound to go through the entire record to determine whether this assertion of fact is sustained by the record. This is not the assertion of a negative, but an affirmative, statement, which, if supported at all, is sustained at some spot in the record. Be that as it may, all we can find is testimony on part of the appellee that there was a reduction, and no statement of how the reduction came to be made.

VII. On the question of damages, witnesses for plaintiff were allowed to testify, in effect, how much less in value the premises were before the weeds were cut than afterwards.

8. **EVIDENCE:** conclusions: lessened value of land.

It is insisted this testimony should have been excluded, on the objection that these were mere conclusions and expressions of opinion as to the amount of damages suffered by plaintiff, and, therefore, a usurpation of the province of the jury. We have to say that, while testimony of this character is in the nature of a conclusion and the expression of an opinion, that this is so of necessity. And if the witnesses were competent to speak to the question, and the record discloses they had the necessary experience and knowledge (and on this record the jury could so find), a statement on their part of what the value was before and after, is not an objectionable form of opinion evidence, and is not the equivalent of an abstract opinion as to how much damage was suffered by the plaintiff. Such testimony does not bind the jury to allow the amount of the alleged difference, but is the basis for the ultimate determination by the jury of how much damage was done.

VIII. Interrogatories proposed to appellee's witnesses

Ewing and Jones on cross-examination were excluded on the objection of appellee. Since these objections were sustained, we do not pass upon whether the objections made were good. For the purposes of this review, it suffices if there be any ground justifying the exclusion; and to whether there was no reason therefor, we now address ourselves.

9. **APPEAL AND ERROR:** untenable objection to objectionable testimony.

Over objection, Ewing testified in chief that, assuming the land as farmed became badly infested with cockle burs all over the cultivated portions of it, then, in his judgment, it would be worth \$5 or \$6 an acre less than if it had been properly farmed, and there were no cockle burs. On cross-examination, he said that, assuming the land was cropped for 30 or 40 years without being seeded down, and that yet it had raised good, average crops of oats and corn, from year to year, up to the present time, he would still adhere to the statement that, if that land had become badly infested with cockle burs all over the cultivated portions of it, there would be much depreciation per acre. It is after this, and in the progress of the same cross-examination, that he was asked to assume that the land produced good, fair crops of oats and corn in 1913, and whether, so assuming, he would say that that land was badly infested with cockle burs; and it was to this that objection was sustained.

10. **WITNESSES:** cross-examination: scope.

It is apparent that the utmost the witness could have answered, if permitted, was that, if the land produced a good crop in 1913, the land was not badly infested with cockle burs. If he had said, in his examination in chief, that the land was thus infested, refusing to let him answer this question on cross-examination would have been error. And so if the cross-examiner had asked whether witness adhered to his testimony on depreciation, although good crops were raised in 1913. But, as said, the proposed cross-examina-

tion could not relevantly develop more than a view of the witness to the effect that the land was, in fact, not badly infested. He had never said it was. He had simply been asked to assume it. His belief that the land was, in fact, not infested, would not weaken his testimony on depreciation, given on the mere assumption that it was infested. The appellant had the right to make this man his witness, and, on showing him qualified to speak, have him say, if he would, that the land was not full of cockle burs, and the like. But a statement by the witness while testifying for appellee that there was a depreciation in a stated amount, if the infesting be assumed, did not make it cross-examination to show by him whether there was, in fact, any infesting.

The same is true of the cross-examination of appellee's witness Herbert Jones. He pretends to no personal knowledge on the actual condition of the land, and says nothing about it except that he does not know its condition as to cockle burs in the year 1913.

IX. It is asserted one witness testified he could not give the value of the property before or after the injury, and yet was allowed to state that the depreciation would be \$1,000. If that be in the record, it is in

11. APPEAL AND  
ERROR: briefs:  
reference to  
record: neces-  
sity.

some place or places in it. There is no reference, in connection with the statement, to where its support may be found. We are not bound to go through the entire record to see whether the statement is supported, but did attempt to do so, and find nowhere a witness who said he could not give the value of the property before and after the injury, and, further, that such injury was \$1,000. If we have failed to find this, it is due to the method of presentation. We are unable to find it, though we did more than our duty required.

X. Appellee's witness Crawford testified that the appellant made a bargain that Crawford should destroy the

weeds, and that, if appellant "had done what he agreed to do," the depreciation per acre would have been less than witness said it was. Appellant attempted to testify as to how long it would have taken Crawford to have done said destroying with a team and mower, and he was not allowed to say. It can reasonably be anticipated the witness would have answered that very little work on part of Crawford was contemplated in their bargain. If the jury believed this, it would weaken the testimony of Crawford on how much was lost to the appellee by failure to cut the burs. In other words, if, say, an expenditure of \$5 in work would have exterminated the burs, the jury could therefrom find that the burs were not as extensive as Crawford, by inference, asserted them to be. We think appellant should have been allowed to answer this.

12. EVIDENCE:  
extent of  
breach of  
contract.

XI. There was testimony that appellant claimed burs did no hurt, and admitted he had never cut any; that, at all times while appellant was in possession of the land, there were always more or less burs, and that this condition was due to his poor farming. In his direct testimony on his own behalf, he said the land was not seeded down for years past, and up to the time he surrendered possession; that it had been cropped regularly, from year to year, during all these years; and that there were cockle burs on the land when he took possession of it, in 1905. He was then asked, "What kind of crops did you produce on that farm from year to year?" This was excluded, on objection by appellee. Next, he was asked to say if he knew whether there were more or less cockle burs in the year 1913 than were present in 1905, when he took possession, and not allowed to answer. We cannot escape the conclusion that these rulings were erroneous. The testimony excluded was fairly calculated to raise an issue on whether the farm was, in fact, infested as badly as the appellee claimed, and, if so, to what extent this was

due to the fault of the appellant. Had answer been permitted, the jury might have found, from the fact that, though the land had been farmed for years, and had not been seeded down, it still produced good, average crops, that it could not have been infested to the extent that appellee claimed. And so testimony that, after years of farming there were less burs on the land than when the appellant took possession of it would have met the claim that the land had not been properly farmed. True, appellant was permitted to say that the burs were not so bad that they affected the crop in any way, and that there was a fair crop of corn in 1913, although the dry weather cut it short some in that season. This does not supply all that it may in reason be anticipated would have been disclosed, had the witness been allowed to answer said questions.

For the errors pointed out in Divisions X and XI hereof, the judgment below must be reversed.—*Reversed and remanded.*

PRESTON, C. J., LADD and EVANS, JJ., concur.

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W. D. BIDWELL et al., Appellants, v. W. E. MCCUEN et al.,  
Appellees.

**EVIDENCE: Ancient Documents—Conditions to Admissibility.**

- 1 instruments of ancient nature, free from suspicious appearance, found in places consistent with their genuineness, and (if constituting conveyances of land) attended with circumstances corroborative of their genuineness, are admissible, without formal or further evidence of genuineness. So held as to a 60-year-old unacknowledged conveyance of land for a highway.

**HIGHWAYS: Failure of Public to Use Full Width—Estoppel.**

- 2 right of the public to the full width of a duly established highway is not lost by abandonment by the fact that, for some 60 years, the public has not used the *entire* width, nor is it lost by estoppel by the fact that, during most of said time, the ad-

joining landowner has been in possession of the unused portion, and has planted trees of small value thereon.

**HIGHWAYS: Graves within Limits of Highway.** Graves, mistakenly placed within the limits of a duly established highway and near the border line thereof, and during a time when the entire width of the highway was not in use, should be appropriately protected after the highway is opened to its entire width.

*Appeal from Jasper District Court.*—K. E. WILLCOCKSON, Judge.

FEBRUARY 15, 1918.

REHEARING DENIED MAY 17, 1918.

SUIT to enjoin the opening of a highway, and for damages to buildings and crops occasioned by the use of explosives in blowing out trees and stumps, in attempting to open said highway in front of plaintiff's premises. Facts are stated in the opinion.—*Affirmed.*

*Ross R. Mowry and John McClellan*, for appellants.

*M. R. Hammer, Jr., and E. P. Malmberg*, for appellees.

STEVENS, J.—Plaintiffs are the owners of a tract of land in Jasper County, Iowa, described in their petition as the north fractional half of Section 6-78-21, and the defendants are the members of the board of supervisors of said county. The controversy in this case arises over a strip of land on the north side of said tract, on which, prior to the matters complained of herein, there was a row of willow and cottonwood trees of various sizes, near and parallel with the north line fence, some of which had a diameter of three feet.

Defendants claimed the disputed tract of land as a part of a highway extending east and west in front of said premises, whereas it is the claim of plaintiffs that no highway was ever established in front of said premises, and that they and their grantors have always been in the possession and



had the use of said tract, and are the absolute owners thereof. It is conceded in the evidence that the disputed strip has never been used by the public as a highway, and that plaintiffs and their grantors have, since about the year 1859, been in possession thereof, and have planted cherry and ornamental trees thereon; that said fractional tract has, for a great many years, been enclosed on the north side by a fence erected upon an irregular line.

It is the contention of defendants that a highway 66 feet in width was dedicated in 1868, a portion of the way from the west Jasper County line along the north side of said tract, by Micajah Van Winkle, who owned the land on both sides of the correction line. Assuming this to be true, the west end of said fence stands about 10 feet north of the south line of said highway, from which point it extends in a northeasterly direction to a point somewhat less than one third of the distance across said tract, and then makes a jog, at right angles to the north, a distance of 10 or 12 feet; thence it extends in a slightly southeasterly direction to a point about two thirds of the distance across said tract, from which it continues in a northeasterly direction to the northeast corner of said tract, which is on the center of said alleged highway; so that the width of the disputed strip is approximately from 10 to 33 feet, and extends across the entire north side of said fractional half section.

The north side of said highway is, and has been for many years, fenced on a straight line, which, so far as the record discloses, is conceded by the parties to be properly located. The disputed tract extends west to the line between Jasper and Polk Counties. It is also claimed by defendants that a highway 66 feet in width was legally established by the board of supervisors of Jasper County, from the east end of the disputed tract west to a point where same and a portion dedicated by Micajah Van Winkle meet, a short distance west of plaintiff's residence, and that same

is part of a state highway established by the acts of the third general assembly; and that said strip, 66 feet in width, was, as above stated, dedicated as a highway, all except the strip in controversy having since been continuously used by the public for that purpose.

The evidence shows without conflict that, on or about the 14th day of January, 1868, a petition, signed by numerous property owners in the vicinity thereof, asking the establishment of a highway in Polk County, purporting also to have been signed by Micajah Van Winkle, was filed in the office of the county auditor of Polk County; that notice thereof was given, as required by law, and a highway established, as prayed. Said petition is addressed to the "Honorable Board of Supervisors of Polk County," and asks the appointment of a commission to meet a like commission from Jasper County, to view, lay out, and establish a road 66 feet wide, between Jasper and Polk Counties, running easterly between said counties on the correction line, to begin in Polk County at the southeast corner of Section 6-78-22, and running thence along easterly said correction line 33 feet in width on each side thereof, and between the said counties, until said road shall intersect and coincide with the road passing the house of Micajah Van Winkle, in Jasper County, leading to Prairie City.

In addition to said petition, the defendants introduced in evidence an instrument purporting to be signed by Van Winkle, as follows:

"Know all men by these presents, that I, M. Van Winkle, of Des Moines Township, Jasper County and state of Iowa do hereby grant and convey the right of way for a state road as petitioned for by P. E. Dye and others through my land in all that part of said road that lies wholly in Jasper County, beginning at a point of the 'correction line' at the westerly boundary of Jasper County and running thence easterly along and on both sides of the said 'correc-

tion line' till the said road coincides with the road passing my house. And I hereby covenant that I am lawfully seized of said premises and that I have good authority to grant the right of way through the same for the purpose aforesaid. In witness whereof I have hereunto set my hand and seal this 6th day of September, A. D. 1868."

The above instrument was never filed for record in Jasper County, but was filed in the office of the county auditor of Polk County, and spread upon the records thereof as a part of the proceedings for said highway, and, at the time of the trial of this case, was found among the said highway papers in said office.

On the 19th day of February, 1915, the proper officers caused a notice to be served upon plaintiffs to remove said fence, trees, and shrubs from said highway. The plaintiffs having failed to comply therewith, defendants employed men who entered thereon and cut a large number of trees, and, by the use of dynamite, blew out stumps and trees, scattering the same, as alleged by plaintiffs, over their wheat fields and other premises, and breaking a large number of window lights in their residence, destroying said fence, and otherwise damaging their premises.

This action was brought to restrain defendants from trespassing upon said disputed tract, from destroying the trees and shrubbery growing thereon, and from removing or further injuring said fence and buildings on said premises. A temporary writ was granted by the court, which, upon final hearing, was dissolved. Plaintiffs, in their petition, also prayed and asked judgment for damages on account of the destruction of said trees, and injury to their residence, fence, and crops. The court awarded judgment in their favor for \$250 therefor.

I. It is the contention of counsel for appellee herein: (a) That, by act of the third general assembly, commissioners were appointed to locate and establish a state high-

way along the north side of said premises, and that same was duly located and established; (b) that a change was made by the board of supervisors of Jasper County in the state highway, and a 66-foot highway established by it in 1856, from the east line of plaintiffs' premises to a point a short distance west of the residence now situated thereon; (c) that, in 1868, Micajah Van Winkle, who owned the land on both sides of said alleged highway, by an instrument in writing dedicated a 66-foot highway extending from the west line of Jasper County east, coinciding with the highway above referred to.

All of the above propositions are denied by counsel for appellant, whose contention is: (1) That no part of said alleged highway was ever established by dedication, or by the board of supervisors of Jasper County; (2) that the highway in controversy is no part of the old state highway; (3) that, in so far as a highway exists along the north side of plaintiffs' premises, it was acquired by prescription only, and the public is confined to the use of the same as it now is; and (4) that the disputed strip has been in the continuous, uninterrupted, adverse possession of plaintiffs and their grantors since long prior to the alleged establishment of any part of said highway, and that they purchased same without notice, actual or constructive, of the claim now asserted by defendants, and that they have planted fruit and ornamental trees on said tract, and that the public is estopped from claiming same as a part of said highway.

There is considerable conflict in the evidence as to the exact location of the state highway, but all concede the establishment thereof. Without quoting therefrom, or reviewing the testimony, we reach the conclusion, from a careful reading of the record, that the state highway passed immediately in front of plaintiffs' premises, for at least a part of the distance. The field notes and plat of said highway were offered in evidence by plaintiffs, but we are un-

able, from the data furnished, to definitely locate the same with reference to the tract in dispute. There is, however, no serious controversy between the parties as to the establishment of a portion of said highway 66 feet in width, from the east line of plaintiffs' premises to a point a short distance west of the residence situated therein. The records of Jasper County, offered in evidence, are quite conclusive upon this point. This highway was located and established on the correction line, without designation of the width thereof, which, however, under the law as it existed at the time, would be 66 feet in width. The only proof offered for the purpose of showing the alleged dedication of said highway from the Jasper County line east to the portion established by the board of supervisors of Jasper County, is the instrument signed by Micajah Van Winkle, copied above. This instrument was not acknowledged nor recorded in Jasper County, but was kept in the auditor's office of Polk County, among the files of the highway petitioned for by Van Winkle *et al.*, and established by the board of supervisors of that county in 1868.

It is contended by counsel for appellant that the signature of Micajah Van Winkle to said instrument was not properly identified, and that same was not admissible in evidence, and did not, by its terms, meet the

1. EVIDENCE:  
ancient documents:  
conditions to ad-  
missibility.

requirements of a conveyance or instrument of dedication. At the time the petition for a highway was filed in the office of the auditor of Polk County, Van Winkle owned the land on both sides of the correction line. The petition for said highway asked that a commission be appointed by the board of supervisors of Polk County, to meet a like commission from Jasper County, for the purpose of laying out and establishing a road 66 feet in width between Jasper and Polk Counties, extending from the southeast corner of Section 6-78-22, Polk County, east 33 feet on each side of the cor-

rection line, intersecting and coinciding with the highway running past the Van Winkle premises. No witness who knew the signature of Micajah Van Winkle testified to the genuineness of the signature upon the petition or the instrument of dedication. The question here presented is whether said instrument was admissible in evidence, without identification of the signature or other direct proof of its genuineness. The instrument was offered on the theory that it was admissible as an ancient document. The rule governing the admissibility of ancient documents, as stated by Greenleaf, is: (a) That the document must have been in existence for 30 years or more; (b) that it must have been found in proper custody,—that is, in a place consistent with its genuineness; (c) that it must not have a suspicious appearance; and (d) there must be, if it purports to convey land, some attendant circumstances corroborating its genuineness, either possession of the land or some other item of corroboration. As thus stated, the rule has been quite generally, if not universally, adopted by the courts. *Davis v. Wood*, 161 Mo. 17 (61 S. W. 695); *Flores v. Hovel*, (Tex. Civ. App.) 125 S. W. 606; *West v. Houston Oil Co.*, 56 Tex. Civ. App. 341 (120 S. W. 228); *Nicholson v. Eureka Lumber Co.*, 156 N. C. 59 (72 S. E. 86); *Morgan v. Tutt*, 52 Tex. Civ. App. 301 (113 S. W. 958); *Doty v. Lyman*, 166 Mass. 318 (44 N. E. 337); *White, McLane & Morris v. Farris*, 124 Ala. 461 (27 So. 259); *Anderson v. Cole*, 234 Mo. 1 (136 S. W. 395); *McConnell Bros. v. Slapney*, 134 Ga. 95 (67 S. E. 440); *Almy v. Church*, 18 R. I. 182 (26 Atl. 58); *Reuter v. Stuckart*, 181 Ill. 529 (54 N. E. 1014); *Butrick, Petitioner*, 185 Mass. 107 (69 N. E. 1044); *Sullivan v. Richardson*, 33 Fla. 1 (14 So. 692); *Lunn v. Scarborough*, 6 Tex. Civ. App. 15 (24 S. W. 846).

As before stated, the instrument in question purports to have been executed in 1868, and was spread upon the records of the auditor's office of Polk County as a part of

the proceedings for the highway petitioned for by Van Winkle *et al.*, and has been kept with the papers relating thereto in said office. There are no circumstances surrounding its execution, filing, or preservation in the auditor's office during the intervening years tending in any way to impeach the genuineness thereof or to throw doubt thereon. It was quite clearly executed, if genuine, in pursuance of the plan stated in the petition for the establishment of a highway, part in Polk and part in Jasper County, and doubtless explains the reason why none was established by the board of supervisors of Jasper County at this point. It is not necessary that the custody of the instrument be in any particular person, but its custody must be consistent with the purpose of its execution. The law in this respect is stated by the Supreme Court of Texas, in *Flores v. Hovel*, *supra*, as follows:

"One of the prerequisites to the admission of an ancient written instrument in evidence is that it must be shown to have been in and come from some place where it would be natural to find a genuine document of such a tenor as the one in question. The important feature of this requirement is that no one custody is to be esteemed the necessary one; all that is required is that it be a natural one, and the question is one to be left to the determination of the trial court on the circumstances of the particular case."

See, also, *White v. Farris*, *supra*; *Havens v. Seashore Land Co.*, 47 N. J. Eq. 365 (20 Atl. 497); *Wright v. Hull*, 83 Ohio St. 385 (94 N. E. 813); *Dickinson v. Smith*, 134 Wis. 6 (114 N. W. 133); *Nicholson v. Eureka Lumber Co.*, *supra*; *McArthur v. Morrison*, 107 Ga. 796 (34 S. E. 205); *Doty v. Lyman*, *supra*; *Brannan v. Henry*, 175 Ala. 454 (57 So. 967).

• It has also been held that recitals in ancient documents are evidence of the facts therein stated. *Anderson v. Cole*,

234 Mo. 1 (136 S. W. 395); *Doty v. Lyman*, supra. The possession of said instrument by the county auditor of Polk County was entirely consistent with its genuineness, and it was, indeed, quite natural that same should have been filed in said office, in connection with the petition for the establishment of the highway in Polk County in which it was asked that a commission be appointed to meet a like body from Jasper County to lay out and establish a highway therein in connection with the Polk County improvement. The failure to acknowledge, and to record the instrument in the office of the county recorder of Jasper County, was probably an omission due to indifference to technicality in the execution of legal papers not uncommon in those days. The recitals contained in said instrument, together with the circumstances surrounding its execution, the petition for the highway filed in the auditor's office of Polk County, the erection by Van Winkle of a fence on the north side of said highway, 33 feet from the correction line, and other facts and circumstances appearing in evidence, satisfactorily show his personal interest in the establishment of a highway at the place in question.

The opening and use by the public, with the consent of Van Winkle, of a portion of the strip, designated in the instrument, together with the other matters referred to, furnish the required corroboration, and establish the admissibility of the instrument. No particular language is necessary to constitute a dedication, and the intention is clear upon the part of Van Winkle to do so. The language of the grant is, "to coincide" with the highway running past his residence. "To coincide" means "to agree with." The fence on the north of the highway was built, and has been since maintained, on a line 33 feet north of the correction line.

II. The next question presented for our consideration is: Has the public lost its right to the disputed strip by



adverse possession of plaintiffs, by abandonment of the public, or by estoppel? There was, prior to our decision in *Quinn v. Baage*, 138 Iowa 426, some question as to whether the right to the use of a highway for the established width could be lost to the public by abandonment, but the court in this case said:

2. **HIGHWAYS:**  
failure of  
public to use  
full width:  
estoppel.

"But where the road has been established and continually used, the mere fact that the fences bordering it are not on the true line, and the portion beyond has been occupied by the landowner up to the fence, and not made use of by the public, will not work an estoppel against the public; but the entire width of the highway may be appropriated by the public whenever required for the purposes of travel. The continued use of the highway rebuts any suggestion of **abandonment**, and the fact that the entire width has not been appropriated to such use indicates no more than that, in the opinion of the then road officers, all is not immediately necessary to meet the demands of the traveling public. There had been no abandonment, declared in *Davies v. Huebner*, 45 Iowa 574, essential to an estoppel in such a case—merely a delay in occupying until required. *Biglow v. Ritter*, 131 Iowa 213. In this respect, the rule is identical with that in relation to the acceptance by a city or town of the portion of a plat set apart for streets and alleys. *Burroughs v. City of Cherokee*, 134 Iowa 429, and decisions therein cited."

The law as here declared has since been followed, and is the law of this case. Plaintiffs acquired no rights to said premises by adverse possession, nor can any right be predicated thereto on the ground that the public has abandoned a portion of the highway, as established. There has been no acquiescence in the line upon the part of the public, as claimed by counsel for appellant, for the manifest reason that no one representing the public was au-

thorized to enter into an agreement upon, or acquiesce in, any particular location thereof. *Quinn v. Baage*, supra.

Plaintiffs' claim to an estoppel is based upon the fact that they have planted some fruit and ornamental trees on said premises, and that a very small part of their barn extends over the line. The trees consist of two or three cherry trees and a soft maple. No such valuable improvements have been erected upon said disputed tract, or expense incurred in planting and cultivating fruit and ornamental trees, as to justify the court in applying an estoppel thereto. The portion of the barn extending over the line, according to the testimony of the county engineer, does not exceed a few inches, and will in no wise be interfered with by the public; while the fruit and ornamental trees are not of very great value. We therefore conclude that plaintiffs acquired no title to the premises in question by adverse possession, and that defendants were not estopped from causing the obstructions to be removed from said highway.

III. We have not discussed all questions referred to by counsel for appellant, but they have not been overlooked: we do not deem those not discussed of controlling importance.

There are three graves on the east end of the disputed strip, the monuments showing dates 1868, 1869, and 1872, respectively. The bodies there buried are those of M. Van Winkle and two members of his family.

3. HIGHWAYS: graves within limits of highway. These graves are located in the portion of the highway established by the board of supervisors of Jasper County in 1856. They are well to the south side of the highway, and we assume that they will be properly protected by the maintenance of a fence or other suitable barrier by the board of supervisors or other officers having charge of said highway. The plaintiffs herein have no other interest in said graves than the public

generally; but they should be properly guarded by the proper highway authorities.

IV. The defendants evidently were very careless in the use of explosives, and in blowing out the trees and stumps along plaintiffs' premises, and showed indifferent consideration for their rights; but the court allowed them damages in the sum of \$250, which, we think, will fairly compensate them for the damages actually suffered to the house and other premises of plaintiffs.

We reach the conclusion that the finding and decree of the lower court should be, and it is,—*Affirmed*.

PRESTON, C. J., LADD and GAYNOR, JJ., concur.

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CLAY BOWERSOX, Administrator, Appellant, v. BOARD OF SUPERVISORS OF JOHNSON COUNTY et al., Appellees.

**HIGHWAYS: Unaccepted Dedication.** *Dedication* of lands for  
1 streets and alleys, by the filing and recording of a town plat, does not work the creation of a public "road" *until there has been a public acceptance of the dedication*. It follows that an order of the board of supervisors which assumes to vacate a street, the dedication of which has never been expressly or impliedly accepted by the public, is a nullity. So held where a *dedication* had remained unaccepted for some 60 years. (See Secs. 917, 1482, 1507, Code, 1897.)

**DEDICATION: Town Plats—Acceptance.** The filing and recording  
2 of a town plat acts as a deed in fee to the public of the lands set apart for streets and alleys, but, like all other deeds, an acceptance is absolutely necessary. In other words, such lands do not become public "roads" until accepted by the public.

**DEDICATION: Acceptance—Evidence.** It is suggested that evi-  
3 dence of the acceptance of a town plat dedication of lands for streets and alleys, aside from a formal order of acceptance by the public authorities, may consist of:

(a) The expenditure of labor or money thereon by the public authorities.

(b) The general or frequent use of the land as a street or road.

(c) The general recognition by the public of the land as a public highway.

*Appeal from Johnson District Court.—R. P. HOWELL, Judge.*

MAY 17, 1918.

PROCEEDING in certiorari to test validity of an order made by the board of supervisors. The writ of certiorari was not sustained, and the plaintiff appeals. The material facts are stated in the petition.—*Reversed and remanded.*

*Milton Remley*, for appellant.

*O. A. Byington* and *E. B. Wilson*, for appellees.

WEAVER, J.—In the year 1856, one Jacob Shuey, owning a tract of land in Johnson County, platted the same into blocks, lots, streets, and alleys, and gave to the place the name of Shueyville. The plat was duly re-

1. HIGHWAYS:  
unaccepted  
dedication.

corded. How many of the lots were sold and conveyed to purchasers does not appear.

It is apparent, however, that, like many other ambitious town plat schemes of that day, the hope of building and developing a city of large proportions did not materialize, and it remains still a small, unincorporated village.

A copy of the plat, put in evidence, indicates what purport to be improvements of some kind on perhaps 20 or 30 different lots. Extending north and south through the plat, or a portion thereof, are marked three streets, named Main, Mill, and Oak, reading the names in their order from east to west. The east and west streets intersecting the first three above mentioned are Jefferson, Deen, West, and Water, reading the names in their order from south to north. The plaintiff is, and for some time has been, the owner of five lots lying immediately south of West Street and west of Mill Street. He also owns two and one-half lots immediately

east of Mill Street and directly opposite the five lots first mentioned. In April, 1915, one Kopecky, a resident of the neighborhood, presented a petition to the board of supervisors of Johnson County, asking the vacation of that part of Mill Street between West Street and Deen Street, and giving as reason for such order that such street is "not used, or is very seldom used by the public for traveling purposes." Upon the making of this application, notice was issued and served, and the matter came on for hearing at a later date. The plaintiff John Novotny (since deceased) appeared thereto and opposed the order petitioned for, and presented a remonstrance against such action, signed by several persons. The objections were overruled, and an order entered, as prayed, vacating Mill Street at the point in controversy. Thereafter, this proceeding in certiorari was instituted in the district court, to annul the order of vacation on the ground that the board of supervisors had no authority or jurisdiction in the premises. On hearing the evidence and examining the record, the court ruled that the supervisors were vested with authority to vacate the street, and dismissed the writ. The plaintiff appeals.

So far as counsel attempt to discuss the necessity or advisability of vacating the street, or whether the same is sought or demanded as a matter of public interest, the argument is beside the one controlling question in the case. If the board of supervisors had any power or discretion to order the vacation, its action cannot be reviewed upon certiorari; and if it had no such power or discretion, then its order to that effect is void. We therefore come directly to the real inquiry: Is power or authority vested in the board to vacate the street, or any other part of the plat?

If such exists, it must have been conferred by statute. This, the appellee concedes, but says that such authority is found in Code Sections 1482 and 1507, found in the general chapter on the subject of roads. They read as follows:

"Section 1482. The board of supervisors has the general supervision of the roads in the county, with power to establish, vacate and change them as herein provided."

"Section 1507. All public streets of villages are a part of the road; and all road supervisors or persons having charge of the same, in the respective districts or villages, shall work the same as provided by law."

For the purpose of having before us all the statutes which may be thought to bear upon the constructions to be placed upon the cited sections, we cite also Code Section 917, which provides that the due execution and record of a town plat "shall be equivalent to a deed in fee simple of such portion of the premises platted as is set apart for streets or other public use."

These statutes have had frequent consideration by this court, and it is now well settled that, while the making and recording of the plat constitute a deed of dedication to the

public of the designated streets, such plat-  
ting or dedication does not have the effect  
to make them public streets or highways un-  
til the public has in some manner indicated its acceptance thereof. Until such acceptance, the spaces left between the blocks and marked as streets are ways, in which the purchasers of lots acquire an easement of passage for the convenience of and access to their respective premises; but they are not public roads or highways. Until there has been such an acceptance, the plat or deed of dedication remains, so far as the general public is concerned, in the nature of a mere tender or offer to dedicate. *Chrisman v. Omaha & C. B. R. & B. Co.*, 125 Iowa 133; *Incorporated Town of Cambridge v. Cook*, 97 Iowa 599; *Bell v. City of Burlington*, 68 Iowa 296; *Uptagraff v. Smith*, 106 Iowa 385; *Burroughs v. City of Cherokee*, 134 Iowa 429. Such tender may be withdrawn, and the offered street may be vacated by the dedicator or proprietor at any time before the dedication had been made effective

2. DEDICATION:  
town plats:  
acceptance.

by acceptance, in so far as it does not prejudice the rights or privileges of any other lot owner in such plat. Code Sections 918 and 919; *Conner v. Iowa City*, 66 Iowa 419; *McGrew v. Town of Lettsville*, 71 Iowa 150. In other words, until the dedication has been accepted, and subject only to the easements, if any, which may have been acquired by purchasers of lots within the tract, the proposed streets and alleys remain private property, and the tender of dedication may be withdrawn in the manner provided by the statute last above cited; and it has also been held that, if the proprietor of the plat, at any time before the acceptance of his dedication, sells and conveys the land for other than public purposes, such conveyance operates as a revocation of the offer to dedicate. *Minneapolis & St. L. R. Co. v. Town of Britt*, 105 Iowa 198, 203. It follows of necessity, from the foregoing statutory provisions and the construction thereof, as settled by numerous decisions of this court, that, until the dedication tendered by the making and filing of a plat has been accepted by the public, the spaces left between the blocks of land for street purposes are not public roads, and are, therefore, not subject to vacation and change as such, under the general law which authorizes and controls the establishing and vacation of public roads, streets, and highways. To quote briefly from some of our cases:

"From these different sections, it is manifest that the word 'street' is used to designate the spaces left between the lots for public travel. The title thereto does not vest in the city or town prior to its acceptance, and until then it is not deemed a road or public thoroughfare." *Chrisman v. Omaha & C. B. R. & B. Co.*, 125 Iowa 133, 137.

"The filing of the plat is made equivalent to a deed in fee simple to the streets and alleys, but, like other deeds, requires acceptance before it can be effective." *Burroughs v. City of Cherokee*, 134 Iowa 429, 432.

Such a dedication "may be withdrawn by the donor at

any time before acceptance by the public." *Minneapolis & St. L. R. Co. v. Britt*, 105 Iowa 198, 203.

The streets and alleys, "upon the acceptance of the dedication tendered by filing the plat, are under the authority of the cities and towns, whose councils may 'widen, straighten, narrow, vacate, extend, improve, and repair them.' " *Talbert v. Mason*, 136 Iowa 373, 380.

An acceptance of the grant by the public is quite as essential to the establishment of the highway as is the dedication by the owner of the soil. *Manderschid v. City of Dubuque*, 29 Iowa 73.

The foregoing is sufficient to make clear that, in the case at bar, to give the board of supervisors any power to vacate the platted street in controversy, it must appear that such street was a public road, and that, in order  
3. DEDICATION :  
acceptance :  
evidence.      that it be treated and considered a public road, there must have been something in the nature of a public acceptance of the dedication. Not that there needs to have been any formal action taken or formal record made by any public authority, in order to constitute a sufficient acceptance; possibly the expenditure of labor or money in caring for the street by the officers charged with such duties, or the assumption of control over it by such officers in removing obstructions therefrom, or even anything like general or frequent public use of the street as a highway, or its general recognition as such by common consent of the local public, would justify a finding of acceptance, within the meaning of the law as we have found it to be; but there must be some tangible or substantial ground on which to base it. A careful examination of the entire record fails to reveal any evidence of this kind.

To render the situation somewhat clearer, it should be said that, running north and south through the plat of Shueyville, along the course of what is marked as Main Street on the plat, there is a public county or state road.



extending from Iowa City to Cedar Rapids. The street sought to be vacated is parallel to this public road and only about 300 feet therefrom, and is not a part of any road extending beyond the plat in either direction. There are no houses facing upon it. No work has ever been done upon it, or improvement of any kind made upon it. It is covered with unbroken blue grass sod, from side to side, and, although there is nothing to obstruct travel therein, it has been used for that purpose very rarely. Persons on foot do pass that way, from time to time. Some of the witnesses say that they have seen wagon tracks upon it, but no one testifies to the fact of seeing it so used. Indeed, one of the defendant's witnesses, who has been familiar with the situation for many years, and says the street has been traveled some," says he never saw a team on the street. Indeed the very reason, and only reason, on which the petition to vacate the street is based, is that it is *not* used by the public; and it is very clear that the fact in this respect is substantially as said by one of the witnesses, that the use made of the street has "not been any different from what it would be on an outlying uninclosed lot." The very fact that the several lot owners living on the sparsely settled plat have an easement in and right to use the platted streets as a means of access to their property, and that this right is held by them regardless of the acceptance of the dedication, even though such streets never become public roads, sufficiently explains the nature of the very slight use which has been made of Mill Street.

Not only is there no showing of any acceptance of the dedication in this instance, but we think that such an acceptance is clearly negatived. Mill Street, therefore, never became a public road, and the board of supervisors was without authority or jurisdiction to vacate the plat or the street which formed a part of it. The order of vacation being void for want of jurisdiction in the board, the writ of

certiorari should have been sustained. The judgment appealed from will, therefore, be reversed, and the cause remanded, with direction to the district court to annul the order of the board of supervisors for the vacation of the street in controversy.—*Reversed and remanded.*

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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HAZEL BUCKNAM, Appellee, v. INTERSTATE BUSINESS MEN'S  
ACCIDENT ASSOCIATION, Appellant.

**INSURANCE: Avoidance of Policy—Non-Specific Statement of Occupation—Knowledge of Agent.** Fraud in obtaining insurance may not be predicated on a statement by the insured, in his application, as to his occupation, when such statement *was true as far as it went*, but, to the personal knowledge of the company's agent who took the application, was capable of greater elaboration as to duties of the insured; especially is this true when the blanks in the applications were inadequate for elaborate explanations.

**INSURANCE: Receipt of Premiums—Effect.** An incorrect statement of insured's occupation becomes wholly immaterial when, subsequent to the issuance of the policy, the insured entirely changes his occupation, and the insurer, with full knowledge thereof, continues to receive premiums. and the insured was killed by reason of the dangers attending the newly assumed occupation.

*Appeal from Story District Court.*—E. M. McCALL, Judge.

MAY 17, 1918.

SUIT by plaintiff on accident insurance policy or certificate, to recover \$5,000. Defendant filed an equitable cross-petition, asking a rescission of the contract and that it be cancelled, because of the alleged fraud of deceased in his application, and because of a change in his occupation. The issue raised by the cross-petition was tried, and the same

was dismissed on the merits, and defendant appeals.—  
*Affirmed.*

*Dunshee, Haines & Brody*, for appellant.

*C. G. Lee, I. R. Meltzer, and C. W. Garfield*, for appellee.

PRESTON, C. J.—1. The points relied upon by appellant, as it states them, are: First, whether there was such a fraud or mistake in the facts as to justify a rescission in equity of the entire contract; and second,

1. INSURANCE: avoidance of policy: non-specific statement of occupation: knowledge of agent. whether there was a waiver on the part of the defendant of the alleged fraud or mistake. These are stated by appellee thus:

(1) Was there material fraud or mistake in the statement by insured of his occupation and duties sufficient to warrant the cancellation of the certificate after his death? (2) Assuming there was fraud or mistake in stating his occupation or duties at the time the certificate was issued, can the company raise such an issue in a case where insured subsequently changed his occupation, and the insurance company, with full knowledge of such change in occupation, has accepted premiums and applied the same before insured is accidentally injured in the course of such new occupation? Defendant's by-laws provided that notice of change of occupation should be given; and it is contended by defendant that, because deceased failed to give such notice, it is released from any liability. The plaintiff pleaded a waiver and estoppel.

It appears that, on April 30, 1913, Harry J. Bucknam applied for insurance and membership in the defendant association. His application was approved, and a policy issued to him. At this time, he was employed as freight cashier for the Chicago & Northwestern Railway Company, at Boone, Iowa, which position he held until March 16, 1915, when he moved to Ames, where he was

thereafter engaged in managing and superintending a transfer or dray line which he had purchased. On October 14, 1915, he fell from the roof of a porch, where he was directing the work of his men in his dray business. He died from such injuries, October 23, 1915.

No authorities are cited by appellant; and its argument is whether, under the evidence, there should be a rescission of the contract. There is not very much dispute in the testimony. The evidence was either undisputed, or such that the court could properly have found the facts substantially as we shall state. So much of the application for the insurance as seems to be material is as follows:

"4. Business or occupation. Cashier in Freight Office.

"5. In what capacity are you employed? Same as above.

"6. State specifically your actual duties. Clerical only.

"7. Name of firm you represent. C. & N. W. Ry. Co.

"Street and Number.——Town.——State.——

"8. Have you any other business or occupation? No."

The above is a reproduction of that part of the application.

Defendant's agent, Doyle, solicited deceased to apply for membership, and on the same date, took his application therefor. The application was filled out and the answers written down by Doyle, who for five years had been employed in the freight department of the Chicago & Northwestern Railway Company, in the general offices at Boone, looking after damaged freight. At the time the application was made, deceased was, in fact, employed as cashier in the freight office, and that was his occupation, as stated in his application, and he had no other occupation.

It is contended by appellant, however, that some of the duties of deceased were more hazardous than stated.

and that, therefore, a fraud was perpetrated upon the company. It appears that it was the duty of deceased, as cashier in the freight office, to go through the yards and check up the cars that were in the yards and to inspect such cars. The inspection consisted especially of noticing the condition of the contents of the cars, taking the seal record, the initial of the car, and the number of all the cars containing perishable freight, also of inspecting the ice boxes on the refrigerator cars. To do this, it was necessary for him to open the hatches of the refrigerator cars and make an inspection of the plugs. This duty required deceased to climb over the refrigerator cars and pull up the hatches, and the result of such inspections was noted on printed blanks. There is some evidence as to the handling of freight by the cashier at Boone; but this was done only occasionally, at most, and seems not to have been any part of his regular duties, but was performed, if at all, only incidentally. We do not understand counsel to rely on this last-mentioned circumstance.

We think the evidence is such that the soliciting agent knew that deceased was required, in the performance of his duties, to do the things before set out. It is true he testified that he had never known that the cashier inspected the refrigerator cars, but it does appear from his testimony that, for about five years prior to the time he had become an insurance agent, he had been employed in the general offices of defendant's railway at Boone, during which time he was employed in an office just west of the freight station, and across the street; during such employment, he had occasion to go out and talk with the freight agents; he was familiar with the duties of freight agents, and states that he was familiar with the duties of the cashier; and that he had frequently heard the cashier talking about checking cars, and that it was part of his regular duty to check the cars. It should have been said

that the company issued policies to freight agents, but it seems that such were required to file a written waiver. However, we do not regard that as very material. So that, considering all the circumstances, taking the three answers in the application together, the character of the duties of deceased, the notice thereof to the company through its soliciting agent, and all the other circumstances, we think the trial court correctly held that deceased was not guilty of false representations, as contended by appellant. As said, the deceased was, in fact, cashier in a freight office. In the subsequent answer, his duties were defined as clerical only. The agent writing the answers understood the duties of the cashier. In defining the duties as clerical only, the term was chosen by the agent. Deceased was justified in relying upon the advice and assistance of the agent in preparing the application. In interpreting the language used, we should give it a reasonable construction in favor of the assured, in order to avoid forfeiture on technical grounds. *Sargent v. Modern Brotherhood*, 148 Iowa 600, 607. It is contended by appellee that the character of the blank application and the amount of space left by the insurer for the applicant to use in his answer is entitled to consideration in construing the application, citing in support *Wilder v. Continental Casualty Co.*, 150 Fed. 92, at 94.

The answers of applicant were as full as the nature of the blanks provided would permit. The company did not ask applicant where his duties were performed. The evidence is that they had a right to make further inquiries, and that they sometimes did so.

Appellee cites *Standard Life & Acc. Ins. Co. v. Fraser*, 76 Fed. 705, at 709. In that case, the applicant stated his occupation as "proprietor of a bar and billiard room, not tending bar," and the evidence showed he tended bar to the extent of relieving his bar tenders at meal hours by waiting on trade; and the court instructed the jury that

the phrase in the policy was intended to describe the occupation—the regular business—of the applicant, and that, if the jury should find from the evidence that he was not engaged in the business or occupation of tending bar as a business or occupation, the defense should be disregarded.

See, also, as bearing upon this, *Mortensen v. Central Life Assur. Assn.*, 124 Iowa 277, 278, 281; *Gotfredson v. German Com. Acc. Co.*, 218 Fed. 582; *Redmond v. United States Health & Accident Ins. Co.*, 96 Neb. 744 (148 N. W. 913).

It seems to us that, since it appears by the undisputed evidence that deceased had changed his occupation entirely, the character of his duties as stated in the application was not connected in any way with

2. INSURANCE:  
receipt of pre-  
miums: effect.

his injury. This change of occupation was known to the company and its agents, and because of such change of occupation the company may not now rely upon the statements in the application as to his occupation; and especially is this so if the company has waived the provisions of the policy in regard to change of occupation by accepting premiums with knowledge thereof.

Numerous cases are cited on the different propositions, but we do not feel justified in prolonging the opinion for further discussion at this point.

2. Now, as to the change of occupation, and the claimed waiver by reason of accepting premiums. Appellee contends that the new occupation of deceased was, under the record, an insurable occupation; but they say that, whether this is true or not, if the company accepted premiums, with notice of the character of the new occupation, they are estopped from claiming a forfeiture; and they cite *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa 216; *Kesler v. Farmers' Mut. Fire and Lightning Ins. Assn.*, 60 Iowa 374; and other cases.

We shall not take the time to discuss the cases nor set out the evidence on this point. It does appear that defendant's agents did know of the new occupation of deceased after he moved to Ames, which was his occupation at the time he was hurt, and that thereafter, and with such knowledge, the company accepted premiums for a considerable time, and up to the time he was hurt.

It is our conclusion that the trial court rightly decided the issue, and the judgment and decree is, therefore, —*Affirmed.*

WEAVER, GAYNOR, and STEVENS, JJ., concur.

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MARY J. CONDON et al., Appellants, v. NEW YORK LIFE  
INSURANCE COMPANY et al., Appellees.

**INSURANCE: Right to Proceeds—Assignment by Insured of Portion Due Deceased Beneficiary.** An insured in an ordinary life insurance policy, payable to named beneficiaries "*or to their executors, administrators or assigns,*" even though possessing the right, under the policy, to avail *himself* of loan and cash surrender value, may not, in the absence of a policy provision so authorizing, and after the death of a beneficiary, validly assign to another the portion of the proceeds of the policy which would have passed to said deceased beneficiary, had said beneficiary survived the insured.

**REFORMATION OF INSTRUMENTS: Insurance Policy—Mutual Mistake.** The right, on the ground of mutual mistake, to reform a policy of insurance, does not necessarily follow from the fact that the policy does not *literally* follow the insured's written application for the insurance. So held where the policy added, after the names of the beneficiaries, the words, "*or to their executors, administrators, or assigns.*"

*Appeal from Cherokee District Court.*—WILLIAM HUTCHINSON, Judge.

FEBRUARY 16, 1918.

REHEARING DENIED MAY 17, 1918.



ON August 5, 1889, the defendant insurance company issued an ordinary life policy for \$3,000 on the life of John J. Condon, making the same payable to Mary J. Condon, his wife, and Nellie, Louis, and Geraldine M. Condon, his children, or to their executors, administrators, or assigns, share and share alike. The insured died on June 24, 1908, and Nellie Condon, whose name, at the time of her death, was Nellie Condon Gilbert, died in 1907, survived by a daughter. On the 8th day of May, 1908, the insured executed a written assignment to Mary J. Condon, as follows:

“Original to Attach to Policy—Executed in Duplicate.

“Assignment of Part of Policy No. 326452.

“Amount of Policy \$3,000.00. Date of Policy, August 5th, 1889.

“On the life of John J. Condon, of Cherokee, Iowa, in the New York Life Insurance Company, of New York, U. S. A.

“For value received, I, John J. Condon, farmer, of Cherokee County, Iowa, do hereby assign, transfer and set over all that part of the above-described policy of insurance payable to my daughter Nellie Condon (she having died), and all sum or sums of money, interest, benefit, and advantage whatsoever, now due or hereafter to become due, by virtue thereof, unto my wife, Mary J. Condon, if living at the maturity of this policy by the death of the insured, subject to all the terms and conditions expressed therein, otherwise this assignment to be void. In case this policy matures as an endowment, this assignment to be of no effect.

“Witness my hand and seal, at Cherokee, Cherokee County, Iowa, on this 8th day of May, A. D. 1908.”

On March 5, 1909, defendant paid three fourths of the amount due on said policy, but declined to pay the balance, amounting to \$1,418.32, to Mary J. Condon, assignee, for the reason that it claimed that said assignment

was ineffectual to pass the interest of Nellie Condon Gilbert, as beneficiary, to Mary J. Condon, but that, as her interest as beneficiary under said policy vested immediately upon its execution, the share that would otherwise be payable to her belonged to her executors, administrators, or assigns, and not to Mary J. Condon.

Plaintiff brings this action as assignee, and is joined therein by Louis and Geraldine M. Condon, the two remaining beneficiaries named in said policy. This action was first brought at law, and subsequently a substituted petition was filed, alleging that the insured, in the application for said insurance, designated the above named persons as beneficiaries, but that the defendant, by mistake or oversight, made said insurance payable to said beneficiaries, or their executors, administrators, or assigns, and that the insertion of the words, "or executors, administrators, or assigns," was contrary to the request of the insured in said application, and wholly without authority; and plaintiff prayed that said policy be reformed so as to express the true intention of the parties.

An administrator was appointed for the estate of Nellie Condon Gilbert, and he was made party defendant, and appeared herein and filed answer and cross-petition, alleging that Nellie Condon Gilbert, designated as beneficiary in said policy, died possessed of a vested interest therein, and that the balance due on said policy, which would have gone to her had she survived, belonged to cross-petitioner as the administrator of her estate, and he asks judgment therefor.

The defendant, for answer, admits the execution of the policy, the receipt of a copy of the alleged assignment from the insured to his wife of the interest of Nellie Condon Gilbert; that there is a balance due and owing on said policy, of \$1,418.32, but avers that same is payable only to the administrator of the estate of Nellie Condon

Gilbert, and tenders payment of said sum to the person found entitled thereto.

The court dismissed plaintiff's petition, and entered judgment against defendant in favor of cross-petitioner for the amount claimed therein, and taxed the costs to appellant.—*Affirmed*.

*Wm. Mulvaney*, for appellants.

*Milchrist & Scott* and *A. R. Molyneux*, for appellees.

STEVENS, J.—I. The policy in suit is an ordinary life policy, containing provisions for settlement, cash-surrender value, paid-up policy, and other provisions giving options to the insured, and is therein designated as a non-forfeiting, free tontine policy.

1. INSURANCE:  
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ceased bene-  
ficiary.

The decision of this case turns upon the question whether the interest of Nellie

Condon, as beneficiary, vested upon the execution and delivery of said policy. It is earnestly contended by counsel for appellant that, as the insured might, if he had survived the twenty-year tontine period, have availed himself of any one of several settlements, or have surrendered the policy and made full settlement with the company, no interest vested in any of the beneficiaries while such right existed and belonged to the insured; and they rely upon *Carpenter v. Knapp*, 101 Iowa 712, to sustain this contention.

It is held by the great weight of authority that the interest of a designated beneficiary in an ordinary life policy vests upon the execution and delivery thereof, and, unless the same contains a provision authorizing a change of beneficiary without the beneficiary's consent, the insured cannot make such change. *Wilmaser v. Continental Life Ins. Co.*, 66 Iowa 417; *Townsend v. Fidelity & Casualty Co.*, 163 Iowa 713; *Phillips v. Carpenter*, 79 Iowa 600; *In re Estate of*

*Conrad*, 89 Iowa 396; *Central Nat. Bank of Washington v. Hume*, 128 U. S. 195 (32 L. Ed. 370); *Indiana Nat. Life Ins. Co. v. McGinnis*, 180 Ind. 9 (101 N. E. 289); *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295 (100 Am. St. 73); *Perry v. Tweedy*, 128 Ga. 402 (119 Am. St. 393); *Hooker v. Sugg*, 102 N. C. 115 (8 S. E. 919); *Foster v. Gile*, 50 Wis. 603 (7 N. W. 555); *Millard v. Brayton*, 177 Mass. 533 (59 N. E. 436); *Preston v. Connecticut Mut. Life Ins. Co.*, 95 Md. 101 (51 Atl. 838); *Phoenix Mut. Life Ins. Co. v. Dunham*, 46 Conn. 79 (33 Am. Rep. 14); *Garner v. Germania Life Ins. Co.*, 110 N. Y. 266 (18 N. E. 130); *Laughlin v. Norcross*, 97 Me. 33 (53 Atl. 834); *United States Casualty Co. v. Kacer*, 169 Mo. 301 (69 S. W. 370); *Ferdon v. Canfield*, 104 N. Y. 143 (10 N. E. 146); *Irwin v. Travelers Ins. Co.*, 16 Tex. Civ. App. 683 (39 S. W. 1097); *Mutual Benefit Life Ins. Co. v. Willoughby*, 99 Miss. 98 (54 So. 834); *Mutual Benefit Life Ins. Co. v. Sweet*, 222 Fed. 200.

And this applies to a policy to which there are attached the incidents of a loan value, cash-surrender value, and automatic extension by premiums paid. *Mutual Benefit Life Ins. Co. v. Willoughby*, supra; *Succession of Desforges*, 135 La. 49 (64 So. 978); *Preston v. Connecticut Mut. Life Ins. Co.*, supra; *Lockwood v. Michigan Mut. Life Ins. Co.*, 108 Mich. 334 (66 N. W. 229); *Pingrey v. National Life Ins. Co.*, 144 Mass. 374 (11 N. E. 562); Bacon on Life & Accident Insurance, Section 377, and cases cited.

In case the beneficiary dies before the insured, without having consented to a change of beneficiary, the insured cannot, without a reservation in the policy giving him such right, change the beneficiary; and the insurance passes to the estate of the deceased beneficiary. *Franklin Life Ins. Co. v. Galligan*, supra; *Perry v. Tweedy*, supra; *Harley v. Heist*, 86 Ind. 196; *Hooker v. Sugg*, supra; *Drake v. Stone*, 58 Ala. 133; *Phoenix Mut. Life Ins. Co. v. Dunham*, supra; *Preston v. Connecticut Mut. Life Ins. Co.*, supra; *Millard v.*

*Brayton*, supra; *Pingrey v. National Life Ins. Co.*, supra; *In re Estate of Conrad*, supra.

As we understand the contention of counsel for appellant, it is that, while the interest of a designated beneficiary in an ordinary life policy may vest immediately upon its execution and delivery, endowment, accumulation, and tontine policies form an exception to this rule, and that the interest of a beneficiary in the latter class does not vest until the death of the insured within the tontine, or accumulation, period. Among the authorities cited by counsel to sustain this contention is *Carpenter v. Knapp*, supra. The instrument before the court in that case was a certificate of membership in a benefit society, and the court held, in accordance with the weight of authority, that no interest vested in the beneficiary until the death of the insured, but the court, referring to the interest of the beneficiary in an ordinary life policy, said:

"It is the general rule that a beneficiary under an ordinary life policy takes a vested interest therein at the moment the policy is executed and delivered, which cannot be impaired or defeated by any act of the assured, or of the assured and the company, to which said beneficiary does not assent."

None of the authorities cited by counsel hold that the incidents of loan and cash surrender values and other features, such as are contained in the policy in suit, attached to an ordinary life policy for the benefit of the insured, affect its character as an ordinary life policy, or change the rule as to the right of the beneficiary, if the assured dies before these rights have matured. The right of the insured to take advantage of any of the several provisions of the policy for his benefit depended upon his surviving the tontine period. In the event that he died within the tontine period, all provisions contained in said policy for settlement, etc., immediately terminated, and the policy matured and be-

came at once payable to the beneficiaries. He had no interest in said policy that would pass by an assignment in the event his death occurred within the tontine period.

It is our conclusion that the interest of Nellie Condon Gilbert vested immediately upon the execution and delivery of the policy, and that same, under its terms, passed to her personal representatives. *Smith v. Metropolitan L. Ins. Co.*, 222 Pa. 226 (20 L. R. A. [N. S.] 928), cited by counsel, holds that, upon the death of the beneficiary before the expiration of the tontine period, the interest of such beneficiary terminates, and leaves the insured free to make such other disposition of the policy as he may desire; but the holding in this case is contrary to the great weight of authority, as shown by the cases cited supra.

II. Counsel also earnestly maintains that there was a mutual mistake in the language of the policy, and that, as the application designated Mary J. Condon, Louis, Nellie, and Geraldine Condon as beneficiaries, defendant exceeds its authority in adding after said names the words "or their executors, administrators or assigns;" that said contract should be so reformed as to eliminate said words therefrom. The only evidence offered by plaintiff to the alleged mistake was the application of deceased, which, in answer to the question "To whom the insurance applied for to be payable in event of death," gave the names as above, without adding the words, "or executors, administrators, or assigns." The evidence offered on behalf of defendant tended to show that the policy in suit was one of a large class of similar policies issued by the defendant company at the time, and was in the form used by it at the time. The application was in the form of a blank used by the agents of defendant generally, and the answer naming the several parties as beneficiaries did not undertake to prescribe or designate the form of policy to be

2. REFORMATION  
OF INSTRU-  
MENTS: Insur-  
ance policy:  
mutual mistake.

issued, nor the method of settlement in the event one or more of said beneficiaries should die before the death of the insured within the tontine period; and, doubtless, the applicant fully expected and intended that a policy of the kind designated would be issued by defendant in the usual form thereof. The policy was delivered to the insured and retained by him for many years without objection or protest, and, in the absence of evidence to the contrary, it may well be assumed that its form and provisions were satisfactory to him.

It will be observed that the insured did not attempt, after the death of Nellie Condon Gilbert, to change the beneficiary, and the instrument offered in evidence was, in form, an assignment only. As the interest of Nellie Condon Gilbert vested immediately upon the execution of the policy, it passed, upon her death, to her personal representatives, and the alleged assignment was ineffectual to pass any interest in said policy to the plaintiff. It is our conclusion that the evidence in this case is not sufficient to require or justify the reformation of said policy in the respect prayed; and that plaintiff, as assignee, took no interest therein; and that the court rightly rendered judgment in favor of the administrator of the estate of Nellie Condon Gilbert for the amount claimed, and against plaintiff for costs. The decree of the lower court is, therefore,—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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KATE CONKLING, Appellee, v. KNIGHTS & LADIES OF  
SECURITY, Appellants.

**INSURANCE: Waiver of Automatic Forfeiture.** An insurer who  
1 falls to avail himself of an automatic forfeiture of all rights  
under a policy when it is to his interest not to do so may  
not avail himself of such forfeiture when it is to his interest to

do so. More concretely, an insurer who, while the insured is alive, continually fails to insist upon the payment of assessments, etc., within the time specifically stipulated by the policy, and thereby causes the insured, as a reasonably prudent person, to believe that such payments may be made within a reasonable time after such stipulated time, thereby waives the right, after the insured is dead, to insist that the policy was automatically forfeited by the failure of the insured to make his last payment within the time stipulated in the policy.

**JURY: Waiver.** The right to have disputed questions of fact determined by the jury is waived by the conduct of counsel in permitting the court to proceed, without objection, on its clearly expressed understanding that all matters are withdrawn from the jury and are to be disposed of by the court.

*Appeal from Polk District Court.*—CHAS. A. DUDLEY,  
Judge.

FEBRUARY 15, 1918.

REHEARING DENIED MAY 17, 1918.

ACTION to recover on a benefit certificate issued to plaintiff's husband, in which she was named as beneficiary. The opinion states the facts. Judgment for the plaintiff in the court below. Defendant appeals.—*Affirmed.*

*Jordan & Jordan, and Dunshee, Haines & Brody, for appellants.*

*McLaughlin, Shankland & Lappen, and Parsons & Mills, for appellee.*

GAYNOR, J.—I. Plaintiff is the beneficiary named in a certain benefit certificate issued by the Knights & Ladies of Security to her husband, Charles R. Conkling. The certificate was issued on the 3d day of March,

1905. Charles R. Conkling died on the 7th day of August, 1914. This action is brought by the plaintiff, as beneficiary, to recover the amount provided in the certificate to be paid to her on the death of her husband.

1. INSURANCE:  
waiver of au-  
tomatic for-  
feiture.



It appears that all dues had been paid up to the 1st of July, 1914. The society defends on the ground that, at the time of the death of Conkling, all rights under the certificate had been forfeited, because of his failure to pay the July dues within the month of July.

Plaintiff replies that it was the general custom of the defendant to receive dues after the month in which the same became due and payable; that the assured relied on this custom and course of business, and was led to assume and believe that no forfeiture would occur from a failure to pay promptly and within the time specified in the contract; that plaintiff had been delinquent frequently before this time, and defendant had accepted payment, as for the preceding month, at a later date than that required by the contract; that the defendant had adopted a course of business with the plaintiff by which he was permitted to pay his monthly dues several days after the month in which the same became due, and was still treated as a member in good standing in the order; that decedent assumed and believed that the defendant would never require a literal and strict compliance with the contract in this particular; that the defendant, in accepting and receipting for said dues after the month in which the same became due, waived a strict compliance with the contract, and is now estopped from asserting that the contract was forfeited for failure to pay the dues in July for the month of July, as required by the contract; that the dues for July were sent to the defendant and received by the defendant on the 6th day of August, 1914; that the same were not only received, but receipted for.

The real question, then, for us to determine is whether or not, by a course of conduct such as this record disclosed, defendant waived a strict compliance with the terms of the contract, to which reference is hereinafter made, and is now estopped to assert that the contract was forfeited by the

failure to pay the July, 1914, dues during the month of July, as required by the contract.

The defendant is a mutual benefit association. The by-laws upon which defendant relies are as follows:

**"Section 112. *Members Suspended by Their Own Act.***

All assessments for every month shall become due and payable on the first day of the month. The certificate of each member who has not paid such assessment or assessments and dues on or before the last day of the month shall, by the fact of such nonpayment, stand suspended without notice, and no act on the part of the Council or any officer thereof, or of the National Council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited. No right under such certificate shall be restored until it has been duly reinstated by the member complying with the laws of the order, with reference to reinstatement.

**"Section 113. *How Reinstated.*** Each member who has been suspended for nonpayment of dues or nonpayment of an assessment or assessments shall only be reinstated in accordance with the constitution and laws of the order.

**"Section 114. *How a Member may be Reinstated Within Sixty Days.*** Any beneficiary member suspended by reason of nonpayment of an assessment or assessments, or dues, may, within sixty days from the date of such suspension, be reinstated upon the following conditions, and none other, viz.: If not engaged in any of the prohibited occupations mentioned in Section 107 of these laws, he may be reinstated by payment, within sixty days from the date of suspension, of all arrearages of every kind, including assessments and dues, for which he would have been liable had he remained in good standing; provided, however, that he be in good health at the time of making payment to the Financier, with a view to reinstatement. The payment of any such assessments and dues for reinstatement shall be a war-

ranty by such member that he is in good health at the time of such payment. Provided, further, that the receipt and retention of such assessments and dues, in case the suspended member is not in good health, or is engaged in a prohibited occupation, shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his benefit certificates.

*"Section 120. National Council not Bound by an Illegal Receipt.* The National Council shall not be bound by the acceptance of arrears of assessments and dues from suspended members who are not entitled to reinstatement in accordance with the laws of the order. The receiving of such arrears and receipting therefor by any officer of a subordinate council, the National Secretary, or by any other person, or the payment by or on behalf of any suspended member of arrears of assessment and dues with a view of reinstatement, except as provided for in the laws of the order, shall not be binding on the National Council. The failure of any financier to report to the National Council as suspended any suspended member of his Council shall not operate in any case as a waiver of the forfeiture occurring on account of the suspension. The retention by the Financier or by the order of assessments and dues paid by members or for them with a view to reinstatement other than is provided in the laws of the order, either before or after death, shall not constitute a waiver of any provisions of these laws, until a demand has been duly made for their return by such member or his beneficiary or legal representative.

*"Section 120. (a) National Council not Bound by Knowledge of or Notice to Officers or Members of Local Councils.* No officer of this society nor any local council officer, or member thereof is authorized or permitted to waive any provisions of the by-laws of this society which relate to the contract between the member and the society, whether

the same be now in force or hereafter enacted. Neither shall any knowledge or information obtained by, nor notice to any subordinate council or officer or member thereof, or by or to any other person, be held or construed to be the knowledge or notice to the National Council or the officers thereof, until after said information or notice be given in writing to the National Secretary of the order.

"Section 157. *Duties of the Financier.* The Financier shall not knowingly collect or receive assessments and dues from a member who has become suspended for non-payment of the same, or who has been expelled from the order for any cause, if, at the time of tender, the member is not in good health, or knowingly collect or receive assessments and dues on account of a suspended member who is dead at time payment is tendered. The receipt of assessments and dues contrary to the provisions of this section, or any other laws of the order, shall be unavailing in favor of the suspended or defaulting member, and such Financier shall forfeit his membership in the order for such violation."

The certificate issued to the deceased, on which plaintiff relies, provides that the certificate or contract is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the laws of the order, or for any other cause or causes of forfeiture which may hereafter be prescribed by an amendment of its by-laws.

It is apparent from these by-laws, which were a part of the contract between the deceased and the defendant company, that a failure to pay an assessment on or before the last day of the month automatically suspends the member, without any act on the part of the defendant, and all rights under the certificate become forfeited. The July, 1914, payment should have been made, under the strict terms of this contract, during the month of July. It was not paid, nor was payment tendered, until the 6th day of August. Con-

sidering this provision of the policy in force, all rights under the certificate became forfeited automatically on the 1st day of August, and the member was suspended. This is a provision of the policy made for the benefit of the society. Upon this provision, the minds of the parties had met. It was binding on the assured. The company had a right to insist on its strict enforcement. No member whose rights had been so forfeited could be reinstated, except by complying with the provisions of Section 114, hereinbefore set out, and this within sixty days from the date of suspension. His reinstatement might be brought about by payment, within sixty days from the date of suspension, of all arrearages, including assessments and dues, for which he would have been liable had he remained in good standing, provided he were in good health at the time of making the payment with a view to reinstatement. Under the provisions of this section, the payment of any such assessments and dues for reinstatement was a warranty by such member that he was in good health at the time of such payment. It appears that the deceased was not in good health at the time this July payment was made, on the 6th day of August; that he had been sick for several days, and died on the 7th. We start with the proposition that these provisions of the by-laws were binding upon the assured and the plaintiff, and, unless waived by the society, stand in the way of any recovery upon the certificate in this suit. The duty to pay strictly within the time provided in By-law No. 112 rests upon the assured. The consequences that follow a failure to pay within the time stipulated are found within that section. A failure to pay within the month works a forfeiture of rights under the certificate, and a suspension of the member. Under a strict enforcement of the contract, the assured thereafter would have no right under the certificate until reinstated, and his reinstatement could only occur upon a payment of the amounts due the society, for

which he would be liable if not suspended, and the further showing that he was in good health at the time he makes the payment. A payment made for reinstatement is a warranty that he is in good health when the payment is tendered. If the payment had been made in July, in accordance with the terms of the contract, it would be wholly immaterial whether the assured was sick or even dead at the time the payment was made. The indemnity is against death occurring while the certificate is in force. If, at the time of the death, the rights of the assured had been forfeited for failure to pay in accordance with the terms of the contract, then sickness or death would be a material matter for consideration; for in no event then could the assured make the proof entitling him to be reinstated.

The question then is: Were the provisions of Section 112 of the by-laws, in so far as it provides, "The certificate of each member who has not paid such assessment or assessments and dues on or before the last day of the month shall, by the fact of such nonpayment, stand suspended without notice," with further provision, "No right under such certificate shall be restored until it has been duly reinstated by the member complying with the laws of the order with reference to reinstatement," operative against the plaintiff?

As we have said before, if this provision was in full force on the 6th day of August, at the time the payment of the July dues was made, then, by virtue of this provision, the member having been suspended automatically by a failure to pay within the month of July, no rights remained under the certificate that could be enforced by his beneficiary after his death; and before death, no right remained in him except the right to be reinstated as provided in Section 114.

This brings us to the one point in this case: Does a failure to comply with Section 112 stand in the way of recovery in this case, under the facts disclosed in this record?

This provision of the contract was made for the benefit of the society, and, being made for the benefit of the society may be waived by the society. The question, then, is: Did it waive this provision of the policy, so that, on the 6th day of August, the assured was not suspended, and his rights were not forfeited under the contract, at the time the payment for July was made to the society and received by the society?

What was the assured's duty in this case? To pay his dues within the month of July. What was the defendant's right? To have the dues paid within the month of July. Assured's duty was contractual. Defendant's right also rested in the contract. Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of such relinquishment. Defendant's contractual right was to have the premium paid within the limits of the month. The duty of the plaintiff and the right of the defendant were equal. The forfeiture was the consequence only that followed a failure of the assured to perform a contractual duty on which rested the defendant's right to have the duty performed. The right of the defendant to have this duty performed could be waived by the defendant. Was it waived?

The record discloses that, upon the payment of the July, 1914, dues, made on the 6th day of August, 1914, the society issued the following receipt:

"\$5.20. Knights & Ladies of Security, Des Moines Council, No. 616, located at Des Moines, State of Iowa, August 7, 1914.

"Received payment of Charles and Clyde Conkling, Five and 20-100 Dollars payment for the months of July and August."

It appears that Clyde was also a member of this same society, and the receipt was to cover payment for his dues and the dues of the deceased.

Prior to this time, the assured had made payments, and receipts were issued in substantially the above form, days after the date fixed in the contract. Witness the following:

April 15, 1908, for October and November.

May 13, 1908, for April.

July 9, 1908, for June.

September 15, 1908, for August.

October 10, 1908, for September.

November 9, 1908, for October.

December 14, 1908, for November.

January 8, 1909, for December.

February 5, 1909, for January.

March 9, 1909, for February.

May 7, 1909, for April.

June 4, 1909, for May.

July 2, 1909, for June.

August 6, 1909, for July.

September 7, 1909, for August.

November 4, 1909, for October.

December 8, 1909, for November.

December 13, 1909, for December and January.

March 14, 1910, for February and March.

May 12, 1910, for April and May.

June 7, 1910, for June and July.

July 12, 1910, for June and July.

September 14, 1910, for August and September.

November 17, 1910, for October and November.

January 10, 1911, for December, 1910, and January, 1911.

February 28, 1911, for February and March.

July 20, 1911, for June and July.

June 4, 1914, for May and June.

The payment in question was received by the financier of the defendant society on the 6th day of August. Payment was for July and August. These payments were entered on the record of the society on the 7th day of August, 1914, and



receipt issued. The society first learned of the death of the assured on the afternoon of the 7th day of August, or on the morning of the 8th. On the discovery of the death of the assured, the money was returned to the parties sending it, and has been tendered back for the use of the society. This payment was not remitted to the National Council. All other payments made by the assured were remitted to the National Council between the 5th and 12th of the month. At no time when any of these payments were made had the society any knowledge of the then physical condition of Conkling, nor does the record disclose that any inquiry was ever made touching his physical condition. As to delinquent payments, no demand was ever made for a certificate of health, or for any showing as to the then condition of the assured's health. All delinquent payments prior to this one seem to have been made and received, not as for reinstatement, but as for a payment of dues essential to keep the certificate alive. Nowhere in the record does it appear that any of these delinquent payments were ever received or accepted for the purpose of reinstatement. This payment and all other payments seem to have been tendered and accepted as for a payment made within the limits of the right of the assured to make payments and preserve the integrity of his policy: at least, no question was ever made, so far as this record shows, as to the character of the payment, or for what it was paid and received. While the contract provided that these payments should be made within the month, to preserve the integrity of the certificate, the society permitted the assured to make payments after the month, and treated his certificate as still continuing; and it must treat this payment the same. There is no question in this record that any of these payments were made for the purpose of reinstatement, or with the thought that reinstatement was necessary. They were not accepted as for reinstatement, nor does there appear to have been any thought in the mind of

either of the contracting parties that the payments were not made strictly in compliance with the terms of the contract, though not within the time limit of the contract. The course of dealing on the part of the society with this assured was such as to lead a man of ordinary prudence to believe that it was not insisting upon a strict performance of the contract touching the time of payments; and we must assume the assured to have been a reasonable man, and that he too believed, from this course of conduct, that the defendant was not so insisting. If the society, by its conduct, led the assured, as a reasonable and prudent business man, to believe that he could make payments a few days after the time specified in the contract, and avoid forfeiture or suspension, then the conduct of the defendant was a waiver of the strict performance of the contractual duty, and estops defendant now to say that such failure to perform strictly as the contract required worked a forfeiture under the terms of the contract, and that this payment was not made in time. If, by its conduct, it gave assured to understand, and, as a reasonably prudent man, he had a right to understand, that a payment could be made after the expiration of the month in which it was due, and he could thereby preserve the integrity of the certificate and avoid suspension or forfeiture, and he made this payment relying thereon, it is estopped now to say that a payment made in accordance with the understanding so induced by its conduct and the custom which it had adopted in dealing with the assured, was not a payment in time to preserve the life of the certificate. In all these instances, so far as this record shows, the payments were made after the time limit found in the contract, not for the purpose of reinstatement, but for the purpose of continuing the certificate in force, and were received, not for the purpose of reinstatement, but for the purpose of continuing the policy, with all the rights and benefits.

Justice Field, in *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326 (24 L. Ed. 387), in construing a policy practically the same as the policy here, said:

"If, therefore, the conduct of the company in its dealings with the assured \* \* \* has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment."

This doctrine is well pronounced in *Hartford L. & A. Ins. Co. v. Unsell*, 144 U. S. 439 (36 L. Ed. 496), in which the court approved an instruction to the effect that:

"Nobody is bound to enter into any contract. It is perfectly voluntary on the part of either side; but, when they once enter in, the terms of the contract, as expressed in the writing, control. The plaintiff comes in, however, and says: 'Conceding that this contract reads in this way, the company by its conduct waived the necessity of a strict compliance. She does not say the company so said to her or her husband, 'We do not insist upon this, we waive this;' but she says that the company so acted, so conducted itself in its dealings with her husband, that he, as a prudent, reasonable man, did believe, and had the right to believe, that payment on the very day specified would not be insisted upon. Of course, we speak by our actions just as much as we do by our words; and, although there may be no spoken word—no written word—declaring a waiver, yet it may be that a man, by his conduct, his course of dealing, justly and fairly leads the other party to believe that he does not care about a strict compliance. \* \* \* It did, when her husband was alive and well, take the dues from him after the time specified, and permit the policy to continue in

force, and that it did so until he had a right, as a reasonable man, to believe, and did in fact believe, that that was to be the rule in the future."

It appears that, in this *Unsell* case, some notice was given the plaintiff in some instances that the money was accepted as for reinstatement, and with this thought in mind, the *nisi prius* court gave the following instruction:

"But the plaintiff says that, beyond these receipts of money after the day specified, there were instances in which money was received without any such notice. Now the question comes up, in respect to that, Was there such a continuance of business—was the whole course of business, from the commencement to the close, such—that from this and that, and from all the receipts and all the transactions, he had a right to believe and did believe that the question of health, even, would not be considered, and that it would be willing to take his money shortly after it had become due, without inquiry as to his health? If so, that makes a waiver. If the company, by its conduct, led him, as a reasonable and prudent business man, to believe that he could make payments a few days after, sick or well, it cannot turn around now and say, 'You did not pay at the time.' I cannot say to you, as a matter of law, that one receipt, after the time specified, would make a waiver, or that fifty would. It is not in the numbers. The question is for you to consider and determine from all of them, and from the whole course of business, whether, as a prudent business man, he had a right to believe that it was immaterial whether he paid on the day or a few days later. If the course of conduct was such that he had a right to believe that he could pay only in good health, then there was no waiver applicable to the case at bar. It must have been such a course of conduct as would lead a reasonably prudent man to believe that the company was willing to take payment, sick or well."

In the case at bar, there is no evidence that the company ever notified the assured that it received as a reinstatement any of the delinquent payments hereinbefore referred to, or advised him that it would be held as for reinstatement upon making proofs of health. The receipt given in each instance was substantially the same as the receipt given at the time of this last payment on August 6th; and the receipt itself shows, and, therefore, all receipts for delinquent payments show, that they were received, not for reinstatement, but as for a payment of dues in compliance with the requirements of the contract. Forfeitures are not favored in law. As said by the Supreme Court in the *Unsell* case:

"That courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted. \* \* \* Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity in his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

In *Cotton States Life Ins. Co. v. Lester*, 62 Ga. 247, the policy provided that the premiums were to be paid quarterly on the 3d of August, November, February, and May of each year; and, in the event of a failure to so pay, then the policy was to be null and void. The policy was issued in 1871, and the insured died in 1875. No payment was made on the day specified. The last premium, which should have been paid on May 3d, was not paid until the 17th of May. The receipt issued for this payment contained the words "And policy holder in good health," after the word "countersigned" in the following clause thereof:

"But this certificate shall not be binding on the company until the amount of the premium is paid and the receipt countersigned."

The court said:

"Substantially but one question is made, and that is. Does the fact that the continued habit of the company in receiving the premiums on days different from those specified in the policy, amount to a waiver of punctual payment on the part of the company, and was Mrs. Tufts' [the insured's] payment on the 17th day of May, therefore, as binding on the company as if made on the 3d day of May, the day the policy required it to be made? If it had been made on that day, of course, health at that time could not vitiate. Was she authorized by the course of dealing between the company and herself to consider that the time was not regarded by them as of the essence of the contract, and that payment on the 17th was as good as if made on the 3d? If so, it did not matter whether she was sick or well on that day, because it would not have made any difference in her right to pay on the 3d whether she was sick or well. Death, and bad health which causes death, are the very things against which the company insures, and it would not do to allow them to refuse payment of the premiums or to predicate a defense on change of health. The nonexaction of punctual payment of these premiums had become the habit of the company, so far as this woman was concerned.

\* \* \* For the first two years, she paid four times a year, before due. For the last two, she paid four times a year after due, and not one word escaped the company of warning to her of any sort. \* \* \* Upon principle, we think that, though time be of the essence of the contract of insurance, and punctual payments essential to their prosperity, yet they may, by their conduct, waive it, and thus produce such an impression upon those dealing with them that it would be unjust to permit them to invoke the prin-

ciple to their aid; and that, in such a case as this, when the day seems never to have been insisted upon, but payment in a reasonable time theretofore or thereafter had been always allowed, that the company should be held to be estopped from engrafting on this last receipt a condition never exacted before."

See, also, *Aetna Life Ins. Co. v. Fallow*, 110 Tenn. 720 (77 S. W. 937).

In *De Frece v. National Life Ins. Co.*, 136 N. Y. 144 (32 N. E. 556), in discussing a question similar to the one here, the court said:

"It was entirely competent for the parties to modify the terms of the original contract with respect to the time of payment and the effect of a failure to make punctual payment, and the evidence is sufficient to support a finding that the defendant agreed, subsequently to the execution of the contract, to accept payment of the premiums quarterly, or within a reasonable time thereafter, and that the policy should continue in force until such payments were made, providing they were not unreasonably deferred."

It is apparent that an implied agreement not to insist upon forfeiture for a failure to pay within the time, where the agreement can be fairly implied from the conduct of the parties, is just as effectual as though it were expressly made and entered into by the parties.

In *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10 (7 Am. & Eng. Ann. Cases 382), it appears the *nisi prius* court gave this instruction:

"Now, if you find from the evidence that she [the insured] made all of the payments of these monthly installments of premium towards the latter part of the month, after the making of the new arrangement, and that the company received them without objection and without calling her attention to the fact that they were payable sooner, and if you further find that, by such course of dealing, she, as a

prudent person, was led to believe and did believe that she was making these payments according to the terms of this new arrangement, by making them at any time during the month,—if you find that she so understood the new arrangement, and that the custom and conduct of the company in receiving these payments without objection were calculated to lead an ordinarily prudent person to so understand and believe, and that she was thereby induced to rest in that belief and understanding at all times previous to her death, and that, in consequence of such conduct on the part of the company, she had good reason to believe, and did believe, up to that time, that she had paid all these installments as they became due, and that the last one was then overdue,—if you find all these facts from the evidence in the case, then I instruct you that the company is estopped and has waived its right to insist upon the forfeiture of this policy by reason of the nonpayment of the last installment of premium, and in that case your verdict should be for the plaintiff.”

The court, on appeal, said:

“This instruction seems to us to be so fully and completely in accord, not only with the established principles of law, but with the universally accepted principles of good morals, that it is difficult to make an argument in its defense.”

This instruction was given and approved by that court, notwithstanding the fact that the certificate provided that the nonpayment of premium when due should forfeit the premiums paid on the policy and terminate the liability of the company thereunder, and notwithstanding it provided further that “the acceptance of any premium after it is due is to be considered an act of courtesy only, and shall not be deemed as establishing a custom or as waiving or disturbing any of the conditions as to payment of premiums thereafter due.” The court further said:



"So it will be seen that this woman, under the strict construction of the contract relied upon by the appellant, during all of these nine months in which they were receiving and appropriating ten dollars a month from her, was actually insured but a very few days. For, during the months of January, February, June, July and August, she was not insured at all, or at the most but for a few hours in each month, and during the other months, as will be seen, her time of insurance amounted to a very few days. It would be inequitable to allow the company to receive money under such circumstances and disclaim any responsibility to the insured."

See *Appleton v. Phoenix Mut. Life Ins. Co.*, 59 N. H. 541; *Goedecke v. Metropolitan Life Ins. Co.*, 30 Mo. App. 601; *Thompson v. St. Louis Mut. Life Ins. Co.*, 52 Mo. 469; *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531 (73 N. E. 202). In this case it is said:

"It is abundantly settled that an insurance company will be estopped to insist upon forfeiture if, by any agreement, either expressed or implied, by the course of its conduct, it leads the insured honestly to believe that the premiums or assessments will be received after the appointed day."

*Hanley v. Life Assn. of America*, 69 Mo. 380; *Suess v. Imperial Life Ins. Co.*, 86 Mo. App. 10; *Garber v. Globe Mut. Life Ins. Co.*, 4 Ins. Law Journal 307; *Mayer v. Mutual Life Ins. Co.*, 38 Iowa 304; *Bricker v. Great Western Accident Assn.*, 161 Iowa 61. In the last-named case it is said:

"Conceding that, by the terms of the contract of insurance, an obligation rested on the plaintiff to pay his installments promptly and strictly on the day fixed by the contract, conceding that all rights under the contract may be denied by the company for a failure to so do, conceding further that the plaintiff failed to perform the conditions of

the contract as to payment, and that without further notice the company would be justified in resisting any claim made by the plaintiff for benefits under the contract, by reason of such breach, yet the right of the company to so insist may be waived by expressed words of waiver, or by such a course of conduct in respect to the matter of payment as led the plaintiff, as a reasonably prudent and cautious man, to think that he could make the payments after the date fixed, as well as on the date fixed. The question here is whether a prudent man had a right to believe that, so far as the company was concerned, it was immaterial to it whether he paid on the day upon which the installments became due or later, providing he paid it within a reasonable time. The question is, Was there such a course of conduct in the business dealings between the plaintiff and the defendant, in respect to this certificate and the time of payment, as justified the plaintiff in the belief that the company was willing to take the payments at a date later, and would not forfeit the contract for a failure to pay on the date fixed; or, in other words, had the plaintiff a right to believe, from the course of conduct between the parties, that the defendant would not claim a forfeiture of the contract or right under the contract, because of a failure to pay strictly and upon the terms of the contract? There was evidence introduced on the part of the plaintiff tending to show that, on several occasions, he had been permitted by the company to pay his installments on a date later than that fixed by the contract; that the same was accepted by the company without question or objection. It appears further, from the evidence of the plaintiff, that this particular assessment in question was not paid on the first day of May.

\* \* \* It is contended, however, by appellee that, under the terms of the policy, the receipt of payment after the time fixed in the certificate for payment did not waive any of the provisions of the policy, for the policy itself so de-

clared; that the statement on the back of the receipt issued was sufficient to notify the certificate holder that the defendant did not, by accepting the payment, intend to waive the provisions of the policy made in its favor. The policy provides that the acceptance of past dues or delinquent calls is optional with the association, and shall not be a waiver of the forfeiture of the policy, but shall be construed, and have the same effect, as if a new application, the same as the last one, were made, and a new policy issued as of the date of the payment. \* \* \* In all these cases, it appears that, no matter when the payment was made, it was accepted by the company as a payment for indemnity from the first day of the month, or from the date on which the payment should have been made by the assured. Instead of treating the payments as made under a new policy, issued on the date of the payment, upon which the right of indemnity alone could be predicated, defendant in every case receipted for the payment as made upon the old policy, and received it as a payment made, not only for the time to come, but for the past."

We think, therefore, the court was justified in holding that the previous dealing between these parties, touching the time of payment of dues, was of such a character (supposing the assured to be a man of reasonable prudence and caution) as to lead him to believe that the company was not insisting upon a strict performance of the contract, and that it was willing to receive payments at any time after the time fixed in the contract, if made within a reasonable time, and that payments so made held the contract in force; that defendant's previous conduct in accepting payments made after the time fixed in the contract was a waiver of its right thereafter to insist that the contract was forfeited by the failure to make payment strictly and in accordance with the terms of the contract; that it is now estopped to say that this payment was not made in time to keep the con-

Commission, within the range of its discretion, has formally held that, under stated conditions, the *waiver* of such provision actually worked for *equality* between shippers, while the literal enforcement of said provision actually worked a discrimination.

**GARNISHMENT: Time of Perfecting Appeal.** Attachment proceedings and garnishments thereunder are collateral to the main action and are carried down by a final judgment against the plaintiff in the main action, and are not preserved for review on appeal unless intention to appeal is announced at the time of such adverse judgment, and unless appeal is perfected within two days thereafter. (Sec. 3931, Code, 1897.)

**APPEAL AND ERROR: Non-Ruling in Trial Court.** A question not presented to, and ruled on by, the trial court may not be reviewed on appeal. So held as to a controversy concerning the scope of an appearance in the trial court.

**APPEAL AND ERROR: Directing Judgment in Lower Court.** When all questions of law and fact are, on plaintiff's appeal, fully settled in favor of plaintiff's recovery, a reversal will be entered with orders to the lower court to enter judgment; otherwise, an order for a new trial will be entered. So held in an action against a carrier for damages to a shipment of goods.

**CARRIERS: Damages—Measure.** In an action for damages to a specific part of a shipment, the carrier may not contend for a measure of damages which would apply the shipper's profits on the undamaged part to the payment of the damage caused by the carrier.

**CARRIERS: Initial and Subsequent Carriers—Liability.** Principle recognized that an initial interstate carrier is liable for all damages caused, either by its own negligence or by the negligence of a connecting or delivering carrier; while a delivering carrier is liable only for damages caused by its own negligence.

**CARRIERS: Damages—Presumption.** Principle recognized that a shipper is entitled to the benefit of the rebuttable presumption that the delivering carrier received the goods in as good condition as they were in when received by the initial carrier.

**CARRIERS: Perishable Goods—Damages—Burden of Proof.** Principle recognized that the shipper of perishable goods, in an action against a delivering interstate carrier, has the burden to prove that the goods were delivered to the initial carrier in such condition that damages thereto could only occur by reason of some negligence of the carriers'.

*Appeal from Wapello District Court.*—SENECA CORNELL,  
Judge.

MARCH 6, 1918.

REHEARING DENIED MAY 17, 1918.

ACTION for damages for loss and injury in certain shipments of berries. The petition was in four counts, and claimed injuries, respectively, on four carload lots. The case was tried to the court without a jury. There was a finding and judgment dismissing the petition, and the plaintiff has appealed.—*Reversed.*

Chester W. Whitmore, for appellant.

Hellsell & Hellsell, McNett & McNett, J. L. Minnis, N. S. Brown, Blewett Lee, and W. S. Horton, for appellees.

EVANS, J.—The plaintiff was engaged, at Ottumwa, in the business of shipping and handling fruit and vegetables. Each count of its petition declares for damages to a carload shipment of strawberries. The first three shipments declared upon in the first three counts of the petition originated at Independence, Louisiana, and were shipped over the line of the Illinois Central Railroad Company, as the initial carrier, and over the line of the Wabash Railroad Company as the terminal carrier. The fourth car originated at Judsonia, Arkansas, and was shipped over the line of the Iron Mountain Railway as the initial carrier, and over the line of the Wabash as the terminal carrier. All deliveries were made at Ottumwa by the Wabash Company. As to the fourth shipment, the initial carrier is not before the court. As to the other three shipments, both the initial and the terminal carriers are impleaded. Each shipment was made in a specially equipped car. The first car was shipped on or about April 29, 1912, and is known in

1. CARRIERS:  
written claims  
for damages.

the record as No. 56536; the second car involved was shipped on or about April 27, 1913, and is known in the record as No. 12470; the third car was shipped on or about May 1, 1913, and is known in the record as No. 56610; the fourth car was shipped on or about May 22, 1913, and is known in the record as A. R. T. 9068. The foregoing initials refer to the American Refrigerator and Transportation Company. In the consideration of the case, it will be more convenient for us to refer to these cars as Nos. 1, 2, 3, and 4, in the order of their dates of shipment.

These shipments were all made under uniform bill of lading, standard form, approved by the Interstate Commerce Commission. It contained the following provision:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

The defendant set up the foregoing provision of the bill of lading, and alleged a breach thereof as a defense to the action. The trial court sustained such defense. The correctness of this holding is the controlling question in the case upon all counts. As to the foregoing defense, the plaintiff both denies and avoids. That is to say, it contends: (1) That it did give notice in writing, which was a sufficient compliance with the requirement of the bill of lading; and (2) that the defendants waived any further or more formal compliance with such requirement.

The facts pertaining to the attempted compliance with this requirement of the bill of lading which pertain to shipments Nos. 2, 3 and 4 are practically identical; whereas those pertaining to shipment No. 1 are somewhat different. We shall, therefore, consider together the facts pertaining

to the last three shipments, and will give these our first consideration.

I. Shipment No. 2 was received at Ottumwa on April 27, 1913, in bad condition. A joint inspection of the same was immediately had by Jacobs, the station agent of the railway company, and Veitch, for the plaintiff. They joined in an inspection report upon blank forms of the railway company, as follows:

"Bracing broken, crates pushed forward, 50 crates in doorway broken, contents partly out on floor, contents shows rough handling."

The same notation above quoted was endorsed by Jacobs, the railway agent, upon the freight bill of the plaintiff, and delivered to the plaintiff. On the following day, the plaintiff delivered to the agent of the delivering carrier the following notification:

"Agent Wabash, City.

"Dear Sir: This is to notify you that, in due time, we will file a claim against your company for damages sustained on car berries P F E 12470 from Independence, Louisiana, to Ottumwa, arriving April 27th, 1913, as per the inspection report of which you have been furnished a copy.

"Yours truly,

"E. H. Emery & Co."

The third shipment in question arrived at Ottumwa on May 1, 1913, in bad condition. A joint inspection thereon was immediately had by one Williams for the railway company, and Veitch for the plaintiff. They joined in a report upon the blank forms of the company, which included the following:

"Bracing broken; crates shifted and broken; crates piled up in doorway; with part contents on floor: 100 c broken.

"Who was present when you made above inspection:  
L. C. Williams.

"Describe its appearance and condition on such examination. Contents show very rough handling."

The foregoing report was also entered upon the back of the plaintiff's freight receipt by the local agent of the delivering carrier, as follows:

"Bracing broken, crates shifted and broken, crates piled up in doorway with part of the contents on the floor; 100 crates broken; contents show very rough handling.

"Received payment.

"Thos. H. Jacobs, Agent.

"Per E. R. H., Cashier."

On the same day, the plaintiff delivered to the agent of the delivering carrier the following notice:

"Agent Wabash, City.

"Dear Sir:

"This is to advise you that we will file claim against your company for damages on C. & F. D. X 56610 strawberries from Independence, Louisiana, arriving in Ottumwa, May 1, 1913, at 1:20 P. M. We will make this claim on the basis that the bracing was broken, crates shifted and broken, crates piled up in the doorway, with part of the contents spilled on the floor. One hundred more or less broken. This was inspected by your Mr. L. C. Williams and our Mr. P. E. Veitch, a copy of the inspection report has been furnished you.

"Yours truly,

"E. H. Emery & Co."

Shipment number four arrived at Ottumwa on May 22, 1913. The damaged condition of this car was claimed to be the result of negligent refrigeration, and not of rough handling of the car. The berries were badly decayed. A joint inspection was also had of this car by representatives of both parties. They joined in a report, which contained the following: "Contents show every evidence of car being out of ice en route; contents show heavy decay." The



foregoing quotation was also entered by the local agent of the delivering carrier upon the plaintiff's freight receipt. On the following day, the plaintiff delivered to the agent of the delivering carrier the following notice:

"Agent Wabash, City.

"Dear Sir:

"This letter is to notify you that there will be a claim filed for insufficient icing and poor refrigeration on car berries A. R. T. 9068 arriving at 2:45 P. M. May 22, 1913. The berries were in fearful condition, the cases mouldy, the fruit leaking throughout, the cases showing every evidence that the car had not been properly handled en route. From the fact that the car had been iced at Moberly and St. Louis would prove the fact that the car was warm upon its arrival at St. Louis. In due time, we will file a claim against your road as the delivering line. You have been furnished with a copy of the inspection report.

"Yours truly,

"E. H. Emery & Co."

The plaintiff did not, within four months, present a claim in writing, except as shown in the foregoing. Our first question, therefore, is, Did the foregoing substantially comply with the requirement of the bill of lading that claims for damages "must be made in writing?" The question presented is controlled by the Federal law. We are not at liberty, therefore, to deem our own previous decisions as authoritative. These would, without doubt, require an affirmative holding. It will be noted that the written notices or letters delivered to the agent by the plaintiff spoke in the future tense. Two of them stated that claim would be filed "in due time." The argument for the appellee is concentrated largely upon this feature of the form of the notice, in that it indicated a purpose to file, in the future, a more formal claim; and that it thereby indicated that the plaintiff itself did not deem the writing as a sufficient compli-

ance with the requirements of the bill of lading. The plaintiff did, later, in each case, file a somewhat more formal claim, but not within four months. This argument necessarily assumes that the claim made might have been sufficient if it had spoken in the present tense. We are impressed that such distinction is more grammatical than substantial, in a legal sense. The bill of lading specified no details as to the form in which a claim should be made. It only required that it be a claim for damages, and that it be in writing. This was in writing. In the light of the joint inspection report and the notation by the agent upon plaintiff's freight receipt, the notice could hardly be construed as other than a claim for damages. We are relieved, however, from the necessity of passing upon the question as an original one. We deem the question here presented as having been clearly determined by the United States Supreme Court in *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190. In that case, a carload of flour had been damaged by water. Some telegrams passed between the consignee and the railway company officials concerning the nature of the damage; whereupon, the consignee sent to the railway company the following final telegram:

"We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment, as we cannot handle it."

The bill of lading had precisely the same provision as is under consideration in the case at bar, and it was pleaded by the railroad company in defense. It was held that the telegram was a sufficient compliance with this requirement of the bill of lading. In that case, as in this, the telegram spoke in the future tense. The amount of damages was not specified. No more formal claim than the telegram was made within four months. It is urged by the appellee that the case is not controlling, because it involved the entire carload, and because it involved a question of delivery.

What other questions were involved in that case are not so material for our consideration. It was involved whether the telegram set forth was a sufficient compliance with the particular requirement of the bill of lading which is involved herein. We quote from the opinion as follows:

"In the preceding telegrams which passed between the parties, and are detailed by the state court in stating the facts, the shipment had been adequately identified; so that this final telegram, taken with the others, established beyond question the particular shipment to which the claim referred, and was, in substance, the making of a claim, within the meaning of the stipulation,—the object of which was to secure reasonable notice. We think that it sufficiently apprised the carrier of the character of the claim; for, while it stated that the claim was for the entire contents of the car 'at invoice price,' this did not constitute such a variance from the claim for the value of the flour as to be misleading; and it is plain that no prejudice resulted. Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency, and it is to be construed in a practical way. The stipulation required that the claim should be made in writing; but a telegram which, in itself, or taken with other telegrams, contained an adequate statement, must be deemed to satisfy this requirement."

We think the case is authority upon the question before us. It has been so treated by a number of other state courts of last resort in similar cases. *Shark v. Great Northern R. Co.*, 37 N. D. 342 (164 N. W. 39); *Baltimore & O. R. Co. v. Leach*, 173 Ky. 452 (191 S. W. 310); *New Orleans & N. E. R. Co. v. Wood*, 112 Miss. 614 (73 So. 615); *Illinois Cent. R. Co. v. Bauer*, 114 Miss. 516 (75 So. 376); *Snyder v. King*, (Mich.) 165 N. W. 840. See, also, *Southern Pac. Co. v. Stewart*, 147 C. C. A. 630 (233 Fed. 956). The inspection report and the notation upon the freight receipt made by

the railroad agent specified, in each case, the number of crates that were destroyed. The plaintiff has sued for the value of just that number of crates, so specified, respectively, in each case, at invoice prices plus freight paid and expense of sorting, and for nothing more. The plaintiff makes no new demand in its suit, but confines itself strictly to the damages as ascertained in the inspection report joined in by the railroad company's agent. We hold, therefore, that the requirement of the bill of lading relating to the method and time of making claim for damages was sufficiently complied with.

II. The evidence relating to shipment No. 1 and the damage thereto is more meager than that considered in the foregoing division. This shipment arrived at Ottumwa on May 4, 1912. The car and the berries contained therein were damaged, apparently, by rough handling. At the request of the plaintiff, the local agent of the delivering carrier immediately made an inspection of the contents of the car and reduced his report to writing, and endorsed the same upon the back of the freight receipt over his signature. Such endorsement was as follows:

"Blocking in door broken, one end of car. Contents jammed also in door. Estimated 150 crates smashed. Part of contents on car floor."

Plaintiff sues herein for the loss of 150 crates of berries, as specified in such report. The plaintiff did not, in this case, deliver to the railroad agent a written notice of a claim for the damages, as it did in relation to the other three shipments. It is contended for appellant that such a written notice was rendered entirely unnecessary by the fact that the railway agent had already made the inspection and ascertained the loss, and by the further consideration that the plaintiff is in no manner disputing the inspection report of the railroad agent. If the plaintiff had delivered to the railroad agent a writing similar to those considered

in the first division hereof, it could have served no other purpose than to advise the agent of the same facts of which he had already, in writing, acknowledged not only notice but knowledge. If the purpose of the requirement in the bill of lading was only to give prompt notice, and thereby to enable the railway companies to investigate the facts, then there is great force in appellant's contention. That such is the purpose of such bill of lading requirement is declared in the opinion in the *Blish* case. When the local agent of the delivering carrier made his inspection report and endorsed the same upon the freight receipt, he so endorsed it, not only over his own signature, but over the stamped signature of the higher officials. It was his duty to have reported to the higher officials the record thus made

2. EVIDENCE:  
agent report-  
ing to his  
principal.

by him. We see no reason why he should not be presumed, *prima facie* at least, to have so reported. This presumption receives confirmation in the subsequent conduct of the railroad officials. In the subsequent negotiations and correspondence pertaining to this claim covering a period of more than 18 months, the claim department raised no question as to the method or time of presentation of the claim. There is respectable authority to the effect that, where the proper agent of a railroad company has inspected the injury, and especially if he has reported the same in writing to the higher officials, this is a sufficient compliance with the requirement of a bill of lading that a claim shall be made in writing. In the recent case of *Snyder v. King*, (Mich.) 165 N. W. 840, the question of damages sustained by injury to animals was involved. The owner advised the railroad agent that claim would be made. The agent examined the extent of the damage and reduced his finding to writing, in the form of a letter to his superiors. The requirement of the bill of lading was that claim of damages should be

made by verified claim in writing within five days. The plaintiff presented a formal claim after the expiration of the five days. It was held by the Supreme Court of Michigan that the action of the agent sufficiently fulfilled the requirement of the bill of lading, and that it was not essential that the owner of the horses should himself have presented the writing. The opinion in this case purports to be guided by the reasoning of the United States Supreme Court in the *Blish Milling* case, *supra*. In *Hinkle v. Southern R. Co.*, 126 N. C. 932 (36 S. E. 348), the owner of cattle injured in shipment, in receipting for the delivery of his cattle, wrote upon the receipt, over his signature, the words "under protest." The North Carolina court held this to be a sufficient compliance with the requirement that claim should be made in writing. In *St. Louis, I. M. & S. R. Co. v. Cumblie*, 101 Ark. 172 (141 S. W. 939), the consignee of a shipment of peaches refused to accept the same because of their damaged condition. The railway agent was present in an examination thereof. The consignee sent a telegram to the consignor, advising him of his refusal to accept the peaches because of their damaged condition. A copy of the telegram thus sent was delivered by the consignee to the railroad agent. This was held by the Arkansas Court to be a sufficient compliance with the requirement of the bill of lading, which was similar to the requirement under consideration herein. In *Kelly v. Southern R. Co.*, 84 S. C. 249 (66 S. E. 198), the Supreme Court of South Carolina held that, where the injury to goods is examined by the carrier's agent, for the purpose of ascertaining its extent, the requirement limiting time for filing a claim has no application. In *Shama v. Chicago, M. & St. P. R. Co.*, 128 Minn. 522 (151 N. W. 406), a box of merchandise was missing from a shipment, and this fact was noted in writing by the railway agent and delivered to the consignee plaintiff therein. This was held by the Supreme Court of Minnesota to be a suffi-

cient compliance with the bill of lading requirement under consideration here. In line with the foregoing holdings is that in the case of *Southern Pac. Co. v. Stewart*, 147 C. C. A. 630 (233 Fed. 956), where it is held, in substance, that actual knowledge of the facts by the railroad agent dispenses with the necessity of formal notice. In *Shark v. Great Northern R. Co.*, 37 N. D. 342 (164 N. W. 39), in a case where the owner of property made oral claim, which the railroad agent put in writing, and upon which the higher officials of the railway company acted, and it was held that this was sufficient compliance with the requirement for a written claim. Several of the foregoing cases here reviewed were decided subsequently to the *Blish Milling* case, and the conclusions therein purported to be reached pursuant to the holding and reasoning in the *Blish* case. We think it must be said, therefore, that the weight of authority has set quite definitely in the direction here indicated. The validity of this requirement of the bill of lading has been sustained on the ground that its purpose is reasonable, and in harmony with the spirit of the Interstate Commerce Act. If the purpose were not such, the condition itself would be disregarded by the courts as an infringement upon the statute. It is deemed reasonable that, in the event of a claim for damages to a shipment, it shall be brought to the attention of the carrier with reasonable promptness, in order that it may have opportunity to investigate while the facts are fresh and evidence available. Where, in a given case, therefore, it is made to appear that an immediate inspection before delivery has been had by the carrier's proper agent, and the result of the inspection has been reduced by him to a formal writing, and the same delivered to the shipper, and presumptively to the higher officials of the carrier, and where the shipper confines his claim to the exact damage found by the inspection report; why is not the reasonable purpose of the requirement thereby met, and

what is there left of such reasonable purpose for its further operation? To insist upon a further writing is to insist upon the merest technicality, and to render the condition itself unreasonable, under such circumstances. This holding doubtless carries us a little further than the actual holding of the court in the *Blish* case, but it is in harmony with the reasoning thereof. Counsel for appellees urge upon our attention at this point *St. Louis, I. M. & So. R. Co. v. Starbird*, 243 U. S. 592. We find nothing in the opinion therein running counter to the foregoing. It was simply held there that mere verbal notice to a dockmaster of the generally bad condition of a car of peaches was not a compliance with the requirement of the bill of lading, and did not meet the reasonable purpose thereof. We are constrained, therefore, to hold that the requirement of the bill of lading was sufficiently complied with as to this shipment, as well as to the others.

III. The question of waiver has been quite fully discussed in the briefs. In view of our conclusion reached in the foregoing division, it is perhaps not very necessary that we should deal with such question, and we shall do so only briefly, and only as it pertains to the first shipment. Disregarding, for the moment, the question of whether it was competent for the railroad company to waive the provision, and for the plaintiff to accept a waiver, because of the provisions of the Interstate Commerce Act, we may say that waiver by the railroad company of this requirement of the bill of lading abundantly appears in the record. The plaintiff presented its formal claim December 4, 1912. It went to the claim department, and was marked "O. K." and "Voucher," and returned to the local agent, who called upon the plaintiff and required information and data as to the amount of the original invoice and the account of sales of the undamaged goods. These were furnished. More or

3. CARRIERS:  
bill of lading  
requiring writ-  
ten notice,  
etc.: waiver.



less correspondence ensued between the plaintiff and the claim department, wherein no question was ever raised as to a failure to comply with the requirements of the bill of lading in the presentation of the claim, until February, 1914. The fact of waiver, therefore, was proved without dispute. Whether the waiver can be recognized by the courts, and thereby given effect, is a more difficult question. If not, it is because such recognition is forbidden by public policy and the Interstate Commerce legislation. It is not because the defendant may repudiate the waiver, as a matter of right. It is the intent of the Interstate Commerce Act to abolish and prevent all preferential treatment and discrimination on the part of railroad companies toward their patrons. Privileges and generosities may not be extended to one and withheld from another. To that end, publicity of tariffs and privileges is provided, and departures therefrom are not tolerated. The form of the bill of lading in this case was duly published, and was duly approved by the Interstate Commerce Commission. *Prima facie*, therefore, public policy forbids waivers of its requirements, as tending to create the favoritism and discrimination which the Interstate Commerce Act was intended to prevent. This is the reason, and the only reason, for a refusal of the courts to give recognition to such waiver. Such was the reasoning adopted in the *Blish Milling* case, *supra*, and in *Missouri, K. & T. R. Co. v. Ward*, 244 U. S. 383.

A somewhat anomalous situation, however, is made to appear in this record. By virtue of certain orders of the Interstate Commerce Commission, promulgated and published in February and March, 1914, and duly pleaded and proved herein, it is made to appear that the particular requirement under consideration herein had not been universally adopted by the railroad companies, and that the same was not in force at all in certain sections of the country; and that its enforcement in other parts of the coun-

try worked the very discrimination which the Interstate Commerce Act had sought to avoid. The ruling thus promulgated was, in part, as follows:

"For the purpose of promoting uniformity as to the substance and form of bills of lading, the carriers operating generally in official and western classification territories, after numerous conferences with shippers and this Commission, covering a considerable period of time, agreed upon what was designated as the 'uniform bill of lading,' which, upon final submission to the Commission, was, in a report announced June 27, 1908, recommended by it for use among all carriers. 14 I. C. C. 346. In that report, it was indicated that the Commission would not, at that time, undertake to order the carriers to use this form of bill of lading, and it was made clear that the recommendation thereof was to be understood as subject to such modification or change as might be found necessary, either by experience or upon further investigation. The form and contents of the bill of lading thus agreed upon by shippers and carriers, and recommended by the Commission, was adopted by most of the carriers in the territories mentioned, and its provisions embodied in their freight classifications, which were published and filed with the Commission, thus becoming a part of their established tariff schedules. Among these provisions was the following (Section 3, Paragraph 3): 'Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable.' It has been disclosed by investigation and otherwise that, during much of the period since these provisions became part of the tariff schedules of said carriers, the provision above quoted has, to a greater or less extent, been disregarded by

most or all of them, for various causes. In many instances, in the establishment of commodity rates they have not made the proper reference to this provision published in their classifications so as to make it applicable to such commodity rates. In this respect, again, there appears to have been no uniformity of practice. The observance and enforcement of this limitation as to the time for presenting to the carriers claims for loss of or damage or delay to freight in some cases, and the waiver or disregard of it in others, result, of course, in widespread and serious discrimination in the territories mentioned. The carriers in the south did not generally adopt the so-called 'uniform bill of lading,' but adopted instead another form, known as the 'standard bill of lading,' which contained many features, including this provision, common to both. These carriers, however, did not make the provisions of their bill of lading a part of their classification or tariff schedules, and there does not appear to be much cause of complaint in this respect in that territory. The representatives of carriers and shippers alike, appearing in a general proceeding of inquiry respecting the matter of bills of lading now pending before the Commission, have joined in a request for the Commission's approval of a waiver by the carriers of the above provision, limiting the time within which claims of the character referred to might be presented to the carriers, with respect to all such claims presented prior to December 1, 1913, that were not presented within the four-months period, and also all claims accruing within two years prior to the date of this report which have not been presented to the carriers, provided such claims are presented to the carriers on or before April 1, 1914. It is urged that a waiver of this four-months limitation provision to the extent indicated is the only course that will prevent or cure the discrimination otherwise resulting. This is evidently true." 29 I. C. Com. Rep. 417.

It also promulgated a ruling to the effect that a written notice of a claim should be the equivalent of the presentation of a claim.

If the foregoing order of the Interstate Commerce Commission can be regarded as authoritative for any purpose, it is, by its terms, applicable to each and all of the shipments involved herein. It is naturally urged by the appellees that their rights were vested, and that no order of the Interstate Commerce Commission could relate back and affect such rights. The argument is doubtless sound, so far as any actual rights of the appellees are involved. As already indicated, however, it is not a matter of right to the appellees to repudiate their waiver, if waiver there was. They are protected at that point, if protected at all, by the operation of a rule of public policy. If the recognition of a waiver tends to discrimination, it will not be recognized by the courts. If it does not so tend, it will be recognized. The Interstate Commerce Act has conferred upon the Interstate Commerce Commissioners a certain power of discretion in details which is to be used in aid of the practical purpose and operation of the statute itself. The approval of the form of a bill of lading is within the power thus conferred upon such board. It will be seen, from an examination of the ruling promulgated, that the enforcing of the provision here under consideration had itself become a discrimination, as between shippers, and that such discrimination could be avoided only by a present waiver of such requirement, for a limited time. We think that the ruling thus promulgated by the Interstate Commerce Commission was within its power, and that it was authoritative as a finding that a waiver of such requirement did not, under existing conditions, tend to create discriminations; and that such waiver tended to uniformity and to the avoidance of discrimination. In the presence of this fact so found by this tribunal, we ought not to say that we will not recognize

a waiver, duly established as between the parties, as being forbidden by public policy. Our duty is further emphasized by the affirmative finding that the enforcement of the provision works a discrimination. In the presence of such fact, so found, public policy would forbid recognition of the bill of lading requirement itself. The waiver having been proved, we think, therefore, that public policy does not forbid our recognition of it. Finally, we may say that the proof of waiver is abundant as to each shipment, and that our conclusion herein renders the waiver available to the plaintiff as to each count of its petition. The condition of the bill of lading thus alleged to be waived was one in the nature of forfeiture. In such cases, the courts find a waiver more readily than when the substantial essence of a contract is involved. Cases on this subject are legion, from every appellate jurisdiction, and it would be idle to sustain the proposition with a citation of authority. In *Hudson & Co. v. Northern Pac. R. Co.*, 92 Iowa 231, 235, the rule was stated briefly as follows:

"Any agreement, declaration, or course of action on the part of him who is to be benefited by the contract which leads the other party to believe that, by conforming thereto, the forfeiture will not be incurred, will and ought to estop the promisee from insisting on the forfeiture."

And again:

"'But it may be broadly asserted that if, in any negotiations or transactions with the assured, after knowledge of the forfeiture it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act, or to incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel,'"—the foregoing being quoted

from the opinion in *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

IV. The brief of appellant presents for our consideration questions pertaining to a garnishment proceeding. It appears that, as to the fourth shipment, the initial carrier was the St. Louis, Iron Mountain & South-

4. GARNISHMENT: time of perfecting appeal. ern Railroad Company. After suit was brought, this company was, by amendment, made a party defendant, but no personal jurisdiction thereof was ever acquired. The plaintiff caused an attachment to issue against it, and served the attachment by garnishment. The garnishees so summoned were the other defendants in the case. They were garnished as supposed debtors of the nonresident defendant. They answered as garnishees. Later, in response to an order of the court, they answered again. The plaintiff filed a pleading controverting the answers. It also filed a motion to strike such answers, and a motion accompanied with a list of interrogatories calling for many details pertaining to the inter-line accounts of the defendant railway companies, with a view, undoubtedly, of uncovering, if possible, balances in favor of the attached defendant. Both the motion to strike and the motion requiring answers to these interrogatories were overruled by the trial court. Likewise, the petition to require the garnishees to produce books of accounts and papers was overruled. These rulings are all complained of in argument.

We do not think that the appellant is in any position to obtain, on this appeal, a review of such rulings. The garnishment was a part of the method of service of the attachment. The attachment proceeding is not a part of the main case, except in a collateral sense. The statute expressly provides that proceedings relative to the attachment are to be deemed independent of the main case, and only auxiliary thereto. Code Section 3877. If appellant's mo-

tions had been sustained, the issues arising on the answers of the garnishee and the controverting thereof would not be tried as a part of the issues in the main case. The answers of the garnishee did not show any indebtedness. On the face of the pleadings, therefore, jurisdiction was not acquired even *in rem*, as against the Iron Mountain road. Whether the garnishees were discharged at this time or not, does not appear from the record. If not, the final entry of judgment against the plaintiff would discharge the garnishment. *Harger v. Spofford*, 44 Iowa 369. It was open to the plaintiff to save the pendency of the proceeding by a prompt appeal within two days, as provided by Code Sections 3931 and 3932. A mere appeal from the judgment would not, ordinarily, be an appeal from the order discharging the garnishee. If it could be deemed such in this case, it would not avail the appellant at this point, because the appeal from the judgment was not taken within two days, as required by Section 3932. If the jurisdiction as to the Iron Mountain road were not dependent upon the attachment proceeding, the plaintiff's right of appeal in the main case as to such defendant would be the same as to any other defendant, regardless of the attachment. *Munn v. Shannon*, 86 Iowa 363. We must hold, therefore, that the rulings of the trial court pertaining to the garnishment proceedings are not before us for review on this appeal. It necessarily follows, also, that the jurisdiction *in rem* as to the St. Louis, Iron Mountain & Southern Railroad Company has been lost.

In this connection, we take notice, also, of a claim by the appellee that the Wabash Railroad Company has not appeared in this case, and is, therefore, not a party thereto.

5. APPEAL AND  
ERROR: non-  
ruling in trial  
court.

Some dispute of fact appears in the briefs upon this question. It is not a question upon which any ruling was had in the trial court. No alleged error is, therefore, pre-

sented for our consideration. The dispute between counsel is whether defendants' counsel in the court below entered an appearance for the Wabash Railroad Company and for the Wabash Railway Company, or whether it entered such appearance for the Wabash Railroad Company alone. It is a question to be first determined in the court below. Our jurisdiction here can extend no further than that of the trial court, nor will it fall any shorter.

V. The point is urged by appellant that, in the event of a reversal, the case should be remanded, with directions to enter judgment, rather than for a new trial.

As to the first three shipments, being those which originated at Independence, Louisiana, both the initial and the terminal carrier are parties defendant. There was no intermediate connecting carrier. The plaintiff has sued for the loss of the exact number of crates ascertained in the inspection reports made by the agent of the defendants. The bill of lading provided that, in the event of damage, the invoice prices paid at the point of shipment should be the basis of the measure of damages. The plaintiff has conformed to this measure of damages, and has claimed for the lost crates only at invoice prices therefor, plus the proportionate amount of freight paid thereon and the actual cost of sorting and separating the damaged berries from the salvage. The evidence is practically conclusive and without conflict as to the amount of this damage in each case. The resistance to the amount of damage made by the defendants at this point is argumentative only.

6. APPEAL AND  
ERROR: di-  
recting judg-  
ment in low-  
er court.

7. CARRIERS:  
damages:  
measure.

It is contended that the damage should be regarded as a damage to the entire carload shipment, and that the invoice prices should be considered for the entire carload shipment; and from such amount should be deducted the full amount realized from the salvage. If this method were



adopted, it is shown by appellees that the amount received by the appellant on the sale of the undamaged berries was equal to the amount of the invoice prices, and that, therefore, no damage resulted, within the meaning of the bill of lading. This method would enable the appellees to absorb the profits of appellant's sales and apply the same to the discharge of the damage actually suffered.

There is nothing in the terms of the bill of lading that requires the adoption of this method of measuring the damage. Granting that it would be a proper method if the plaintiff had sued for damage to the entire carload lot, he did not do so. It is argued for appellees that the evidence shows that the damages permeated the whole shipment. Even if that be true, the plaintiff had a right to waive it and to confine its claim for damages to such berries as were wholly destroyed. The rule required by the bill of lading, and adopted by the plaintiff, is more favorable to the defendant appellees than the ordinary rule of measure of damages which would obtain were it not for the requirement of the bill of lading. We reach the conclusion, therefore, that, upon a remand of the case, it should be with a direction to the trial court to enter judgment for the plaintiff on the first three counts of its petition: namely, those involving the shipments originating at Independence, Louisiana.

As to the fourth count of the petition, a somewhat different situation is presented. This is the shipment that originated at Judsonia, Arkansas. The defendant Illinois

8. CARRIERS:  
initial and  
subsequent  
carriers: liability.

Central Railway Company is not interested therein. Only the terminal carrier is a party defendant before the court. The initial carrier, the St. Louis, Iron Mountain & Southern Railway Company, has not been successfully brought in, as yet. Under the Carmack Amendment, the initial carrier is liable to the shipper for

the full amount of the damage, regardless of its own negligence, and it may recover over from such connecting carriers as are in truth responsible for the negligence causing the injury. A somewhat different rule of liability obtains as between the shipper and the terminal carrier. The terminal carrier is liable only for its own negligence. The shipper, however, is entitled to the benefit of the presumption

that such terminal carrier received the goods in as good condition as they were in when received by the first carrier, and that the damaged condition, if any, in which they were delivered to the consignee, was the result of the terminal carrier's negligence. On the other hand, the terminal carrier may show that the damage was not caused by its negligence, but by the negligence of a preceding carrier. The burden of proof is upon it, in such case. On the trial below, evidence to that effect was introduced on behalf of the terminal carrier. Whether it has overcome the presumption against it, is a jury question. We think that it must be said that a case of conflict of evidence is presented.

Nor is it to be overlooked that the damage as to this shipment is predicated upon the decay of ripe berries; and that the burden is upon plaintiff to show their condition to have been such at the time of delivery for shipment that they could not have decayed, except for negligent refrigeration. As to this count, therefore, the case will be remanded for a new trial. For the reasons indicated, therefore, the judgment below will be reversed and remanded on all counts. As to the first three counts, it will be remanded with directions to enter judgment for the plaintiff in harmony herewith. As to the fourth count, it will be remanded for a new trial.—*Reversed and remanded.*

9. CARRIERS:  
damages: pre-  
sumption.

10. CARRIERS:  
perishable  
goods: dam-  
ages: burden  
of proof.

PRESTON, C. J., LADD and STEVENS, JJ., 'concur.

SALINGER, J. I concur in all but Division 3. As to it, I think it is unnecessary for us to decide the point in this case.

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W. H. EWING, Appellant, v. EWING PLANING MILL COMPANY  
et al., Appellees.

**GARNISHMENT: Receivers.** A receiver is, without the consent of the court, subject to garnishment as to funds which he has assumed to collect under his appointment, but which in fact *do not belong to the estate for the preservation of which he was appointed*. It necessarily follows that evidence is admissible in the garnishment proceedings to prove such fact.

*Appeal from Marshall District Court.*—JAMES W.  
WILLETT, Judge.

MAY 17, 1918.

APPEAL from a garnishment proceeding. Facts appear fully in the opinion.—*Reversed*.

*Carney & Carney*, for appellant.

*F. E. Northup* and *E. N. Farber*, for appellees.

STEVENS, J.—In an action brought by the Fidelity Savings Bank against C. E. Hatcher and others to foreclose a mortgage upon certain lots in the city of Marshalltown, H. J. Allard was appointed receiver, in accordance with the provisions of the mortgage, to take charge of the property, collect the rents, and apply the same, so far as necessary, to the payment of the mortgage indebtedness. He collected rent to the amount of \$533.35, but no part was applied on the debt. Later, W. H. Ewing, plaintiff and appellant herein, obtained a judgment against the Ewing

Planing Mill Company, on which he caused an execution to issue, and Allard to be garnisheed as receiver and personally, as a supposed debtor of the defendant Ewing Planing Mill Company. The answers of the garnishee were subsequently taken before a commissioner appointed by the court for that purpose. His answers were controverted by the plaintiff; and later, the receiver moved that he be discharged as garnishee, upon the ground that the funds in his hands were exempt from garnishment and that no jurisdiction thereover had been obtained by the garnishment proceedings, which he alleges were a nullity; and he further asked that he be authorized to pay the funds, as receiver, to C. E. Hatcher, mortgagee. Written objections were filed by plaintiff to the motion of the receiver to dissolve the garnishment. The Fidelity Savings Bank also filed a reply to the plaintiff's controversion of the answers of the garnishee, and prayed that the funds in his hands be applied to the payment of costs, fees, and expenses connected with the receivership.

The written objections to the answers of the garnishee and the reply to his motion for discharge as such are somewhat voluminous, and numerous reasons are assigned why the garnishment should not be dismissed and the garnishee discharged. Among the numerous grounds stated in the several papers filed by plaintiff, is that the mortgaged property was leased to the defendant Planing Mill Company, and by it to one L. R. Helland; that the rents collected by the receiver from Helland were due and belonged to the defendant Planing Mill Company, and not to Hatcher, and that the garnishee had no right thereto as receiver in the foreclosure suit. It is also claimed that the judgment in favor of the Fidelity Savings Bank was fully paid off and satisfied in full at the time of the filing of the objections to the answers of garnishee and the notice to

dissolve the garnishment. C. E. Hatcher filed a claim demanding payment to him, as the owner of the leased premises, of the fund in the hands of the receiver.

Plaintiff proffered proof to the effect that Helland was a subtenant of the defendant Planing Mill Company, to whom the rent in fact belonged. This evidence, upon objection of counsel, was excluded by the court, and the motion to discharge the garnishee sustained. The motion was sustained upon the ground that the funds in the hands of the receiver were in the custody of the court, and not subject to garnishment without the consent of the court. It is doubtless the general rule that funds in the hands of a receiver are not the subject of garnishment without the court's consent. *McGowan v. Myers*, 66 Iowa 99; *Howard County v. Strother*, 71 Iowa 683. It has, however, been frequently held that, if a receiver assumes to take property of one not a party to the record, under an appointment over the property of a party to the record, he will be a trespasser. *Wheat v. Bank of California*, 119 Cal. 4 (50 Pac. 842); *Wiener v. Sturgiss*, 79 Md. 271 (29 Atl. 613); *Wheaton v. Spooner*, 52 Minn. 417 (54 N. W. 372); *Farmers & Merchants Nat. Bank of Waco v. Scott*, 19 Tex. Civ. App. 22 (45 S. W. 26).

Again, it has been held that the rule that property in the hands of a receiver is not subject to garnishment without the consent of the court, is not to be applied where nothing remains to be done except to pay the money upon a final decree. *Robertson v. Detroit Pattern Works*, 152 Mich. 612 (116 N. W. 196); *High on Receivers* (4th Ed.), Sec. 151.

Allard was garnisheed as receiver, and also individually. If the funds in controversy in fact belonged to the defendant Ewing Planing Mill Company, then his possession thereof cannot be sustained upon the ground that he had qualified as receiver in a proceeding to foreclose a mort-

gage in favor of the Fidelity Savings Bank, against Hatcher; and, unless plaintiff could reach the same by garnishment proceedings, funds liable for the payment of his judgment might be wholly lost to him.

The theory upon which a receiver is ordinarily exempt from garnishment is that:

"Receivers are appointed to take charge of and manage the property of insolvent debtors for the purpose of husbanding the assets and distributing the proceeds thereof among the creditors according to equitable rules. A receiver, having the funds in his possession, is the representative of the court. He is said to be the mere hand of the court to hold the money and property for distribution. The receiver is one of the agencies employed by a court of equity to prevent unseemly scrambles among the creditors of an insolvent, and the wasting of the assets in useless and expensive litigation in courts of law." *McGowan v. Myers*, *supra*.

This, however, suggests no reason why funds in the hands of a receiver which are not the property of the estate for the preservation of which he was appointed, should be exempted from garnishment at the suit of a creditor of the person entitled thereto.

Assuming that the judgment in the foreclosure suit was, at the time of the garnishment proceedings, paid, the court, upon proper application, would doubtless have ordered the receiver to turn the funds over to Hatcher. He was not a receiver of a bankrupt debtor, but was appointed in the foreclosure proceedings, in compliance with the terms of the mortgage, to take charge of the mortgaged property, to collect the rents for that purpose, and to apply the same, so far as necessary, to the payment of the mortgage debt. Plaintiff's judgment gave him no lien upon the funds, nor could he have obtained a right thereto by any other proceedings except by garnishment. No good reason

appears why the garnishee should be discharged, until the question was decided whether the funds in the hands of the receiver belonged, in fact, to the Ewing Planing Mill Company, the debtor of the garnishing creditor. If the court, upon hearing, had found that the funds in his possession belonged to the defendant Mill Company, they could plainly be reached by garnishment proceedings, and the garnishee was not, as receiver, entitled to the possession thereof. If it were conceded, in the absence of an attachment or some other lien thereon or claim thereto, that the funds belonged to the Planing Company, the court would not have had authority to order the same turned over to this plaintiff in satisfaction of his judgment. Plaintiff alleged, and sought to prove, that the funds in question belonged, in fact, to the Ewing Planing Mill Company, and this evidence should have been admitted.

We need not determine other questions presented, but plaintiff should be permitted to offer proof that the garnished funds belonged to his debtor, and, if successful in making proof to that effect, he will be entitled to have the same so treated, and judgment entered as provided by law. It therefore follows that the judgment of the court below must be, and is,—*Reversed*.

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

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FREDERICK HUBBELL et al., Appellants, v. CITY OF DES MOINES, Appellee.

**MUNICIPAL CORPORATIONS: Streets, Etc.—Vacation—Action**  
1 **for Damages—Petition.** In an action by a property owner for damages for a valid vacation of a public alley adjacent to the plaintiff's property, it should be alleged and proven: (a) That the vacation was without plaintiff's consent; and (b) that compensation has not been made to plaintiff by reason of the vacation.

**MUNICIPAL CORPORATIONS: Streets, Etc.—Vacation—Damages**

2 —When Action Lies. A property owner suffers no actionable injury by reason of the valid vacation of an adjacent alley, unless he can show that, *at the time of the vacation*, his *then* use of, and right of access to and egress from, his property was, by reason of said vacation, substantially interfered with.

*Appeal from Polk District Court.*—LAWRENCE DE GRAFF, Judge.

MAY 17, 1918.

THE opinion states the facts—*Affirmed*.

*Parker, Parrish & Miller*, for appellants.

*H. W. Byers, Guy A. Miller, and D. C. McMartin*, for appellee.

WEAVER, J.—The plaintiffs are, and for a considerable period have been, the owners of Lots 1 and 3 in Coliseum Place in the city of Des Moines. This property, or that part thereof affected by this litigation, is 144 feet in width and 278.6 feet in length, bounded on the north by Grand Avenue and on the south by Locust Street, which streets are open and improved, and extend east and west across the city. Prior to May 20, 1912, a platted alley, 16 feet in width, abutted said property on the east side. Immediately east of the alley was formerly an unimproved tract known as Lot 2, which, prior to the date named, had been appropriated by the city for improvement as a city park. In the year 1909, plaintiffs leased their property above described, west of the alley, to the Des Moines Coliseum Company for a term of 40 years, which lease is still in force and effect. Having secured the lease, the Coliseum Company improved the property by erecting thereon a large building, especially designed for use as a place for exhibitions and meetings of a public character. This building is

1. MUNICIPAL  
CORPORATIONS:  
streets, etc.:  
vacation: ac-  
tion for dam-  
ages: petition.



of a permanent character, and covers substantially all of the east 144 feet of Lots 1 and 3, and extends from Locust Street to Grand Avenue, with doors, exits, and entrances opening upon each of said public ways. There is, as we understand the record, no entrance to or exit from the building on the alley side. On May 20, 1912, the city, by its council, in furtherance of its design to improve Lot 2 as a public pleasure ground, enacted an ordinance vacating said alley, and placed the same under the supervision of the superintendent of parks. On February 16, 1916, plaintiffs brought this action at law to recover damages alleged to have been sustained by them because of the vacation of the alley. The city admits the enactment of the ordinance, but denies that plaintiffs have sustained any actionable injury therefrom. The cause coming on for trial to a jury, and plaintiffs having offered their testimony and rested, the court sustained defendant's motion for a directed verdict. From this order and from the judgment entered upon the directed verdict, the plaintiffs appeal.

The evidence consists: First, of maps and plats showing the location of plaintiff's property and of the alley in question; second, of stipulations of counsel that plaintiffs are the owners of said property, subject to the lease to the Coliseum Company, that the alley was lawfully established, and that, since the execution of the lease of the property to the Coliseum Company, in 1909, plaintiffs have made no use of the alley as a means of ingress to or egress from said Lots 1 and 3, Coliseum Place; third, testimony showing the location, surroundings, improvement, and use of the property and of other property in its immediate neighborhood; and fourth, testimony of several expert witnesses that, in their opinion, the vacation of the alley had the effect of depreciating the value of Lots 1 and 3, in an amount variously estimated at from \$10,000 to \$12,000.

We have then, to consider whether, upon the issues

joined and the evidence offered, plaintiffs made a case which they were entitled to have submitted to the jury. This inquiry suggests first an examination of the pleadings and a statement of the facts upon which a recovery of damages is sought. The petition in brief terms alleges plaintiffs' ownership of the property; the existence of the alley upon its east boundary; the due enactment by the city council of an ordinance vacating the alley; and that, by reason of such vacation, the plaintiffs have been damaged in the sum of \$15,000. There is no allegation, express or inferential, that, in vacating or closing the alley, the city acted wrongfully or in excess of its authority, or that such action was taken without the consent or over the objection of the plaintiffs. Nor is there any evidence whatever tending to show the existence of these facts. Indeed, every word of the petition and the testimony may be taken as literal truth, and yet be entirely consistent with the theory that the alley was vacated with the plaintiffs' acquiescence or consent, or upon their own request. It is stated in the petition that the vacating ordinance was duly enacted, and it is conceded that the city had the power and authority to make such an order. There is no presumption of law or of fact that such power was abused or exceeded, or that it was exercised without the plaintiffs' consent. It may be that, under the rule which obtains in this state (see *Hubbell v. City of Des Moines*, 173 Iowa 55), that damages occasioned by the vacation of a street or alley need not be ascertained and paid before such an ordinance can have effective force, no presumption will arise that a formal condemnation has been had or that claims for damages have been adjusted or settled; but it would seem equally clear that, in the absence of both allegation and proof, we may not presume that such vacation has been made in hostility to the lot owners or without their knowledge or consent, or without making due compensation for the injuries, if any, so inflicted.

The foregoing consideration affords ample ground for affirming the judgment below; but, in view of the discussion by counsel, we may go further, and say that, even if we

- waive the manifest failure to plead a cause of action, it is still true that the case made by the evidence has no tendency to establish any actionable injury suffered by plaintiffs.
2. MUNICIPAL CORPORATIONS : streets, etc. : vacation : damages : when action lies.

The power to vacate the alley was confessedly in the city, and the regularity of the proceeding taken by the council is nowhere challenged. There is much authority to the effect that, under such circumstances, the resulting injury, if any, to property in the vicinage affords no right of action for the recovery of damages. In this state, however, the rule has come to be recognized that damages may be recovered where it is made to appear that any particular lot or tract served by the street or alley has thus been made to suffer substantial injury of a kind other than such as it suffers in common with the neighborhood or public in general (see *Hubbell v. City of Des Moines*, supra, and decisions there cited). But in nearly every case where the right has been recognized, care has been taken to state this modification of the earlier rule with caution to prevent its unreasonable expansion. The right of access to one's real property, and of ingress to and egress therefrom, is ordinarily of substantial value, and the owner may not be deprived thereof without compensation. But rights of property must be exercised with due care and reasonable regard to the convenience of others; and streets and alleys are not provided for the peculiar or exclusive use of any individual, but for the common and public benefit. If, therefore, the vacation of a street or alley does not operate to deprive the owner of an adjacent lot of convenient access to or use of such property, or cut him off in any substantial degree from free and convenient intercourse with the public generally, or prevent the reason-

able use or improvement of the property for the legitimate uses to which it is adapted, then he suffers no actionable injury. For example, in *Long v. Wilson*, 119 Iowa 267, one of our first cases recognizing the right to damages for the vacation of a street, it appeared that the street in question was "the only street by which the plaintiff had convenient access to his homestead." In *Borghart v. City of Cedar Rapids*, 126 Iowa 313, the vacation of a part of a public square left plaintiff's property without any outlet. In *Ridgway v. City of Osceola*, 139 Iowa 590, 595, we said:

"If the owner still has free access to his property and to the improvements thereon, and his means of ingress and egress are not substantially interfered with, no damages may be recovered."

In the *Hubbell* case, *supra*, the majority opinion, by Gaynor, J., repeatedly emphasizes the proposition that the vacation will sustain an action for damages only where it "substantially interferes" with the free access to the owner's property. The court was there considering the identical alley and identical vacation involved in the present case, and the opinion is there expressed that, "by the vacation of this alley, there was no substantial invasion of any right of the plaintiffs upon which they could predicate any right for damages. Their egress and ingress have not been substantially interfered with." Again, it is there said that:

"The vacation of this alley has not affected any substantial right of the plaintiffs of exit from or ingress to their property; that whatever right they have been deprived of \* \* \* is a right to use the alley in common with the general public. \* \* \* There is no substantial evidence of any damages sustained by the plaintiffs. \* \* \* The mere expression of the opinion that the property has been damaged is not substantial proof against the physical fact that no damage has resulted."

It appears, as we have stated, that this property has a

frontage of 144 feet on Locust Street and on Grand Avenue. That these afford all reasonably necessary access to the permanent building which covers practically the whole area is apparent from the mere statement, and this conclusion is emphasized and confirmed by the fact, that, in erecting the building extending from street to street by the side of this alley, it was not thought necessary to provide any means of passage to or from the property on that side.

The effect of this argument is sought to be avoided by the argument that, at some time in the future, the owners may conclude to replace the present building with some other structure, or make use of the premises for some other purpose for which the alley would prove a convenience of substantial value. This feature of the controversy also had consideration by the court in the *Hubbell* case, supra, and it was held by the majority that the recoverable damages, if any, are such only as are now ascertainable, and that the possibility of other and different uses of the property in the indefinite future are not to be considered. Such is the clear effect of the argument in the principal opinion, by Justice Gaynor. In the concurring opinion by Justice Deemer, the question is also dealt with in clear and specific terms. It is there said:

"The first question, then, in the case is whether or not plaintiff suffered damage different from that suffered by all people who might use the alley before its vacation. It is not claimed that the alley was actually used for ingress to or egress from the building. The building was not so constructed that it could be entered from the alley, and the only exits and entrances were on Grand Avenue and Locust Street; so that the damages, if any, from the closing of the alley were not different in kind from what they would have been had the first street running north and south immediately west of the block on which the Coliseum is located been vacated. Neither afforded a direct entrance

to the building, and the damage in either event was the same as that suffered by the public in general, save in degree. \* \* \* This was the situation when the vacation of the alley was made, and it seems to me the damage, if any, which the owner of the lot suffered was *damnum absque injuria*, and that no action would lie to recover damages by reason of the vacation. \* \* \* If damages be awarded in a suit at law, they will be with reference to the present use of the property; although, as the vacation will be assumed to be permanent, both past, present, and future damages may be awarded. But it is damages to the property as it then stands, and not as it might possibly be used in the great future. \* \* \* This for the reason that it is conceded that the legislature had the power to grant municipalities the right to vacate streets or alleys. \* \* \* If, then, one improves with reference to an alley or street, he may in some cases recover damages if it be vacated, and the damages must be based upon the condition of the property when the damage is inflicted, and not upon some possible future use. His acceptance of an easement in the street and alley is only to the extent that he indicates that he wishes to use it; and after such acceptance he cannot have damages awarded on the theory, that, at some future time, he might want to use it in some other manner. He must take notice that, after such acceptance, the city may conclude to vacate the street or alley, \* \* \* and if it does this before he makes the change, it is with his eyes open, and he can be recompensed only for the damage done his property at the time of the vacation. \* \* \* *In this respect, the case differs essentially from one where physical property is taken.*"

We make the foregoing extended quotation from the earlier case touching the vacation of this alley because it states, in clear and unmistakable phrase, the proper rule which we conceive to be applicable to such cases,—a rule which, unless we are to recede from that precedent, neces-

sitates the affirmance of the judgment below in this case. We have italicised the last sentence of the quotation because it points out the fundamental distinction between damages recoverable for the actual taking of physical property for public use and damages for the taking away of an easement appurtenant to such property in a public way. The owner's title to the physical property is complete, absolute, and unconditional, except as against the sovereign power of the state, a power which is limited and restrained by constitutional guaranties; and he holds such property with the absolute right to put it to any lawful present or future use to which it may be adapted. Consequently, when the state, by an exercise of eminent domain, takes such property from him, in whole or in part, it is bound to compensate him for the damage so inflicted. In estimating such compensation, the physical condition and character of the property, its location and surroundings, its present use and improvement, and its fitness and desirability, if any, for other uses in the future, may all be considered for what they are worth as bearing upon the amount of actual damages sustained by the owner. But the owner of a city lot has no title to the alley or street on which it abuts. As one of the public, he may use it, if he so desires, in passing between the connecting streets; and, as abutting owner, he may make special use of it as an entrance to or exit from his premises; but it is a right which the municipality may terminate at any time, without liability to damages other than such as he may sustain by the withdrawal of the special right or privilege which he has enjoyed in the use of the public way as a means of convenient access or approach. While there is some sort of presumption or reasonable expectation that the establishment of a street or alley is of permanent character, yet it is not created in perpetuity, in the sense that it may not be vacated or changed according as the proper authorities may find is required in the in-

terest of the general public; and it follows, we think, of necessity that, if a lot owner finds that an alley abutting upon his property is of no present use or value to such property and proceeds to shut himself out from access on that side by erecting a solid division wall between his lot and the alley extending from street to street, he is not in position to complain if, before he changes the situation thus created by him, the city exercises its admitted right to take the alley away entirely; and this is especially true where, notwithstanding such vacation, his property is left with other abundant and convenient means of approach, ingress, and egress. Stated somewhat differently: when a lot owner so keeps or uses or improves his property as to make an adjacent alley a convenient means of access, without which he would suffer damage other than such as is sustained by the public generally, the city may not deprive him of such convenience without compensation; but the further right in the future to make the alley a valuable convenience in the improvement of his lot for other purposes, for which the existence of the alley may prove of material value, is simply the right to avail himself of such convenience, provided always that, when that time arrives, the city has not exercised its right to vacate the alley. So long as the city maintains the alley as such, the abutting owner may conform and adjust the use of his property to the convenience so provided, and will be protected therein; but his right so to do ceases when the alley is vacated, and its vacation before he has availed himself of that privilege does him no wrong for which an action will lie.

These considerations are decisive of the merits of the case, and render unnecessary any discussion of the measure of damages and other questions to which counsel have given attention, and to which we have not adverted.

The judgment appealed from is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.



L. E. LEWIS, Appellant, v. CEDAR RAPIDS & IOWA CITY  
RAILWAY & LIGHT COMPANY, Appellee.

**CARRIERS: Derailment—Res Ipsa Loquitur.** A passenger injured by the derailment of a train need not show the *causes* of the derailment, *though alleged*. The injured party makes a prima-facie case by showing: (a) That he was a passenger on the train; (b) that the train was derailed; (c) that he was injured thereby; and (d) that he was not guilty of negligence.

*Appeal from Johnson District Court.*—R. P. HOWELL,  
Judge.

MAY 17, 1918.

ACTION for damages claimed to have resulted from the derailment of one of defendant's electric cars. There was a trial to a jury, and verdict in favor of the defendant for costs. Plaintiff appeals.—*Reversed*.

*Milton Remley and Ranck & Bradley, for appellant.*

*Dutcher, Davis & Hambrecht and John A. Reed, for appellee.*

STEVENS, J.—This is an action for damages claimed to have been caused by the derailment of one of defendant's interurban electric cars, on which plaintiff was riding as a passenger. The accident occurred near defendant's bridge across the Iowa River. The accident was caused by the breaking of an axle. Plaintiff's petition is in two counts, the first alleging the above matters, and the second, in addition thereto, that the defendant negligently permitted the track, at the place of the accident, to become uneven and unsafe; that the car was being operated at an excessive rate of speed; that the motorman in charge undertook to suddenly check the speed thereof just before reaching the

bridge, thereby causing the same to be thrown from the track; that the journals, or axles, on said car were inferior, of defective construction, and too small and of insufficient strength to carry the car and permit the operation thereof at the rate of speed at which, and in the manner in which, the same was being operated.

Numerous errors of the court in rulings upon the admission of evidence are alleged and argued by counsel for appellant. It may be conceded that much incompetent evidence was admitted, but there was probably sufficient competent evidence, upon the point sought to be proved thereby, that was undisputed, to render the error without prejudice.

Complaint is also made of several of the court's instructions, but we will consider only the exceptions to the following:

"While the burden of proof is upon plaintiff to show that he was injured by the negligence of defendant in some one or more of the particulars set out above, yet, if he has shown that he was injured by reason of the derailment of the car upon which he was a passenger, and that said accident and derailment was so unusual and of such a nature as that it could not well have happened without the defendant being negligent, a presumption of negligence on the part of defendant arises, and the burden is then cast upon the defendant to rebut this presumption. To do so, defendant must establish that the accident was not caused by any negligence on its part in the particulars charged by plaintiff, or that, in all such particulars, defendant exercised the high degree of care required of it, as hereinafter explained."

The contention of counsel for appellant is that this instruction placed the burden upon the plaintiff of showing the exact cause of the accident: that is, the facts and circumstances constituting the negligence of defendant which caused the derailment. Defendant, as a carrier of passen-

gers, was bound to exercise the highest degree of care and diligence for the convenience and safety of plaintiff. As was said in *Weber v. Chicago, R. I. & P. R. Co.*, 175 Iowa 358:

"To this end, it is its duty to see that nothing which human foresight could guard against happens in the management and control of its trains, its rolling stock, and road-bed, that will imperil the safety of the passenger while being so transported."

The derailment in this case occurred while the car was proceeding around a two-degree curve approaching the bridge, causing the car to run upon the ties until it reached the trestle approach to the bridge when it toppled over and fell to the ground, injuring plaintiff. Proof that plaintiff was a passenger upon the derailed car and that he was free from contributory negligence on his part made out a prima-facie case against the defendant, and a presumption arose that the accident was the result of some negligence on defendant's part.

Counsel for appellee maintain that the language of the instruction in question was taken from the opinion of this court in *Pershing v. Chicago, B. & Q. R. Co.*, 71 Iowa 561, and that substantially the same instruction was approved in *Fitch v. Mason City & C. L. Traction Co.*, 124 Iowa 665. In the first of the above cases, the court stated the substance of the instruction in general terms, without quoting the same. We gather from this statement that the instruction was probably similar to the one under consideration, but the discussion of the court was confined to the extent of proof required of the defendant to exculpate itself from the negligence causing the injury, and not to the burden of proof resting upon the plaintiff. The court said:

"The rule undoubtedly requires the carrier to prove his own freedom from negligence as to the cause of the injury. But that, it appears to us, is the doctrine of the instruc-

tions. The immediate cause of the injury to plaintiff's intestate was the breaking down of the bridge, and the consequent precipitation of the car into the ravine; and this was occasioned by the blow or concussion by the derailed train. In seeking for the cause of the injury, then, it became necessary to inquire as to the cause of the derailment of the train, and whether there was any defect in the track or roadway or bridge, or in the cars or machinery of the train, or any negligence in the management of it at the time; for the circumstances indicated unmistakably that the cause of the accident was to be found in some of these matters. They constituted the subject of the inquiry as to this branch of the case, and defendant very properly confined its proof, as to the diligence and care it had exercised, to that subject."

In *Fitch v. Mason City & C. L. Traction Co.*, supra, the plaintiff was injured while riding as a passenger on one of defendant's trains. While he was seated by the side of the conductor, on a seat provided for passengers, near an open door, he was thrown from the seat out of the door and upon the right of way of the defendant, receiving the injuries complained of. It was charged that, at the time of this occurrence, the train was being run at an excessive rate of speed, on a down grade, upon a ten-degree curve, where the track was out of alignment; and that this caused him to be thrown from the train. The instruction before the court in that case is somewhat analogous to the one under consideration, but not identical therewith. The court, in referring to the burden of proof and the presumption arising from proof of an accident and injury, said:

"Defendant's contention that the presumption does not arise from the mere fact of injury alone, and does not in any case arise in the absence of proof of some defect in the instrumentalities of transportation, is only partially true. Of course, mere proof of injury, without showing a colli-

sion, derailment, or other cause or circumstance connected with the operation or equipment of the road, does not make out a prima-facie case of negligence. In other words, from the mere fact that plaintiff was found along the side of the track with his leg broken, no presumption of negligence arises. The presumption arises, if at all, from the cause of the injury, which was the accident referred to by the court in this case, and from the circumstances attending it. When these are so unusual and of such a nature that the accident could not well have happened without the defendant being negligent, or when it is caused by something connected with the equipment or operation of the train, a presumption of negligence arises on the part of the company; and plaintiff, upon proof of his freedom from contributory negligence, is entitled to the verdict, unless the defendant shows that its negligence in the respects charged did not cause the injury."

In *Cronk v. Wabash R. Co.*, 123 Iowa 349, the court disapproved an instruction somewhat, in effect, like the one under consideration. The instruction there considered, however, was favorable to the appellant, and the judgment of the lower court was affirmed. In the course of the opinion, the court said:

"It is said that, if the jury found the roadbed or rolling stock defective in any one of the ten or twelve particulars alleged, this cast the burden of the proof upon the defendant to show that it was not negligent, not only as to that one, but as to all of the specifications contained in the petition. It was not incumbent upon the plaintiff, however, in the first instance, to prove any of these defects. Upon proof that the injury of plaintiff resulted from the derailment of the train, the burden of proof shifted, and was cast upon the defendant to show that the accident was not occasioned by any negligence on its part."

This court, in *Weber v. Chicago, R. I. & P. R. Co.*,

supra, speaking to this point, used the following language:

"The derailment of a train does not usually and ordinarily occur when the carrier has discharged this duty. Proof of derailment of a train and injury to the passenger is, therefore, prima-facie evidence that the company had not discharged this duty. This is based upon the thought that such accidents do not ordinarily occur when the carrier has discharged its full duty. This showing, therefore, established a failure on the part of the company to perform its duty, and out of this arises the actionable negligence. \* \* \* So, then, the law wisely shifts to the defendant the burden of exculpating itself, either by showing that it had done its full duty, and the accident was unavoidable, and one that could not be anticipated or guarded against, or that it was the result of some independent intervening cause, over which the defendant had no control and could not have guarded against." See also *Basham v. Chicago G. W. R. Co.*, 178 Iowa 998; and *McGinn v. New Orleans R. & L. Co.*, (La.) 13 L. R. A. (N. S.) 601, 606, and cases cited in the margin.

Appellee's counsel argue herein that, conceding the erroneous character of the instructions, yet plaintiff, under the evidence, could not have been prejudiced thereby. We are unable to agree with the contention here made. To sustain the instruction upon this theory, it is necessary to assume that the jury must have found, from the evidence, that the accident was so unusual and of such a nature that it could not well have happened without negligence upon the part of defendant; whereas negligence was presumed from the fact of the derailment, upon proofs of which, with the other necessary facts to make out plaintiff's case, the duty rested upon the defendant to show that the accident was not the result of negligence on its part. The instruction cast the burden upon the plaintiff of proving that his injuries were caused by the derailment of the car, upon which

he was a passenger, without negligence or fault on his part; and also that it could not well have happened in the absence of negligence on defendant's part. Plaintiff was not required, to make out a prima-facie case, to prove the facts constituting the negligence on the part of the defendant, causing the derailment. To discharge the burden imposed upon plaintiff by the instruction, it was not necessary for him to offer proof of the circumstances causing the derailment of the car. The cases cited by appellee do not sustain its contention in this respect. A distinction is made, in the proof required to make out a prima-facie case, where the injury resulted from the derailment of a car, and where the facts and circumstances of the accident are of such a nature and so unusual that it could not well have happened but for some negligence on the part of defendant. In the former case, proof of derailment, with the other facts necessary to be shown to entitle plaintiff to recover, make out a prima-facie case in favor of plaintiff; whereas, in the latter, proof of facts and circumstances from which the inference that the accident could not well have happened but for some negligence upon the part of the carrier must be offered, before the presumption of negligence will arise. The distinction to be observed is well stated and illustrated in *Fitch v. Mason City & C. L. Traction Co.*, supra, and *Weber v. Chicago, R. I. & P. R. Co.*, supra.

Upon proof by the plaintiff that he was a passenger, that he was injured by the derailment of a car,—an occurrence so unusual and of such a nature that it could not well have happened without negligence upon the part of defendant,—the presumption arose, without further proof of the facts and circumstances causing and surrounding the accident, that the defendant was negligent, and a prima-facie case was established. The duty to go forward with its proof then shifted to the defendant. To discharge the burden thereby cast upon it, it undertook to show that the

broken axle was purchased of a reputable manufacturer; that it was carefully tested by the usual and approved methods of making tests of the character required, that its roadbed, at the point of the accident, was properly constructed and in good condition, that the speed of the car was not unusual or imprudent, that its servants were not negligent in its operation, and that the derailment was caused by a latent defect in the axle, causing it to break.

As above suggested, much evidence of doubtful competency was received, but errors in this respect are not likely to, and should not, occur upon a retrial of the case. Therefore, we do not deem it necessary to discuss them in detail. Other errors alleged in the instruction are argued by counsel for appellant, but, in view of our conclusion that there must be a reversal, it will not be profitable to review or point out the alleged errors therein. Because of the error in the instruction above quoted, the judgment of the court below must be and is—*Reversed*.

PRESTON, C. J., LADD, EVANS, and SALINGER, JJ., concur.

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LUTHER McCREARY, Appellee, v. A. W. MCGREGOR, Appellant, et al.

**MORTGAGES: Redemption by Equitable Owner.** An equitable owner of real estate by virtue of a contract to pay a sum which includes a pre-existing mortgage, may not acquire full title, and thus absolve himself from obligation to pay the balance of the purchase price, by redeeming from a foreclosure sale of said mortgage, and taking deed thereunder. Such redemption simply works a payment of his debt by the owner.

**ESTOPPEL: Asserting Validity of Foreclosure Deed and Fraud Leading Thereto.** One may not base his claim to title on a foreclosure deed, and in the same breath contend that the entire foreclosure proceedings were a fraud upon him.

**VENDOR AND PURCHASER: Disputing Vendor's Title.** A vendor's title may not be disputed by a vendee who is in possession by virtue of a contract with the vendor.



*Appeal from Linn District Court.*—MILO P. SMITH, Judge.

MAY 17, 1918.

SUIT to foreclose a contract for the sale of real estate. Judgment and decree of foreclosure as prayed. Defendant appeals.—*Affirmed.*

*Barnes, Chamberlain & Hanzlik*, for appellant.

*Voris & Haas*, for appellee.

STEVENS, J.—Plaintiff and defendant, on December 27, 1913, entered into a contract in writing, by the terms of which plaintiff agreed to sell and convey certain real estate in the city of Cedar Rapids to the defendant, for an agreed consideration of \$1,650, payable in installments of \$15 or more, on the first day of each and every month. At the time of the execution of the contract, a mortgage thereon, executed by former owners thereof, was outstanding against the property. The contract between the parties hereto provided that, when appellant reduced the amount due under the contract to the face of the mortgage indebtedness, appellee would execute a warranty deed conveying the premises to him. Appellee agreed to pay the interest on the mortgage indebtedness, but, in case of default in the payment thereof, appellant was given the privilege of paying same, and receiving credit on the contract therefor. Appellant agreed to pay the taxes and keep the buildings insured and the premises in good repair. The holder of the mortgage transferred the same to W. D. McCreary, the father of appellee, and R. D. Elson, who, some time after the execution of the contract, brought suit to foreclose the mortgage. On November 7, 1914, decree of foreclosure was entered therein, and on December 11, the premises were sold at sheriff's sale upon special execution, and on September 7, 1915, appellant redeemed from said sale, paying for that purpose \$958.70,

1. MORTGAGES :  
redemption by  
equitable  
owner.

and, at the expiration of one year from the date of the sale, a sheriff's deed was executed to him.

Some time thereafter, appellant entered into a contract in writing, by the terms of which he agreed to convey the same to the appellee William Dew. Appellant continued to make the monthly payments until he obtained the sheriff's deed, whereupon he ceased making further payments. Plaintiff then brought this suit to foreclose the contract, alleging a balance due thereon of \$595.50, after crediting all installments and the amount paid by appellant to redeem from the sheriff's sale.

Defendant, by way of answer to plaintiff's petition, admitted the execution of the contract, the payment of the several installments and the sum paid for redemption from sheriff's sale, and averred that he redeemed therefrom as a junior lien holder; that plaintiff failed and neglected to redeem within twelve months, and that the sheriff's deed vested full title in him; that plaintiff fraudulently conspired and confederated with W. D. McCreary and R. D. Elson to obtain an assignment of the mortgage upon said premises, for the purpose of foreclosing same and depriving appellant of his interest therein; and that plaintiff fraudulently neglected to pay the interest upon the mortgage indebtedness, thereby causing the same to become immediately due; and further, that plaintiff thereby became unable to comply with his contract and convey to appellant a good title to said premises; and that, by reason of all said matters, he is relieved from further liability under said contract.

Plaintiff filed an equitable demurrer to defendant's answer, which was sustained. Defendants refusing to plead further, judgment was entered against A. W. McGregor, appellant, for \$607.80, the balance due on said contract, with interest, after allowing credit for all installments paid and the amount paid for redemption.

Appellant does not claim that he has paid the full

amount of the purchase price agreed upon, or that the judgment entered herein is not, in fact, the correct amount due, on plaintiff's theory of the case; but his contention is that, by allowing the premises to be sold under special execution at sheriff's sale, plaintiff has placed it beyond his power to comply with his contract, and convey a good title thereto; that appellant had a lien upon the premises for the amount of the several monthly installments paid by him, which entitled him to redeem, under the statute, as a lien holder, within nine months after the sale; that he did redeem, as such lien holder, and, after the expiration of the twelve months allowed to plaintiff for redemption, received a sheriff's deed to said premises, and claims title thereunder.

On the other hand, counsel for appellee argue that appellant entered into possession of the premises under his contract with appellee; that he retained possession thereof, making monthly payments in accordance therewith, until he received the sheriff's deed; that he was the equitable, or real, owner of the property, the legal title thereto being reserved in appellee as security for the payment of the balance of the purchase price; that the relation between them was, in effect, that of mortgagor and mortgagee, and that appellant could not redeem from the sheriff's sale as a lien holder, but only as owner, and that redemption by him was equivalent to, and in effect, payment; that, while in possession of the premises under the contract, he could not dispute the title of his vendor; that the payment of the judgment operated, to the amount thereof, as a payment upon the purchase price, for which appellant was entitled to, and was by the court allowed, full credit.

Considerable emphasis is placed by counsel for appellant upon the allegations of his answer charging appellee with fraudulently conspiring with his father to obtain control,

2. ESTOPPEL:  
asserting  
validity of  
foreclosure  
deed and fraud  
leading  
thereto.

and foreclosure of the mortgage for the purpose of depriving him of the monthly payments made under his contract of purchase.

It is not quite clear how appellant can be aided by this plea. By the terms of the mortgage, the entire indebtedness became due upon default in the payment of the interest, and the holder thereof might foreclose the same. It may be that appellee acted in bad faith in failing to pay the interest, and in the other respects charged in defendant's answer; but this could in no way operate either as an estoppel, preventing him from insisting upon the performance of his contract, or to render the foreclosure proceedings, which are based upon a failure to pay the interest when due, as provided by the mortgage, illegal.

Appellant is now claiming title to the premises under a sheriff's deed executed to him as the holder of the certificate issued to the purchaser at the sheriff's sale. The validity of the foreclosure proceeding is not, therefore, questioned by counsel for appellant. He cannot occupy the position of claiming title under the foreclosure and, at the same time, avail himself of a plea of fraud upon the part of appellee in procuring the proceedings to be instituted. The purpose of appellant in redeeming from the foreclosure sale was, doubtless, to protect his interest in the premises as purchaser, and not merely to preserve whatever lien he may have had as vendee for the part of the purchase price paid. By redeeming, he became entitled to credit upon his contract of purchase for the full amount paid for that purpose. He may have been subjected to much inconvenience and hardship by the foreclosure proceedings, and deprived of the privilege of paying for his property in easy monthly payments; but we know of no legal or equitable principle upon which to base a holding that the foreclosure proceedings and the payment of the judgment entered therein would operate to discharge the further liability of appellant under his contract to pur-

chase, unless he, in fact, obtained title to the premises by virtue of the sheriff's deed, thus extinguishing appellee's lien.

It is well settled in this state that the purchaser under a contract to convey upon payment of the purchase price becomes at once the holder of the equitable title to the property, while the seller retains the legal title as security only for the payment of the purchase price, and that their relation is substantially that of mortgagor and mortgagee. *Cowdry v. Cuthbert*, 71 Iowa 733; *Iowa Railroad Land Co. v. Boyle*, 154 Iowa 249; *Allen v. Adams*, 162 Iowa 300; *Bowls v. Oklahoma City*, 24 Okla. 579 (104 Pac. 903); *Ridge-way v. Broadway*, 91 S. C. 544 (75 S. E. 132).

Under such circumstances, the purchaser has the right to redeem the premises from execution sale, or to pay the encumbrance on the property, and, by doing so, will be entitled to credit therefor on his contract. *Adams v. Beale*, 19 Iowa 61; *Dickerman v. Lust*, 66 Iowa 444; *Cowdry v. Cuthbert*, supra; *Swan v. Harvey*, 117 Iowa 58; *Herdlicka v. Evans*, 165 Iowa 207. It is elementary that redemption by the owner is equivalent only to payment of the execution indebtedness, and a sheriff's deed, if executed, would convey no interest whatever to such owner. He has no occasion for a sheriff's deed.

By the terms of his contract of purchase, appellant, by making payments thereunder until all in excess of the mortgage indebtedness was paid, would have been entitled to a deed, upon the execution of which he would have assumed the payment of the mortgage. It formed a part of the purchase price for the property. Appellant was in possession of the property under his contract to purchase, and the real owner thereof. The only interest of appellee therein was as the holder of the legal title as security for the payment of the balance due him on the purchase

3. VENDOR AND  
PURCHASER:  
disputing  
vendor's title.

price. Appellant's legal status was not affected by his attempt to redeem as a lien holder from the foreclosure sale, or by obtaining a sheriff's deed to the property. He was the equitable owner of the premises. His relation to his vendor was, in equity, the same as that of a mortgagor. He held the real title to the land, and what he did protected his title thereto. Redemption by him was the exact legal equivalent of payment of the judgment. He was still under obligation to pay the full purchase price under his contract. He exercised the option of discharging the mortgage, and thereby reducing his indebtedness to appellee to the extent thereof. It is true that a vendee may, under certain circumstances, assert a lien for the payments made, upon real estate purchased by him; but, in this case, appellant entered into, and continued in, possession of the premises under his contract of purchase, and made payments thereon in accordance therewith for a year after the sheriff's sale, and until he obtained sheriff's deed thereto. So long as he continued in the possession of the premises under his contract, he could not dispute his vendor's title thereto.

"It is the general rule that a vendee in undisputed possession of the purchased real estate cannot refuse payment of the purchase price for alleged lack of title in the vendor unless he rescind the contract and restore possession." *Allen v. Adams*, supra.

Appellant elected to retain possession of the premises which he obtained under his contract and to redeem from the foreclosure sale, and thereby extinguish the lien created thereby. In doing so, he protected his equitable title to said premises, and became entitled to full credit for the amount paid therefor upon his contract of purchase; but he could not, by this method, obtain the legal title to the property, and thereby extinguish the lien of his vendor. His attempted redemption as a lien holder conferred no greater right upon him under the sheriff's sale than would have the

payment of the mortgage indebtedness before judgment. We reach the conclusion, therefore, that, on account of appellant's failure to pay the installments under his contract, plaintiff had the right to treat the whole indebtedness as due, and to commence proceedings to foreclose the contract, as provided by Sections 4297 and 4298 of the Code, 1897; that, because of his refusing to plead over, after the demurrer to his answer had been sustained, judgment was rightly entered against him by the court, and the same must be, and is,—*Affirmed*.

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

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MURRAY BROS. & WARD LAND COMPANY, Appellant, v. CHAS. V. KEESEY et al., Appellees.

**FRAUD: Representations of Value.** False assertions of value, made  
1 for the purpose of being relied upon as a *fact*, and so relied upon, furnish basis for rescission of contracts.

**SPECIFIC PERFORMANCE: Contract to Convey Lands Which Em-**  
2 **brace Homestead.** A contract to convey lands embracing an unadmeasured homestead may not be specifically enforced against the protest of the wife, when such contract is executed by the husband only, unless the one demanding such performance elects to take a conveyance exclusive of the homestead.

**SPECIFIC PERFORMANCE: Vendor Without Title—Subsequent**  
3 **Acquisition.** One seeking specific performance of a contract for an exchange of lands must have title to his own lands, or at least some enforceable contract for title, *when the contract is made*. Subsequent acquisition of title will not suffice.

**VENDOR AND PURCHASER: Statement of Grounds of Rescission**  
4 **—Mending Hold.** One who assigns specified grounds for rescission may not later "mend his hold" and assign other or different reasons; but this rule is not applicable to a ground of which the one rescinding had no knowledge at the time he did rescind.

**FRAUD: Examination of Property—Effect.** The fact that the one  
5 alleging fraudulent representations in the execution of a con-

tract for the exchange of properties *makes an examination of the property which he is to receive*, does not necessarily preclude reliance upon the fraudulent representations.

*Appeal from Dallas District Court.*—LORIN N. HAYS, Judge.

FEBRUARY 16, 1918.

REHEARING DENIED MAY 17, 1918.

SUIT in equity for specific performance of a contract to convey real estate. Decree and judgment for defendant. Plaintiff appeals. The facts are stated in the opinion.—*Affirmed.*

*Don R. Lehman, E. W. Dingwell, and E. J. Kelly*, for appellant.

*White & Clarke*, for appellees.

STEVENS, J.—I. On the 26th day of August, 1915, plaintiff and the defendant Charles V. Keesey entered into a written contract whereby plaintiff agreed to convey to defendant a section of land in Cass County, North Dakota, for an expressed consideration of \$56,750, to be paid by defendant's assuming and agreeing to pay mortgages amounting to \$23,000, and the conveyance to plaintiff of a 305-acre tract located in Dallas County, Iowa, subject to a mortgage of \$12,000. On December 7, 1915, defendant's attorneys wrote plaintiff that he elected to rescind the contract, upon the ground that same was procured by fraud. This action is brought to compel the specific performance of the contract. The petition is in the usual form for such purpose, and alleges that the defendant Alta Keesey is the wife of her codefendant.

The defendant Charles V. Keesey answered, admitting the execution of the contract, and alleged that plaintiff, through Charles Murray, its agent, represented to him, before the contract was entered into, that the Dakota land be-



longed to him, and that he knew the cash market value of the same, and that same was \$56,750; that said land, a portion of which appeared to be wet, was well and sufficiently drained by ditches along the highways; that plaintiff was not, at the time of the execution of the contract, nor since, the owner of, or possessed of any right or title in and to, the Dakota land, all of which, it is alleged, was unknown to the defendant at the time the contract was executed; that, at the time of the execution thereof, defendant was a farmer, residing in Dallas County, and wholly unacquainted with real estate values in the neighborhood of the Dakota land and of the land purchased; that, in truth and in fact, the land was not worth to exceed \$60 per acre; was not properly drained, but was wet and unfit for cultivation. The answer also contained all the necessary allegations of fraud. Defendant further alleged in his answer that he and his co-defendant resided upon the Dallas County farm, at the time of the execution of the contract, and still resided thereon, and that same is the homestead of defendants. Defendant alleged also, by way of counterclaim, that, at the time of the execution of the contract, he executed to plaintiff a note for \$6,000 as earnest money, which plaintiff transferred to an innocent holder, and which defendant was compelled to pay, and asks judgment against the plaintiff for the said \$6,000 with interest.

The defendant Alta Keeseey, for separate answer, in substance adopts the material allegations of her husband's answer, and alleged that the Dallas County land was the homestead of herself and husband, which had never been ad-measured or set off from the rest of the tract, and that the contract was invalid. Other issues tendered by the pleadings need not be set out in detail.

The plaintiff company, of which Charles Murray was president, was, at the time of the transactions in question, in the real estate business in Minneapolis, Minnesota, and

Castleton, North Dakota, near which latter place the land in question is located. At the time of the execution of the contract, plaintiff was not the owner of the land, but claims to have had an option for the purchase thereof. The alleged option contract, however, was a letter from Woods & Hallam and F. J. Lahl, giving to plaintiff the exclusive authority, as agent, to sell the real estate.

On January 25, 1915, William M. Miller and wife, by warranty deed, conveyed said premises to W. H. Woods and F. M. Hallam for a consideration of \$40,000, and on November 3, 1915, William Hamilton Woods, F. M. Hallam, and F. J. Lahl, of Monmouth, Illinois, and the plaintiff herein, by Frank C. Murray, its agent, entered into a written contract, by which the parties named agreed to convey the Dakota land to plaintiff, at an expressed consideration of \$61 per acre, on the basis of 635 acres; and, on December 1, 1915, William M. Miller and wife executed a warranty deed conveying the Dakota land to Charles V. Keeseey, defendant herein, for an expressed consideration of \$57,200. When offered in evidence, the following was endorsed on the back thereof: "This deed not used and to be cancelled or discharged;" and on January 15, 1915, William M. Miller and wife conveyed said premises to Joseph W. Sullivan, for an expressed consideration of \$57,200; and on January 17, 1916, the said Joseph W. Sullivan and wife executed a warranty deed conveying said Dakota land to plaintiff.

Defendant claims that he was induced by one Duff, a local agent of plaintiff in Dallas County, to accompany him to Minneapolis for the purpose of negotiating a sale or exchange of his farm. Upon his arrival, he met some of the members of plaintiff's firm, but had no conversation with them concerning the land, and went from there with defendant to Castleton, where they met Charles Murray, and, accompanied by him, looked at various tracts of land, including that described in the contract.

Plaintiff testified that Murray told him that the land belonged to him; that he was familiar with its market value, and that it was worth \$100 per acre, and would sell any time for \$90 per acre, the price finally agreed upon; that, while the land was level and a portion of it apparently wet, it was sufficiently drained by the ditches along the highway, and that same was in good condition for cultivation, and as well drained as any land adjoining it, a portion of which, he stated, could not be bought for less than \$125 per acre, and that a quarter south of it had sold for \$103 per acre. Defendant further testified that he was not familiar with the land in question nor with other land in that vicinity or its value; and that nothing further was done by Murray or Duff to prevent independent inquiry and investigation on his part as to the value and quality of the land, except that he was kept consistently in their company, either looking at land or at the hotel for meals.

Charles Murray, in substance, denied the alleged fraudulent representations, and it might be urged from his testimony that defendant acted upon his own judgment, wholly uninfluenced by anything that was said to him by Murray concerning the land. Both plaintiff and defendant offered evidence of the value of the Dakota and the Dallas County land. As usual, the witnesses varied considerably in their judgment as to market values. Each side called six witnesses, those called by plaintiff fixing the value of the Dakota land at from \$75 to \$100 per acre; whereas defendant's witnesses testified that it was worth from \$65 to \$80, only one of whom, however, placed its value above \$65. Plaintiff's witnesses fixed the value of the Dallas County land at from \$120 to \$125, the majority favoring the latter estimate; whereas defendant's witnesses testified that this land was worth from \$135 to \$140 per acre, the latter figure being the one favored by the majority. Murray did not testify as to

the value of the Dakota land, and the defendant testified that his land was worth \$140 per acre.

As we understand the evidence, some time after the contract in question was executed, plaintiffs entered into a contract for the purchase of the Dakota land from Woods, Hallam, and Lahl, at an agreed consideration of \$61 per acre, on the basis of 635 acres.

Most of the legal questions discussed by counsel are ruled by a long line of prior decisions of this court, and we will not, therefore, go into much detail in the discussion thereof. We have stated the testimony, in substance, upon which the defendant relied to establish the allegation of fraud contained in his answer.

It appears from the record that defendant is a farmer, about 44 years of age, and that he has owned and sold or traded several tracts of real estate, prior to the transaction in question; but there is no evidence that he was familiar with the Dakota land or its value, and he testified that he was without any knowledge on this point. Murray and Duff drove him around the section, giving him an opportunity to observe its general appearance, and he seems to have discovered that a portion of it appeared to be wet. He testified that some of it was covered with weeds, and that the ditches in the highway were obscured thereby. He called the attention of Murray to the appearance of the land, and says Murray told him it was sufficiently drained by the ditches along the highway. He further testified that he believed the statements and representations of Murray as to the value and quality of the land and its facilities for drainage, and was induced thereby to purchase the same. We think the evidence quite conclusively shows that the land was not worth to exceed \$60 to \$65 per acre; and it is conceded that plaintiffs entered into a contract with the Illinois parties, after the execution of the contract in question, for the purchase of the land at an agreed consideration of \$61

1. **FRAUD:** representations of value. per acre. It is, however, earnestly argued by counsel for appellant that the statements and representations of Murray were expressions of opinion only; but it is evident from the whole record that they were intended otherwise, and that the defendant understood that plaintiff knew the market value of the land, and that he made statements and representations as facts, intending defendant to believe and rely thereon. We have recently reviewed the authorities upon this question, and it is unnecessary to refer thereto at length.

It was said by us in *Hetland v. Bilstad*, 140 Iowa 411, that "statements of value or of quality may be made with the purpose of having them accepted as of fact, and, if this is done and so relied on, they are to be treated as the parties designed they should be, namely, representations of fact." See, also, *Hise v. Thomas*, 181 Iowa 700, and cases therein cited.

The trial court found that defendant was induced to enter into the contract by the fraudulent representations of Charles Murray, the agent of plaintiff; and, upon a careful reading of the record, we reach the conclusion that its finding is fully sustained thereby. The statements and representations of Murray as to the value of the Dakota land are shown to have been wholly false; and that they were known by him to be false is abundantly established by the evidence. It was shown that plaintiff maintained an office at Castleton, near the land, and was, at the time, authorized to sell the same at \$60 or \$61 per acre. The advantage obtained by plaintiff in the transaction was very large, and the trial court found that the contract was unconscionable. We are not disposed to disturb the finding of the district court upon this question, or its finding that the transaction upon the part of plaintiff was fraudulent.

II. Counsel for appellant practically concede that, under Section 2974 of the Code, and the holding of this court

2. SPECIFIC PERFORMANCE: contract to convey lands which embrace homestead.
- in *Ormsby v. Graham*, 123 Iowa 202, 212, *Townsend v. Blanchard*, 117 Iowa 36, *Wheelock v. Countryman*, 133 Iowa 289, and other cases, the conclusion of the

trial court was right that, in the absence of an election upon the part of plaintiff to accept a conveyance of the land, exclusive of the homestead, the court could not enforce a decree for specific performance of the contract to convey; but, in avoidance thereof, counsel argue that the contract did not bind defendant to convey the Dallas County land in exchange for the Dakota section, and that the contract, when rightly construed, does not provide for an exchange of properties, but that the sale of the Dakota land was for cash, with the option to defendant to convey the land in lieu of the payment thereof.

We need not set out the particular provision of the contract referred to; but it is apparent from the record that both parties contemplated and intended an exchange of properties, and not a sale of the tract for cash. All of the negotiations between the parties contemplated that the defendant would convey the Iowa land, subject to certain encumbrances, in exchange for the Dakota tract, subject also to mortgage encumbrances. In view, however, of our conclusion that the contract was procured by the fraud of plaintiff, it is unnecessary for us to construe the same, and it is immaterial which construction should prevail. If the same were construed as a contract strictly for the exchange of properties, it could not be enforced, for the reason that plaintiff at no time elected to accept a conveyance thereof, exclusive of the homestead; and, if construed in accordance with the contention of counsel for appellant, its fraud in the procurement of the contract is conclusive against it.

III. The record title to the Dakota land, at the time the contract was entered into, was in one Miller, who resided at Monmouth, Illinois; and plaintiff did not acquire

3. SPECIFIC PERFORMANCE:  
vendor without title:  
subsequent acquisition.

same until the 17th day of January, 1916. We have frequently held that a party who did not have title to the land when the contract was made, cannot maintain an action for specific performance by subsequently obtaining title thereto. *Luse v. Dietz*, 46 Iowa 205; *Ormsby v. Graham*, supra; *Gossard v. Crosby*, 132 Iowa 155; *Luttschwager v. Fank*, 151 Iowa 55; *Monroe v. Crabtree*, 178 Iowa 546; *Olson & Nessa v. Rogness*, 173 Iowa 331. The case last cited recognizes the exception that, if the purchaser knows that his vendor does not have title when the contract is made, but expects to procure it later, the purchaser cannot avoid specific performance on that account if the seller obtains title before the time has arrived for the consummation of the contract. Counsel for plaintiff insist that it had an option contract for the purchase of the land such as a court of equity would enforce in an action for specific performance; but the trouble with this contention is that the evidence fails to show plaintiff possessed of any such contract. The instrument relied upon gave plaintiff exclusive authority to sell the land, but contained no agreement to convey the same to plaintiff, or of plaintiff to purchase it. Subsequent to the execution of the contract herein, plaintiff entered into a contract with some Illinois parties, who claimed to have an unrecorded deed to the land; but, as plaintiff had no title or interest whatever in the land, the contract was, as found by the trial court, wholly without mutuality. On the other hand, plaintiff testified that Murray told him the land belonged to him. This is denied, and we need not go into the question of the weight of the evidence in reference thereto.

It is also contended by counsel for appellant that defendant is estopped to plead this or other defense except that of fraud, for the reason that, in the letter written by

4. **VENDOR AND PURCHASER:** . . . ing to rescind the contract, the ground  
statement of grounds of re- stated therefor was that same had been ob-  
scission; mend- tained by misrepresentation. The misrepre-  
ing hold. sentations relied upon were not stated, and  
it is not shown by the evidence that defendant, at that time, knew that plaintiff was not the owner of the land; and the only thing in the entire record in any way tending to charge him with notice thereof is the provision of the contract by which plaintiff agreed to convey, or cause the Dakota land to be conveyed, to the defendant. It does not appear, however, that defendant's attention was called to this provision of the contract, or that its purpose or meaning was in any way discussed between the parties.

The facts do not bring the case within the exception noted, nor do they support the alleged estoppel. The rule contended for by counsel for appellant has often been applied; but, for reasons already stated, it cannot avail upon this appeal.

IV. In compliance with the terms of the contract, defendant, at the time of its execution, gave plaintiff his note for \$6,000, as earnest money to be returned to him when the deeds were exchanged; but plaintiff negotiated said note to a bank in Illinois, which brought suit thereon against him in the Federal court, and defendant paid same before judgment. The court awarded him judgment for the amount of said payment, with interest on his counterclaim. Complaint is made by counsel for appellant of this ruling of the court; but it is frankly conceded by them that, if there were fraud in the inception of the contract, the judgment of the court was proper. It is, therefore, unnecessary for us to discuss this question.

Other questions are discussed by counsel, but we omit reference thereto, for the reason that the matters above considered are decisive of the case. It is probably true, as



5. FRAUD: examination of property: effect.

counsel claim, that defendant could have inquired concerning the value and quality of the Dakota land, and it also appears that he saw it and observed that a portion thereof appeared to be wet; but he was not encouraged by Murray or Duff to make an independent investigation until after he had signed the contract, and it may well be assumed that plaintiff's agent knew that defendant was not then likely to make inquiry or investigation touching the subject of the contract. In our opinion, the defendant was not negligent in failing to make inquiry concerning the quality or value of the land, and plaintiff is in no position, after obtaining an advantage in the transaction of upwards of \$15,000, to charge him with negligence in believing and relying upon his representations as to said matters.

We have carefully read the entire record, and are convinced that the judgment of the trial court is right. It is, therefore,—*Affirmed*.

PRESTON, C. J., LADD and GAYNOR, JJ., concur.

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J. C. O'MALLEY, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

**RAILROADS:** "Grade" Crossings Not Universal Rule. "Grade"

1 crossings over railway right of ways which divide the land of landowners are distinctly in favor, and are, ordinarily, all the landowner may demand; yet the company may not so construct its embankments as to render a "grade" crossing impossible of construction wholly upon its right of way, and then insist on a "grade" crossing or no crossing at all, on condition that the landowner contribute the necessary land for approaches outside the right of way.

**RAILROADS:** Private Crossings—Application to Railroad Commis-

2 sion. The statutory duty of a landowner to apply to the railroad commissioners to settle disputes relative to private crossings applies only to those cases where the landowner already

has *one* crossing and desires an *additional* one, either under, overhead, or grade. (Sec. 2022, Code Supp., 1913.)

**RAILROADS: Private Crossings—Mandamus.** A landowner whose  
3 lands are divided by a railway right of way has an absolute right, enforceable in the courts, *and without application to the Railroad Commission*, to at least *one* adequate crossing over such right of way to a grade crossing, if that be practicable, but, in any event, to an adequate crossing, even though it be an overhead or underground crossing. (Sec. 2022, Code Supp., 1918.)

*Appeal from Dallas District Court.*—W. H. FAHEY, Judge.

JANUARY 9, 1918.

REHEARING DENIED MAY 17, 1918.

ACTION in equity for a mandatory injunction requiring the defendant to give to plaintiff an adequate crossing over its tracks. The opinion states the facts. Decree for the plaintiff. Defendant appeals.—*Affirmed*.

*Hughes, Sutherland & Taylor*, for appellant.

*E. J. Kelly*, for appellee.

GAYNOR, J.—This is a suit in equity, the purpose of which is to secure a writ of mandamus compelling the defendant to construct a private crossing for the plaintiff where defendant's railway crosses plaintiff's farm. The plaintiff claims that the right of way of the defendant company cuts the plaintiff's land into two parts, one of which lies north and the other south of the right of way; that the defendant has refused to construct and maintain a private crossing over its railway track at any point where the said track divides the land, and plaintiff has no adequate means of access to his lands. Plaintiff further pleads that the railway track over its right of way has been so constructed for a period of thirty years; that, during most of this period,

1. RAILROADS:  
"grade" cross-  
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versal rule.

defendant has maintained a farm crossing for the plaintiff, connecting the two parts of his land and providing for plaintiff a reasonable and adequate crossing over its tracks to his lands; that, within the past three years, the company has raised the grade of its track to such an extent as to render the farm crossing theretofore used by the plaintiff and maintained by the defendant useless; and that, since it raised its track, the plaintiff has no adequate means of reaching his land from one side to the other; that, for more than a year prior to the filing of this petition, the plaintiff demanded of the defendant that it construct a crossing over its railway track at the point at which the farm crossing theretofore used had stood, and that the defendant has refused to do so, and still refuses, and has refused to furnish the plaintiff any adequate means for crossing its track.

Defendant, for answer, says that the plaintiff has never requested the defendant to make a crossing over its tracks, nor has plaintiff pointed out a place where such crossing should be constructed; further, that there is no jurisdiction in the court to order defendant to make the crossing, for the reason that the jurisdiction is lodged in the Railroad Commission of the state, after notice duly given. It further says that it is willing to construct and now offers to construct a grade crossing, at, or substantially at, the point where plaintiff's former crossing was located, being the place where plaintiff has signified his desire to have the same put, and to do this within a reasonable time, provided the plaintiff signifies his willingness to permit the approaches to the same to extend on his land for a sufficient distance to permit of a safe and proper grade; but that the plaintiff has not signified his willingness to have the approaches so constructed, but objects to the same.

Upon the issues thus tendered, this case was submitted on a stipulation of facts as follows:

"It is conceded by both parties to this action that the

defendant is a corporation, engaged in the operation of a railroad through and across Dallas County, Iowa; that the plaintiff is the owner of the land described in his petition; and that the railroad of the defendant company runs through said land, and consists of a double-track system, with a right of way, at the point where the same crosses plaintiff's land, of 170 feet in width; that plaintiff's residence, barns, and other farm buildings are south of said railroad tracks; and that that portion of plaintiff's land lying north of said railway track consists of approximately 40 acres of ground, and is used by the plaintiff for the cultivation of ordinary farm crops, and for the pasturage of stock; and that the balance of plaintiff's land lies on the south side of said railway tracks; that, during the two years prior to the filing of the petition in this case, the defendant company has raised the grade of its tracks, and its roadbed where the same crosses plaintiff's land, the raise in grade at said point being proximately 13 feet; and that the average height of said track across plaintiff's land is 20 feet above the level of the land; that, for many years prior to the raising of the grade of the said track of the defendant company, the said company maintained for the plaintiff a farm crossing at grade across its said track and right of way, connecting the said two parts of plaintiff's farm over the track of the defendant company; that the right of way owned by the railway company at or near the point at which plaintiff's farm was, is not of sufficient width to permit of the building of approaches to a grade crossing at said point, and said point being conceded to be the lowest point in the grade across plaintiff's farm, and it being conceded that, in order to construct a grade crossing at said point, it will be necessary to construct the approaches thereto upon land belonging to plaintiff, unless more land is acquired by the defendant company; that the distance at which said approaches at said point project from the right of way of the defendant as now

maintained on the south side would be proximately 100 feet; and that said approaches would be, at the base thereof, proximately 70 feet in width. It is further conceded that, should a grade crossing be constructed at any other point in plaintiff's land over said railroad tracks, that the approaches thereto would extend outside of the railway company's present right of way proximately the same as has heretofore been stated."

This stipulation was supplemented by the following testimony given by the plaintiff:

"I know the location of the crossing that the railway company maintained over their tracks and right of way prior to the time this grade was raised, and that it is about the most suitable location for a grade crossing anywhere in my field. The old crossing is shut up. It is fenced in, and they have never put in the new crossing. The raising of the grade destroyed the old crossing, and the right of way is fenced across the road. I have no crossing there at the present time. The railway company has done nothing toward providing me with a crossing since the other crossing was closed up. I have demanded the company to construct a crossing, but they have not done so yet."

With this evidence supporting the issues tendered, the court entered a decree for the plaintiff, ordering "that a writ of mandamus issue, compelling the railway company to construct and make ready for plaintiff's use an adequate means of crossing their right of way, at or substantially at the point upon plaintiff's land where plaintiff's former crossing was located, and that defendant is hereby ordered to construct said crossing as aforesaid," the work to commence within sixty days from the date of the decree, and the crossing to be completed as rapidly as is reasonable, in view of weather conditions. From this decree defendant appeals, and urges for our consideration the following propositions:

- (1) The court erred in refusing and failing to hold that

the plaintiff was required to provide the land upon which the approaches to the crossing should be built, before he could request the construction of the same, or before the court could order it constructed.

(2) The court erred in decreeing that the defendant should construct a crossing at or substantially at the place where plaintiff's former crossing was located, without first requiring the plaintiff to provide ground for the approaches thereof; since the decree, in effect, required the construction of an under crossing, which can only be ordered by the board of railroad commissioners, in the manner provided in Section 2022 of the Supplement to the Code, 1913.

(3) The court erred in ordering the issuance of the writ of mandamus compelling the construction of an under crossing, until the plaintiff had furnished the necessary ground upon which to construct the approaches thereto.

The theory of the appellant, defendant, seems to be that the only crossing that the court had power to require defendant to construct was the grade crossing; that the defendant is not bound in law to construct any other crossing, unless ordered to do so by the board of railroad commissioners; that, inasmuch as the court was limited in its power in a mandamus proceeding to requiring the defendant to construct a grade crossing, it had no power to mandamus the defendant to construct any other crossing than a grade crossing; that the record discloses that a grade crossing cannot be put in at the place designated by the plaintiff, except by extending the approaches onto plaintiff's land; that the court should have required the construction of a grade crossing, but should have imposed upon the plaintiff the duty of furnishing approaches to the grade crossing upon his own land; that the defendant is not bound to construct a grade crossing for the plaintiff except upon its own right of way; that, if an adequate grade crossing cannot be furnished in that way, and it becomes necessary, in order to

make it effectual as an adequate crossing, that the approaches extend onto the plaintiff's land, the plaintiff should be required to contribute so much land as is necessary for the construction of the approaches.

It is well to have the statute before us, in disposing of this question. Section 2022, Code Supplement, 1913, being Chapter 163 of the Acts of the Thirty-fifth General Assembly, provides:

"When any person owns land on both sides of any railway, or when the railway runs parallel with the public highway, thereby severing the farm from the public highway, the corporation owning the same shall, when requested to do so, make and keep in good repair a sufficient causeway or other adequate means of crossing the same and one cattle guard on each side thereof connected by cross fences to the right of way fence on each side of the right of way at such reasonable place as may be designated by the owner. If such person desires more than one crossing or desires an overhead or underground crossing over or under said railway, he shall serve or cause to be served a notice in writing upon such railway company setting forth his demand, with a plat of the land showing the place and manner of the desired crossing or crossings. If such railway company, within thirty days after having been served with such notice, has failed and refused to construct such crossing or crossings, such person may apply to the board of railroad commissioners of this state which shall have full authority to determine all questions growing out of such demand, and upon hearing, after due notice, make such order as it may deem just and equitable."

The provision of the statute above set out has been the law of this state for many years, except that portion which gives to the railroad commissioners the power, under certain circumstances, to determine the character of the crossing, commencing with the words: "If such person desires

more than one crossing or desires an overhead or underground crossing." As said in *State v. Chicago, M. & St. P. R. Co.*, 86 Iowa 304, "Grade crossings are the rule in this state." As said in *State v. Burlington, C. R. & N. R. Co.*, 99 Iowa 565:

"Owing to the topography of the state and the usual size of farms, grade crossings are usually adequate, and hence 'are the rule in this state.'"

We may start with the proposition that grade crossings are usually adequate; that they are the rule in this state; that ordinarily a grade crossing can be furnished by the

company over its right of way; and that a  
 2. RAILROADS :  
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this thought in mind that the Thirty-Fifth General Assembly saw fit to add to the statute, and to say that, if the landowner desires more than one crossing, or desires an overhead or underground crossing, he must apply to the railroad commissioners to determine his right to such crossing or crossings. It could not have been the intention of the legislature to say that the absolute right to a crossing, provided for in the first part of the statute, is limited to grade crossings; that, in the event the railroad company made it impossible, by the manner of constructing its roadbed, to make a grade crossing, the right to a crossing as an absolute right did not thereafter exist, but the right must be presented to and determined by the railroad commissioners before it could be insisted upon. The first part of the statute gives to the landowner the right to a crossing over the railroad tracks to his lands on either side, and imposes upon the railroad company the duty to furnish him an adequate means of crossing the same, and it must furnish this to him upon request,—make it and keep it in repair. The right to cross from one piece of land to the other, divided by the railroad track, is an ab-



solite right given the landowner, and the duty is imposed upon the company to furnish him an adequate means for so doing. The theory being that a grade crossing is usually adequate, the company is not required, ordinarily, to furnish any other; and, where a grade crossing can be furnished and is adequate, the company discharges its duty by furnishing such a crossing. If, however, the landowner desires more than one grade crossing, or desires an underground or overhead crossing, notwithstanding the fact a grade crossing may be or is furnished, he may apply to the railroad commissioners to have determined his right to such other crossing or crossings.

The plaintiff in this case has never demanded or expressed any desire for more than one crossing, or for an overhead or underground crossing. He demands of the de-

3. RAILROADS:                    defendant a primary right given by the state  
private cross-                to cross over these tracks to his lands. The  
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"We have so constructed the embankments upon our right of way and our roadbed that we are not able to furnish you an adequate grade crossing. We therefore cannot and will not give you any crossing, because we cannot give you a grade crossing that is adequate without trespassing on your land. This we have no right to do. We will not give you an underground crossing or an overhead crossing because you have not invoked the right tribunal to compel us to do that. Therefore, you must go without any crossing, or you must join with us in making a grade crossing by furnishing sufficient of your own land to make the approaches. Or, in other words, we cannot make a grade crossing unless you contribute to the expense of making it. Unless you will contribute to the expense of making it, we will not make it."

The court says:

"Your duty is to give him a crossing over your right of

way. The law does not designate what kind of crossing you shall give him. The duty rests on you. If you cannot give him a grade crossing, give him such other crossing as is adequate. You have then discharged your duty under the statute. You need no order from the railroad commissioners to authorize you to do this. You must make a grade crossing or an underground crossing, but it must be adequate. This is all the plaintiff asks. This is all the decree requires of you."

As has been held by this court, the right to resort to the railroad commissioners, under this statute as amended, is merely permissive, and is not inconsistent with the continued right of the court to enforce such rights. See *Michalek v. Cedar Rapids & I. C. R. & L. Co.*, 173 Iowa 231.

When the defendant company, through the power of eminent domain, entered upon the plaintiff's land, and condemned it to the uses of the company, the law said to the railroad company, "You must make compensation." When the right of way divides the lands of the plaintiff into two or more parts, and roadbeds and embankments are constructed for the laying of tracks, the owner necessarily is embarrassed in the use of his lands so divided, and, if they were permanently divided, that fact would be considered in determining the amount the company is required to pay him. He is met, however, with the proposition that the lands are not permanently divided; that, under the law, "it is the duty of the railroad company to give him adequate means of crossing these tracks at such reasonable place as he may designate." His damages are, therefore, lessened because of the fact that this duty is imposed upon the company, and his damages are, therefore, assessed in the light of this fact. Now the company pays the damages, takes possession of the land, constructs its roadbed, raising the grade 20 feet above the surface, and says to the landowner:

"We cannot give you a grade crossing unless you con-

tribute to the expense. The damages which you recover from us were estimated on the theory that we would give you this grade crossing,—that we would furnish it, make it adequate and keep it in repair; but we find we have so constructed our track that we cannot give you this crossing unless you contribute to the expense of erecting it by furnishing to us more land, sufficient to enable us to build approaches to the crossing. We consider an underground crossing too expensive.”

This answer would hardly meet the situation. An apology for not discharging a duty is no good reason for not requiring the duty to be discharged. The plaintiff is entitled to a crossing. If the defendant finds itself in such a situation that it cannot give him the usual and ordinary crossing, to wit, a grade crossing, then it must furnish him some other adequate crossing within the power of the company to furnish. Can it be the law that the plaintiff, under the situation, is required to contribute to the building of that which, the law says to the defendant, “you shall give him in part consideration for the taking of his land?” It is a part consideration because it is an element to be considered in estimating the amount of damage which the plaintiff may recover. We see no escape from the conclusion that the plaintiff is not bound to furnish land for the approaches; that the defendant is bound to furnish the plaintiff an adequate means of crossing from one side of the track to the other; and that, if it cannot make a grade crossing, it must give to the defendant some other adequate means of crossing this track. We have read *Speer v. Erie R. Co.*, 68 N. J. Eq. 615 (60 Atl. 197), and *Williams v. Clark*, 140 Mass. 238 (5 N. E. 802), and are not by these cases persuaded to a different holding than is here indicated.

Upon the whole record, we see no ground for interfering with the judgment of the district court, and its decree is affirmed. The time within which to perform the mandate

of the court, however, is extended to May 1, 1918.—*Affirmed.*

PRESTON, C. J., LADD, EVANS, and SALINGER, JJ., concur.

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F. A. POST, Appellee, v. W. R. NULL et al., Appellants.

**CORPORATIONS:** Conspiracy to Destroy Business. Evidence reviewed, in an action to compel the transfer of shares, and held insufficient to show that plaintiff was in a conspiracy to destroy defendant's business.

*Appeal from Plymouth District Court.*—W. D. BOIES,  
Judge.

FEBRUARY 16, 1918.

REHEARING DENIED MAY 17, 1918.

ACTION for a writ of mandamus to compel the officers of a corporation to transfer certain shares of capital stock on its books and to issue new certificates therefor. The court found in favor of the plaintiff, and ordered that a writ issue as prayed.—*Affirmed.*

*T. M. Zink*, for appellants.

*H. S. Martin*, for appellee.

STEVENS, J.—The plaintiff alleged in his petition that he was the owner of two shares of stock, which had been duly assigned to him; that he presented same to the officers of defendant for transfer upon its books, and requested the issuance of new certificates; and that the defendant refused to transfer the stock or issue new certificates. The suit was brought against W. R. Null and William Utech, the president and the secretary-treasurer, respectively, of defendant; and in his petition, plaintiff prayed a mandatory writ directing the officers of defendant to transfer the shares of stock and to issue new certificates therefor. The defendant Elevator

Co-operative Company voluntarily entered its appearance herein, and filed joint answer with its codefendants, alleging, in substance, that the Farmers Elevator Company was incorporated some time prior to January 12, 1910; that it subsequently organized, under the Acts of the Thirty-sixth General Assembly, as a co-operative association, with its principal place of business at Le Mars, Iowa; that M. A. Moore & Company is a rival corporation, also having its principal place of business at Le Mars, but conducting similar business at several near-by towns; that plaintiff and M. A. Moore are shareholders in the Moore Company and enemies of defendant; that, by preconcerted plan, arrangement, and conspiracy between themselves and with other shareholders of the Moore Company, they sought to acquire stock in defendant association, for the purpose and with the intent to obtain information respecting the business affairs of defendant association, for the purpose of limiting the territory within which defendant might do business, and to injure and wreck said association, destroy its business, and to obtain control thereof and dictate its policy and affairs; and that plaintiff was not, therefore, at the time he presented the certificates of stock to the officers of defendant for record and transfer, the owner thereof in good faith, but for the purpose above stated.

The trial court rendered judgment in favor of the plaintiff, and ordered that a writ of mandamus issue commanding the officers of defendant to transfer the said certificates of stock and issue new stock to plaintiff therefor.

The contention of appellee in this case is based largely upon our holding in *Funck v. Farmers Elevator Co.*, 142 Iowa 621. The plaintiff and M. A. Moore testified upon the trial of this case, and admitted that they purchased, or procured friends and employees to purchase, 60 shares of the capital stock of the defendant association, and that, for the purpose of voting at a shareholders' meeting, they par-

celed the said stock among its friends and employees. They also admitted that they purchased all of the stock of defendant they could, and would have purchased a controlling interest therein, if they could have done so.

Both the Moore Company and the defendant association handled coal and lumber, and there was sharp competition between them. The defendant association, when it began business, seems to have reduced the price of lumber, and its rival thereafter also sold some kinds of lumber at a reduced price. It may be inferred from the evidence that the rivalry between the two concerns had engendered some personal hostility, and it may be assumed that the Moore Company felt the effect of the defendant's competitive prices and methods of doing business.

However, the case does not turn upon the question of the personal antagonism between members of the respective corporations, or the rivalry between them for the business of the community, but upon the alleged conspiracy or preconcerted effort and purpose of the plaintiff and his associates to do things alleged in plaintiff's petition. The evidence reveals no instance of unfair methods of competition on the part of either of the rival concerns, or that plaintiff or his business associates had misrepresented the affairs of defendant, or in any way sought to boycott its business, or to secretly or otherwise obtain information of its affairs for the purpose of interfering with its customers or dealers, or in any unlawful or dishonest way to injure or destroy the business of defendant. It may be that the plaintiff and his business associates purchased the stock in question, and sought to purchase other stock, for the purpose of controlling the business policy of defendant, reducing competition, and harmonizing the prices of the respective commodities handled by the two concerns; but this is supported only, at most, by inference from the testimony, and both the plaintiff and Mr. Moore testified that they had no such purpose, and denied a

conspiracy or desire to injure the business of defendant, and asserted that they purchased the stock as an investment. It is, however, admitted by them that defendant was selling lumber too cheap, and that the expenses of its management were unnecessarily large; but they testified that they desired to become shareholders in defendant association and obtain representation upon its board of directors for the purpose of counseling and advising with its officers, and to improve its business methods, reduce expenses, and increase the profits to its shareholders. It may be doubted whether this assumed benevolent attitude was the sole motive that prompted this action; but the evidence, in our judgment, wholly fails to sustain the allegations of defendant's answer that plaintiff was not a good-faith holder of the stock. He and his business associates owned 60 shares, for which, so far as appears from the evidence, they paid full value.

No evidence of a conspiracy or preconcerted plan or arrangement on the part of plaintiff and his associates to injure or destroy the business of the defendants was introduced upon the trial. There was some evidence to the effect that Moore had stated, at a shareholders' meeting, that the two concerns should get together and harmonize prices, and that some independent effort was made by him to bring about an understanding between them on this point. It is not, however, alleged in plaintiff's petition that plaintiff sought control of the defendant corporation for the purpose of forming an unlawful combination to fix or control prices; and the evidence, in any event, is not sufficient to have sustained such allegation, if same had been made. The evidence shows that there were some reciprocal business relations between the two concerns, and fails to disclose any facts tending to show that plaintiff or his agents had in any way sought to misrepresent the business of defendant, or to in any way interfere with its business, customers, or other persons or concerns with whom it did business.

The facts do not bring the case within our holding in *Funck v. Elevator Company*, supra. A comparison of the record in the two cases will show a very different state of facts. In the *Funck* case, the plaintiff was not a good-faith holder of the stock, but was, as the court said, a mere puppet of other parties, who were seeking, by various dishonest methods, to destroy the business of the defendant.

It is our conclusion that the evidence in this case sustains the holding of the trial court, and its judgment is, therefore,—*Affirmed*.

PRESTON, C. J., LADD and GAYNOR, JJ., concur.

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S. A. POWERS, Appellant, v. C. HARTEN et al., Appellees.

**SCHOOLS AND SCHOOL DISTRICTS: Consolidated Districts—Size**

1 of District—"Section." The word "section," as used in the requirement as to the minimum size of consolidated school districts, is used in the sense of the ordinary *government* section, whether it be a full section of 640 acres or only a fractional section. (Sec. 2794-a, Code Supp., 1913.)

**ELECTIONS: Naturalization—Adoption.** The adoption by a citizen

2 of the United States of a foreign born minor does not, *ipso facto*, naturalize such minor.

**ELECTIONS: Privilege of Secrecy as to How Elector Votes.** An

3 *illegal* voter, who admits that he did vote on the occasion in question, possesses no right of secrecy as to *how* he voted.

**ELECTIONS: How One Voted.** Circumstances, in and of them-

4 selves, may be sufficient to show *how* a person voted.

**ELECTIONS: Residence.** Evidence reviewed, and held insufficient

5 to show that an elector was not a resident of the precinct in which he voted.

*Appeal from Boone District Court.*—E. M. McCALL, Judge.

MAY 17, 1918.

ACTION to enjoin the establishment of a consolidated school district, and to enjoin certain defendants from act-



ing as officers thereof. Decree for the defendants. Plaintiff appeals.—*Affirmed.*

*Frank Hollingsworth and Harpel & Cederquist*, for appellant.

*F. W. Ganoe and Goodykoontz & Mahoney*, for appellee.

GAYNOR, J.—This action was brought by a resident taxpayer, to have the establishment of a consolidated independent school district adjudged void, and to enjoin the defendants from acting as a board of directors of such district.

The district was organized under Section 2794-a of the Code Supplement, 1913, which provides:

“When a petition describing the boundaries of contiguous territory containing not less than sixteen sections within one or more counties is signed by one third of the electors residing on such territory, and approved by the county superintendent, \* \* \* and filed with the board of the school corporation in which the portion of the proposed district having the largest number of voters is situated, requesting the establishment of a consolidated independent school district, it shall be the duty of said board, within ten days, to call an election in the proposed consolidated district, for which they shall give the same notices as are required in Section 2746 of the Code and Section 2750 of the Supplement to the Code, 1907, at which election all voters residing in the proposed consolidated district shall be entitled to vote by ballot for or against such separate organization. When it is proposed to include in such district a city, or town or village, the voters residing upon the territory outside the incorporated limits of such city, town or village shall vote separately upon the proposition for the creating of such new district. The judges of said election shall provide separate ballot boxes in which shall be deposited the votes cast by the voters from their respective territory, and if a majority of the votes cast by the electors re-

siding either within or without the limits of such city, town or village, is against the proposition to form a consolidated independent corporation, then the proposed corporation shall not be formed. If a majority of the votes so cast in each territory shall be in favor of such independent organization, the organization of the proposed consolidated independent school corporation shall be completed by the election of a board of directors for said school corporation, \* \* \* and when so organized shall not be reduced to less than sixteen sections unless dissolved as provided by this act."

The district was organized under the provisions of this section. It is conceded that every provision of the statute was complied with, except in the two particulars upon which plaintiff predicates his right to maintain this action, and to the relief prayed for.

The first contention of the plaintiff is that the district, as proposed and organized, contained less territory than is contemplated by the statute.

From a reading of the statute, it will be noted that the proposed territory must contain not less than 16 sections, and that it shall not be reduced at any time to less than 16 sections. That there were 16 government sections included in the proposed territory, is not disputed. The contention is that some of the included sections were fractional; that some of them did not contain 640 acres; that the included territory was something over 100 acres less than 16 *full* sections. This is the first ground upon which the plaintiff relies, and on which he contends that the district was not legally established. Before the act herein set out was passed, the law provided for 16 *government* sections. The amendment omitted the word "government;" and this is said to be suggestive, at least, of an intention to require, not government sections, but sections containing 640 acres each.

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"section."

It is true that a full section contains 640 acres. The word used here must be understood in its usual and ordinary sense, and, we must assume, was used by the legislature in the sense in which it is usually and ordinarily understood and used. The government, in dividing lands, for convenience and for the purpose of facilitating sale, divided the territory into townships, and subdivided the townships into sections. Surveys were not accurately made, but stakes and stones were placed to indicate the boundaries of sections as surveyed and laid out by the government. Some of these sections overran. Some of them, though not reported fractional, contained less than 640 acres. The fractional sections were caused by lakes and streams and reservations, and by township lines when the township is more or less than 6 miles in extent in one or both dimensions. Had the legislature intended that each section to be included in the school district should contain not less than 640 acres, we think it would, by apt words, have expressed this thought. If, when it said, "It shall contain not less than 16 sections," it meant 16 sections each containing not less than 640 acres, we think it would have so expressed itself in the statute. Inasmuch as it must have been known to the legislature that there was such a thing as government sections, and that land was sold according to sections and subdivisions thereof, it must be that the legislature meant the use of the word in the sense of government sections, and not in the sense contended for by appellants. Plaintiff's contention, in its fullness, would require an accurate survey, to determine whether, in the territory proposed, each of the 16 sections contained the full quantum of land; and it would follow that, though 16 government sections were included in the proposed district, another section would have to be added, in order to make the quantum of 16 sections, if, peradventure, the land ran short in its measurement of 640 acres to the section.

It is a fact, within the common knowledge of men, that

sections not recorded as fractional contain less than 640 acres. If plaintiff's contention should be adopted, no district would be safe without including more than 16 sections, lest it should turn out, upon an actual measurement, that the 16 sections included do not contain a quantum of land in the aggregate amounting to 16 times 640 acres. As bearing upon this question, see *Brown v. Hardin*, 21 Ark. 324; *Hazelwood v. Rogan*, 95 Tex. 295.

We think the contention of plaintiff, based upon the fact that the 16 sections included in this district did not contain in the aggregate 16 times 640 acres, cannot be sustained.

The second proposition is that illegal votes were cast at the election.

It appears that there were 56 ballots cast, in all. The returns from the election show that there were 29 votes for, and 27 against, the proposed district. It is claimed that there were 2 illegal votes cast. It appears that one Lumen Van Pelt and one Nick Curry voted at this election. It does not appear affirmatively, from direct testimony, how these persons voted. If both these votes were cast in favor of the consolidated district, and are rejected because they are illegal, then it would leave the vote a tie for and against the proposed district. Curry was not a legal voter. He was born in Italy; came to this country when he was a child; and was adopted by a citizen of the United States, when still a child. It does not appear that his father was ever naturalized. The adoption did not have the effect of naturalizing the child. The naturalization of a father operates to confer the rights of citizenship upon the minor child who is dwelling, at the time of the father's naturalization, within the jurisdiction of the United States, or who dwells within the jurisdiction subsequent to the father's naturalization, and during his own minority. See *Conover v. Old*, 80 N. J. L. 535 (77 Atl.

2. ELECTIONS :  
naturaliza-  
tion : adoption.

1070). This is the only provision for the naturalization of a child by operation of law that can be suggested to cover the case here. It does not do it.

It appears that this Nick Curry voted in good faith; that he believed he was a citizen and entitled to vote; that he was present at the voting place on the day of election.

3. ELECTIONS:  
privilege of  
secrecy as to  
how elector  
votes.

It appears that he was opposing the consolidated district. He admitted that he voted, but refused to tell how he voted,—claimed his privilege. The court sustained his claim of privilege, and in this we think the court was in error. A legal voter has a right to claim the privileges of secrecy. While one who votes illegally cannot be compelled to state whether he voted or not, yet if he admits that he voted, as this witness did, he has no protection under the rule of secrecy, and may be compelled to state how he voted. 9 Ruling Case Law, Section 142, under head of "Elections," and cases cited.

The general rule is that, in order to defeat an election, it must appear that the successful ticket receives such a number of improper votes that, if rejected, the majority would be brought down below that necessary to an election. There is no question that the voter himself is in the best position to know just how he voted. Curry, being an illegal voter, the court should have required him to state how he voted. This fact, however, may be proven by circumstances, as well as by direct testimony of the witness. A majority of the legal votes in favor of the proposed district is sufficient. Omitting Curry's vote as illegal, there were but 55 votes cast. The record discloses, to our satisfaction, that Curry voted against the district. This would leave but 26 votes against the district, which, taken from 55, would leave 29 for the district. The finding that Curry was an illegal voter does not destroy the efficacy of the legal votes cast. Assuming that all the

4. ELECTIONS:  
how one  
voted.

other votes were legal, the record stands, at this point, 29 for to 26 against.

As to Van Pelt, the record discloses that he was a qualified voter; that he was living in the district at the time he voted. It is claimed, however, that he was only temporarily there; that his home and voting place were outside this proposed consolidated district.

5. ELECTIONS :  
residence.

The record on this point discloses that he is a single man; that he was working for one Claus; that, when he presented himself at the polls, he was asked the question, "Where do you reside?" and he said, "With Mr. Claus." Mr. Claus's home was within the consolidated district. Claus, having been called, testified, in substance, that Van Pelt worked for him during February and March preceding the election,—worked by day's wages; that, when he wasn't busy at carpenter work, he was working as a farm hand, or any other labor he could get. He testified:

"I think he began working for me the first of January, as a farm hand, doing chores, and feeding cattle, and then built the hog house for me. While he was doing all this work, he boarded and slept at my house, and, as far as I know, that was his place of residence, or home, at that time. I have known of him being hired out in the same general capacity and staying other places as he did at my place, ever since he has been of age. It was his custom to stay or board and room and make his headquarters and home where he was working. He was at my place during February and March, doing carpenter work; built a hog house. He first came to help me with some other work, chores and other work on the farm, and fed cattle. That was in the winter, before he commenced building the hog house. He got his board and some money besides. I know he didn't drive back and forth from my home every week. He was more than a month building the hog house. He was there before that, six weeks, feeding the cattle and doing chores."

True, this witness says that the father and mother lived about three miles from his place, and outside the district; that the young man was seen frequently going to his father's house; but there is no substantial evidence that he made his home at his father's home; that he made his home at any other place than the place where he was working, as testified to by Mr. Claus. There is some opinion evidence that his home was at his father's place, but the opinions are not based upon a knowledge of any substantive fact. The burden was on the plaintiff, and we think he did not carry it to a successful issue. We think that Van Pelt was a legal voter. There is no evidence which way he voted. The young man was 28 years of age. Ever since he was a boy, he had been doing for himself; had been living where his work required him to live. There is no substantive evidence that he made his home with his parents after his majority. His home was where he was living. It is not necessary that it be a permanent home. The inquiry is, Where was his home at the time he cast the vote in question?

On the whole record, we find no ground for interfering with the judgment of the court below, and it is—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

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FRED W. POWERS, Trustee, Appellee, v. MAYTAG-MASON  
MOTOR COMPANY, Appellant.

**MORTGAGES: Foreclosure—Who May Purchase Trust Property.** A bona-fide foreclosure sale of trust property, made in full compliance with the order of court, is not invalid, even though the property be sold for less than its value, because the purchaser is a corporation of which the trustee is an officer and stockholder.

*Appeal from Black Hawk District Court.*—CHAS. W.

MULLAN, Judge.

MARCH 12, 1918.

REHEARING DENIED MAY 17, 1918.

APPEAL from an order overruling a motion to set aside a receiver's sale. The facts are stated in the opinion.—*Affirmed.*

*John T. Sullivan and Mason & Dyer*, for appellant.

*Williams & Clark*, for appellee.

STEVENS, J.—The defendant, Mason Motor Company, formerly the Maytag-Mason Motor Company, is a corporation organized under the laws of Iowa for the manufacture and sale of automobiles, and having its principal place of business at Waterloo in this state. Prior to the time it changed its name, and on the 14th day of December, 1911, it executed bonds in the aggregate amount of \$150,000, and, to secure the payment thereof, executed a trust deed upon certain real property in the city of Waterloo, its machinery, raw material, and other personal property, to the plaintiff herein, as trustee.

On the 6th day of October, 1913, plaintiff filed a petition in the office of the clerk of the district court of Black Hawk County, praying judgment on said bonds in the sum of \$100,000, and a decree foreclosing said trust deed. The defendant waived notice, entered its appearance, and admitted the allegations of plaintiff's petition; whereupon, the court entered an order appointing Ira J. Hoover receiver, with authority to take full and immediate possession of all of defendant's property, and to continue its business in such manner as he deemed for the best interest of defendant, its shareholders and creditors, and, by consent of the parties, was further authorized to borrow money and issue receiver's certificates in the sum of \$5,000. The court further, in said order, directed the receiver to apply the amount borrowed and the net income derived from said business to the pay-



ment of certain specified indebtedness. On July 28, 1915, final judgment was entered against the defendant for the sum of \$118,260 and costs, and the foreclosure of said trust deed was decreed. Hoover was continued as receiver.

The decree is somewhat lengthy, and contained many findings respecting the indebtedness of defendant, and directed the receiver to sell its property at public sale, after having first published notice of the time and place of said sale for four consecutive weeks in two newspapers published at Waterloo, said sale to take place upon the premises of defendant company. The decree further authorized the receiver to sell said property without appraisal, but at not less than \$35,000. After due publication in the manner provided in said decree, on the 8th day of September, 1915, the receiver sold said property to the Black Hawk Improvement Company, a corporation doing business at Waterloo, for the sum of \$35,000; and on the 17th day of September, said sale was duly approved by the court. No objections or exceptions, up to this time, were filed by the defendant or other appellants herein; but, on the 30th day of December, 1915, the defendant corporation moved the court to set aside the deed and the approval of the receiver's sale, on the ground that, while the purchaser at said sale was ostensibly the Black Hawk Improvement Company, the real purchaser was the plaintiff herein, and that, as trustee, he had no right to purchase said property at said sale.

Later, Edward R. Mason, who was president of defendant corporation, filed a motion in the office of the clerk of the district court of Black Hawk County, alleging, in substance, that he was personally held as accommodation endorser upon an \$11,000 note of the defendant's, payable to the Black Hawk National Bank, the payment of which was further secured by a large amount of the first mortgage bonds of the defendant, which bonds were secured by the trust deed above referred to, and asking that said note be

paid out of the proceeds of the property of defendant. Later, defendant and Edward R. Mason amended the motions previously filed, alleging, in addition to the matters therein set forth, that Fred W. Powers, the plaintiff herein, was, at the time of the receiver's sale, a stockholder, secretary, and a member of the board of directors of the Black Hawk Improvement Company, and also a member of the board of directors, and president, of the Black Hawk National Bank, and largely interested in each of said corporations, and in the property purchased at said receiver's sale. On July 21, 1916, the Black Hawk Improvement Company filed a petition of intervention, alleging that the receiver's sale was conducted by one Ira J. Hoover, a wholly disinterested person; that it purchased said property in good faith, at public sale, with the knowledge and consent of the defendant corporation and of Edward R. and Fannie K. Mason and W. B. Wallis; that, notwithstanding the knowledge of said parties of the relation of the plaintiff to the Black Hawk Improvement Company, no exception was taken or objection made thereto until after the sale had been consummated and approved by the court.

Upon final hearing, the court overruled the motion of appellants herein, from which ruling this appeal was taken.

It is admitted by plaintiff that he sustained the relation to the Black Hawk Improvement Company and the Black Hawk National Bank claimed by appellant. He was examined as a witness by counsel for defendant, concerning his interest in the bank and the Improvement Company, and as to the part taken by him in the purchase of the property at the receiver's sale. It appears from this evidence that the Improvement Company raised at least a portion of the money to pay for the property purchased by selling a part thereof; that it purchased preferred claims against defendant at a discount, and otherwise financed the deal. Edward R. Mason testified that he did not, on the day of the sale,

know that plaintiff was a stockholder or otherwise interested in the affairs of the Black Hawk Improvement Company, but admitted that he was fully informed upon this point on the same day by one of plaintiff's attorneys, and that the Improvement Company would have to borrow the money to consummate the purchase.

Neither fraud nor collusion on the part of plaintiff or the receiver is alleged or claimed by appellants in the motions filed, or in argument in this court. It is, however, urged by counsel for appellant that plaintiff, as trustee, had no right to purchase the property at the receiver's sale, or to be interested in any way, directly or indirectly, therein; and that, while the negotiation for the purchase of said property was conducted in the name of the Black Hawk Improvement Company, plaintiff was the real party in interest and purchaser at said sale; and that said purchaser holds said property in trust for the benefit of the bondholders; and that the sale should be set aside, or such purchaser required to account to the bondholders for the reasonable value thereof. That a trustee may not purchase at a sale of trust property, is too well settled for discussion. He cannot be at the same time vendor and vendee, nor can he represent himself in opposite or conflicting interests. As vendor, he must sell as high as possible, and as purchaser, he would naturally buy as cheaply as possible.

If the evidence in this case revealed that the plaintiff was, in fact, the purchaser of said property, or that, by fraud or collusion with the receiver, using the Black Hawk Improvement Company as a pretense, he actually purchased said property for his own use and benefit, a different case might be presented for our decision. As the record appears in this court, the receiver, an officer of the court, was wholly disinterested, and acting under its specific direction and with its approval, and there is no suggestion of collusion on his part with the plaintiff or other officers of the Black Hawk

Improvement Company. The Improvement Company is a corporation, and, so far as the evidence shows, purchased the property in good faith in its own name, and became the owner thereof; and the only interest of plaintiff therein was as a shareholder and official. The sale was to the corporation; and, while it is possible that the property was purchased for less than it was worth, it was sold to the highest bidder, after full publicity had been given of the time and place of the sale. The legal principle urged by counsel for appellant is, as above stated, entirely sound; but the facts of this case do not warrant its application. The trial court that signed the order appointing a receiver, the final decree, and approved the receiver's report of sale, and directed him in the application of the proceeds thereof to the payment of the indebtedness of defendant, also overruled the motion in question.

We can reach no other conclusion herein than that the plaintiff did not purchase the property at the receiver's sale, but that same was purchased by the Black Hawk Improvement Company, a separate and distinct entity, to which plaintiff sustained only the relation of a shareholder and officer. The ruling of the lower court upon the motion was correct, and should be and is—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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STELLA B. ROMMEL, Appellant, v. NATIONAL TRAVELERS  
BENEFIT ASSOCIATION, Appellee.

**INSURANCE:** "Obvious Risk of Danger." "Exposure to obvious  
1 risk," within the meaning of a policy of insurance, is shown  
as a matter of law, under instant record, which deals with  
the act of the insured in attempting to cross, in a rowboat, a  
swollen and turbulent stream, for the purpose of reaching and  
destroying an ice gorge.

**INSURANCE: Dangers Incident to Occupation.** Concede, *arguendo*,  
 2 that a clause in a policy of insurance providing for limited liability in case of death from exposure to "obvious dangers" has no application to dangers attending the *official* duties of the insured, yet manifestly such concession becomes immaterial when, at the time of the exposure in question, the insured was performing a non-official act.

*Appeal from Mahaska District Court.*—HENRY SILWOLD, Judge.

FEBRUARY 16, 1918.

REHEARING DENIED MAY 17, 1918.

ACTION upon a policy of insurance for \$5,000 death benefits. The court directed the jury to return a verdict in favor of the plaintiff for \$100. Plaintiff appeals. The facts are fully stated in the opinion.—*Affirmed*.

*Thomas J. Bray* and *J. G. Shifflett*, for appellant.

*Burrell & Devitt* and *Carr, Carr & Evans*, for appellee.

STEVENS, J.—I. Arthur E. Rommel, at the time of his death, which occurred on the 26th day of February, 1916, by drowning, held a certificate of membership in the National Travelers Benefit Association, of Des Moines, Iowa, by the terms of which the association agreed, in case of death by accident, to pay Stella B. Rommel, his wife, and plaintiff herein, the sum of \$5,000. The policy, however, provided:

1. INSURANCE:  
 obvious risk  
 of danger.

"This policy shall not cover \* \* \* injuries occasioned by \* \* \* exposure to obvious risk \* \* \* to an amount exceeding \$100."

The circumstances surrounding his death are, in substance, as follows:

Mr. Rommel was county engineer of Mahaska County; and, an ice gorge having formed in the Des Moines River near Oskaloosa, causing the channel to become obstructed

and the flood waters to flow over the adjacent bottom land, he, with some companions, attempted to destroy the gorge by the use of dynamite. The river is described by some of the witnesses as having two channels, one a quarter of a mile in width, and another, between a knoll or elevation of land, referred to in the evidence as an island, and an ice gorge beyond. The latter channel was about 130 to 200 feet in width, but the distance from the island to the gorge, the way deceased and Thomas went, was about 300 feet.

On the day in question, deceased, with Mr. Ruggenberg, Mr. Reynolds, and Mr. Thomas as companions, rowed across the first channel to the island in two small boats, but only Rommel and Thomas attempted to cross the channel from the island to the ice gorge. They appear to have crossed the first channel to the island without serious difficulty. The witnesses described the channel between the island and the gorge as containing many trees and shrubs, and the water as flowing very swiftly. This is also indicated by the difficulty encountered by Thomas and the deceased in launching the boat for the trip. The other two men assisted them in getting into it; and an oar, placed in the water by Thomas for the purpose of holding the boat, was immediately carried to the surface by the swiftness of the stream. In crossing this channel, they abandoned their oars, and propelled the boat by taking hold of trees and forcing it with their feet. The same method was pursued in attempting to return to the island; but, when deceased took hold of a tree, one end of the boat tipped, and passed from under him. His companion, who testified that the water was not very swift at the point where this occurred, adjusted the boat, enabling Rommel to get into it, and they proceeded on their way toward the island. Deceased again took hold of a tree, causing one end of the boat to settle and again pass out from under him. Thomas then grabbed the same tree, and the boat passed from under them beyond their reach. Thomas ap-

parently had a secure hold on the tree; while deceased, for a time, held on to Thomas, the latter assisting him by holding onto his coat collar.

Ruggenberg and Reynolds, who remained on the island, observing their peril, went to the opposite site of the island for the other boat, which they dragged to the channel between the island and the gorge; but, on account of the swiftness of the water, were unable to launch the same or render any assistance to the parties. In the meantime, Rommel had loosed his hold upon Thomas, and drifted down stream to a point where his body was later found. Several hours later, a young man, who was an experienced boatman, rescued Thomas from the tree, and took him to the island, where the parties remained until the following morning, when they returned to the shore from which they started the day before. The young man who rescued Thomas brought with him some ropes, one of which he attached to the boat, and the same was held by the men on the island, while he crossed the channel to a point near where Thomas was, and threw a trot-line, attached to a rope, to him, who tied the end of the rope to the tree, and by the use thereof reached the boat. In returning, the oars were not used, and the party in charge of the boat pulled it ashore by holding to the rope, one end of which was fastened on the shore, and the other to the tree from which Thomas had been rescued. Reynolds and Ruggenberg both declined to cross the channel from the island to the gorge, evidently on account of the dangerous appearance thereof; and there was some evidence that Mr. Rommel stated, before going to the river, that it was a useless and dangerous undertaking to attempt to destroy the gorge by the use of dynamite; and one witness testified that he cautioned him against going, on account of the hazard involved. It is contended by counsel for appel-

2. INSURANCE:  
    dangers inci-  
    dent to occu-  
    pation.

lant: (a) That deceased was, at the time he was drowned, engaged in the performance of his duties as county engineer, and that whatever risk was involved therein was incident thereto; (b) that the case presented a question of fact for the jury, and that the court erred in directing a verdict in favor of the plaintiff for \$100.

Appellee, for defense, relies upon the provision of the policy above quoted. The evidence is conflicting as to some minor details, but not as to the more important facts involved. While the county engineer performs his duties under the direction of the board of supervisors, they are, nevertheless, prescribed by statute. The evidence does not show that, at the time in question, deceased was engaged in the performance of his duties as county engineer, or that he was acting under the direction or command of the board of supervisors. Whatever he did was voluntary on his part, but with the knowledge and apparent acquiescence of the board of supervisors. There was testimony tending to show that deceased was importuned by various persons affected by the flood to do something to relieve the situation, and that his efforts were inspired rather more by these importunities and the desire to be relieved therefrom than by the necessity of performing official duties. It is quite clear that the risk assumed by deceased was not incident to his office or occupation. Section 1527-s3, Supplemental Supplement, 1915, and following sections.

II. That the deceased entered upon a dangerous venture, when he and Thomas undertook to cross the channel between the island and the ice gorge, conclusively appears from the situation as described by the witnesses, and the unfortunate consequences that followed. This alone will not, however, prevent plaintiff's recovery. The risk assumed, to defeat recovery, must have been an obvious one. The exception contained in the policy is for "injuries occasioned



by exposure to obvious risk." The word "obvious," as used in this connection, must be given its common or generally accepted meaning, which, as given by Webster, is, "easily discovered, seen or understood; readily perceived by the eye or the intellect; plain, evident, apparent." *Combs v. Colonial Casualty Co.*, 73 W. Va. 473 (80 S. E. 779); *The Sikh*, (D. C.) 175 Fed. 869. In *Small v. Travelers Protective Assn.*, 118 Ga. 900 (45 S. E. 706), the court said:

"The words 'obvious risk' designate not only a risk which may be readily perceived by the eye or senses, but also one that may be perceived by the intellect." *Diddle v. Continental Casualty Co.*, 65 W. Va. 170 (63 S. E. 962).

This court, in *Correll v. National Accident Society*, 139 Iowa 36, defined an apparent danger as follows:

"'An apparent danger' is one which is capable of being seen or otherwise comprehended through the medium of the senses. Webster's Dictionary; Century Dictionary. And to constitute a voluntary or unnecessary exposure, the danger must either have been known to the insured in fact, or one which, in the exercise of his faculties as an ordinarily prudent person, should in reason have been known to him."

And in *Jones v. United States Mut. Acc. Assn.*, 92 Iowa 652, 655, it is said that the acts of the injured must have been such as reasonable and ordinary prudence would pronounce dangerous. For the rule as stated in other jurisdictions, see *Small v. Travelers Protective Assn.*, supra; *Combs v. Colonial Casualty Co.*, supra; *National Life & Acc. Ins. Co. v. Lokey*, 166 Ala. 174 (52 So. 45); *Diddle v. Continental Casualty Co.*, supra; *Shevlin v. American Mut. Acc. Assn.*, 94 Wis. 180 (36 L. R. A. 52); *Garcelon v. Commercial Trav. Acc. Assn.*, 195 Mass. 531 (81 N. E. 201); *Rebman v. General Acc. Ins. Co.*, 217 Pa. 518 (66 Atl. 859); *Price v. Standard Life & Acc. Ins. Co.*, 92 Minn. 238 (99 N. W. 887).

The question, presented, therefore, is: Was the hazard or risk assumed by deceased obvious, or so apparent to a rea-

sonably prudent and cautious person that it can be said, as a matter of law, that reasonable minds would not differ in respect thereto? If the risk was so plain, apparent, and obvious that it would have been readily perceived or observed by an ordinarily prudent and cautious person, then a verdict, if returned in favor of plaintiff for the full amount in the policy, could not be permitted to stand. The burden of proof to show that death resulted from exposure to obvious risk was on the defendant. It was shown by the evidence that there was a small, false bank, apparently only a few inches in height, a short distance above the point where the accident occurred, over which the water was flowing very swiftly, and that, when it reached the point where deceased caught hold of the tree, its velocity was very great, and was estimated by one of the witnesses as fifteen miles per hour. Whether the judgment of this witness was accurate or not, it is manifest, from the description of the witnesses, and the difficulties encountered by deceased and Thomas, that its velocity was great. Thomas remained in the tree for several hours, and was not rescued until a young man who was an experienced boatman arrived, with ropes which were used in the rescue in the manner above described. One of the witnesses testified that the delay was due rather to the want of proper equipment than to the danger and difficulties of reaching Thomas; but after his rescue, the parties remained on the island until morning, notwithstanding that a crowd of sympathetic people had, in the meantime, gathered on the shore. There was evidence tending to show that deceased observed and appreciated the fact that the undertaking was a dangerous one; and the board of supervisors sought to employ another person to destroy the gorge, but were unable, apparently, to do so. One witness testified that thirty minutes were consumed by four men in crossing the first channel, and that approximately the same length of time was required for Thomas and Rommel to go from the

island to the gorge, a distance of approximately 300 feet. It was not necessary that the danger to deceased of losing his life should have been immediately apparent to him, or the exact situation fully known or appreciated by him; but, if same would have been obvious or apparent to a reasonably prudent and cautious person, then the risk assumed in attempting to cross from the island to the gorge and return was obvious, and death resulted, within the terms of the policy, from exposure to obvious risk.

We have made a careful examination of the evidence, and are convinced that deceased exposed himself to a hazard that must have been obvious and apparent to a reasonably prudent and cautious person; and that, upon this question, reasonable minds could not differ; and that, had a verdict been returned in favor of the plaintiff for the amount of the policy, it could not be permitted to stand.

It is also urged on behalf of appellant that deceased was an experienced boatman, and believed from his experience that there was no apparent hazard or danger in crossing either of the channels; but we are unable to agree with this contention. We think it apparent that there was obvious risk, and that, under the clause of the policy above quoted, the court did not err in directing a verdict for plaintiff for the smaller sum allowed by the policy.

The judgment of the lower court is, accordingly,—  
*Affirmed.*

PRESTON, C. J., LADD and GAYNOR, JJ., concur.

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STATE OF IOWA ex rel. A. D. PUGH, Appellant, v. E. T.  
MEREDITH et al., Appellees.

**CORPORATIONS: Elections—Non-Voluntary Proxy.** A proxy is not  
1 rendered non-voluntary by the fact that the president of the  
company sent the stockholder a blank form, with a request that

the stockholder execute the same. (See Sec. 1821-y, Code Supp., 1913.) And such a proxy is personal to the one to whom it is addressed, even though such person is described as "president," etc., of the corporation.

**INSURANCE: Elections—Solicitation of Proxies.** Whether the president of an insurance company is an "*agent*," within the prohibition of Sec. 1821-y, Code Supp., 1913, relating to solicitation of proxies, *quaere*.

**CORPORATIONS: Elections—Improper Solicitation of Proxy.** A vote cast at a stockholders' meeting, under a proxy which the stockholder voluntarily executed, is in no manner invalidated by the fact that the person to whom the proxy was given was guilty of criminal solicitation in obtaining the proxy. (See Sec. 1821-y, Code Supp., 1913.)

*Appeal from Polk District Court.*—CHARLES A. DUDLEY,  
Judge.

MAY 17, 1918.

THE opinion states the nature of the case and the material facts.—*Affirmed*.

*A. D. Pugh*, for appellant.

*Sidney J. Dillon*, for appellees.

WEAVER, J.—The National Life Association is a corporation doing a business of life insurance at Des Moines, Iowa. Its articles of incorporation provide for the election of one member of its board of directors at each annual meeting. Each person insured in the association is a member, entitled to one vote, either in person or by proxy, for each \$1,000 of insurance carried by him. At the annual meeting and election held in January, 1916, the defendant E. T. Meredith and the relator, A. D. Pugh, were the only candidates for election to the board of directors. The votes were as follows: For the relator, 31 votes cast by members in person and 216 votes cast by proxies; and for Meredith, 45 votes cast by members in person and 1,100 votes cast by proxies.

On behalf of each candidate, objections were raised to the validity of the proxies held by or for the other; but the votes were cast and canvassed as above indicated, and Meredith declared elected. Pursuant to such election, Meredith has been and is recognized as a member of the board, and is acting in that capacity. The relator, claiming to have been elected, demanded admission to the board as a member and offered to qualify as such, but the demand and offer were refused; whereupon he instituted this action in the nature of *quo warranto*, to test the validity of the election and settle the disputed right to said office.

Stated as briefly as practicable, the plaintiff claims that the 31 votes received by him from members in person and the additional 216 cast for him by proxy were all valid and legal, and should be counted in his favor. He admits the validity of the 45 votes cast for Meredith by members in person, but denies the validity of the 1,100 votes cast for the latter by proxy. The alleged grounds for such objection are as follows:

1. That the proxies were given to James P. Hewitt, in his official capacity as president of the association, and therefore to the association, instead of to a member, as required by the corporate articles and by-laws.
2. That Hewitt, with other officers and agents of the association, solicited the proxies, in order to insure the election of a director who would re-elect or retain them in their several positions, and that Hewitt abused his official trust by demanding the proxies in his official capacity and then using them in his own interest, rather than in the interest of the association.
3. That the funds of the association were expended in procuring the proxies.
4. That none of the proxies were given voluntarily, but were the result of a peremptory demand made by Hewitt in his official capacity.

5. That the proxies were not stamped with revenue stamps and stamps cancelled when they were filed with the association.

The defendants denied the several allegations of irregularity in procuring and casting the votes by proxy for Meredith. They further deny that the relator is a member of the association, and allege that he is neither eligible or qualified to be elected to its board of directors.

There was a trial to the court, and judgment entered dismissing the petition. The relator appeals.

While counsel have argued several of the foregoing objections, chief reliance is placed upon the proposition that the proxies used in the election of Meredith were obtained by improper solicitation. It appears without dispute that, on or about December 7, 1915, and in anticipation of the annual meeting and election to be held on January 18, 1916, Mr. Hewitt, with the assistance of some of the officers and employees of the association, addressed a written notice and request to a large number, and perhaps all, of the members of the association, in the following form:

“NATIONAL LIFE ASSOCIATION.

“Des Moines, Iowa, Dec. 7, 1915.

“Dear Member: The annual meeting of this association will be held January 18, 1916. We would like to have you, as a policy holder, represented at this meeting. Will you kindly date and sign your name to the attached stamped proxy card and mail to us immediately?

“Very respectfully,

“James P. Hewitt,

“President National Life Association.”

To the postal card on which this communication was sent was attached a return card, addressed to the National Life Association, Des Moines, Iowa, and on this was printed the following matter:

"This proxy should be signed by you and mailed to the home office.

"PROXY.

"Amount \$. . . . .

"I hereby nominate and appoint James P. Hewitt (president of National Life Association), if present, and if not present, M. W. McCoy (vice president of said association), as my attorney, or proxy, in the order herein named, to represent me and cast my vote by proxy at the annual meeting of the policy holders of the National Life Association of Des Moines, Iowa, to be held at the home office, January 18th, 1916, hereby ratifying and confirming all my said attorney may legally do by virtue hereof.

"This proxy is given voluntarily and without any solicitation by an agent of the association. Any proxy heretofore given by me for said meeting is hereby revoked.

"Dated . . . . .

"(Sign here) . . . . .

"Member of National Life Association."

In response to the foregoing, many members signed and returned proxies, as requested, and the votes cast by Hewitt at the election in question as proxy for other members were thus obtained. The theory of the plaintiff's case is that the manner of obtaining such proxies is in violation of law, and that the votes so cast should not be counted. The statute on which this contention is grounded provides, among other things, that an insurance company or association may, by its articles of incorporation, authorize its members or stockholders to "vote by proxies voluntarily given" upon all matters of business at its meetings, including election of directors. To be valid, the proxies must be executed within two months prior to the meeting, and be filed with the company at least one day before the election at which they are to be used. Section 1821-x, Code Supplement, 1913. Other

provisions of the statute relied upon by appellant are as follows:

"Sec. 1821-y. Soliciting of proxies by an agent of the company either for personal use or for the use of officers of the company or association, or for any other persons, is forbidden. Nor shall any of the funds of a company or association be expended in procuring proxies.

"Sec. 1821-z. Any violation of this act shall be deemed a misdemeanor and punishable accordingly."

The record in this respect suggests two inquiries: Was the request sent out by Hewitt for proxies a violation of the statute? If a violation of the statute, as argued by appellant, did it have the effect to invalidate the proxies or to deprive Meredith of the benefit of the votes so cast?

There is nothing in the statute which forbids or renders it improper for the president or other officer of the association to act as a proxy for any member who sees fit to authorize him so to do. The only condition

1. CORPORATIONS: limiting that right is that the proxy shall be  
elections:  
non-voluntary executed within two months, shall be volun-  
proxy. tarily given, and be filed with the company

not less than one day before the meeting at which it is to be used. There is nothing in this record to justify the conclusion that these disputed proxies were not voluntarily given. No member whose proxy was thus used by Hewitt undertakes to say that he gave it under any constraint or misapprehension, or otherwise than as a matter of his own free will and personal preference. Counsel argue that the card sent out by Hewitt was in the nature of an imperative demand, and of such character as to impress the member to whom it was addressed with the thought that he was under some duty or necessity to comply; but this, we think, is a strained and exaggerated construction of the language employed. It must be assumed that the average member of the association is a person of ordinary intelligence, and knows



that his insurance contract imposes no such obligation upon him, and that his vote at any corporate election is his own, and that, in voting, he may rightfully cast it for whomsoever he will. If there be exception to this rule, and any member acted otherwise than voluntarily, or if coercion or compulsion was employed to obtain or influence his proxy, there should be some other evidence of such fact than the mere proffer of the request, which is not at all inconsistent with his perfect freedom of action.

There is room for question, also, whether the prohibition of solicitation of proxies by agents covers the act of Hewitt in sending out the requests. It is true that the pres-

ident of the association is, for most purposes, its agent; and, if the word as employed in this particular statute is to be given this broad signification, then, of

2. **INSURANCE:**  
elections:  
solicitation of  
proxies.

course, his act in this respect was a violation of its terms. For reasons hereinafter stated, we do not attempt to dispose of the question so raised. It is worth while, however, to observe that the chapter in which these sections are found is the one in which particular attention is given to the requirement of a license to be issued to soliciting agents of life insurance companies and associations, and that no other class or kind of agents is mentioned therein, unless we are to enlarge the scope of that word as it is used in the sections we have quoted. It is also to be noted that a distinction seems to be suggested in the very provision relied upon by appellant (Section 1821-y) when it forbids "solicitation of proxies by an agent of the company either for personal use or for the use of officers of the company," etc. But whatever be the

3. **CORPORATIONS:**  
elections: im-  
proper solicitation of  
proxy.

better or true construction of the statute in this regard, we are satisfied that, so long as the proxy is given by a member having a vote, and is his voluntary act, and the written authority is executed and filed in the proper time,

the vote is not invalidated because of the improper solicitation of the proxy. One sufficient reason for this holding is that the statute does not expressly or by implication provide for such result. It is clearly provided that members "may vote by proxies voluntarily given," and the only expressed conditions affecting the validity of such vote are found in the declaration that "No proxy shall be valid unless signed and executed within two months prior to such meeting or election for which the proxy was given," and that "All proxies must be filed with the company at least one day prior to an election at which they are to be used." The clear implication of the quoted language is that, if the proxies conform to these requirements, they are to be treated as valid, and given effect accordingly. As we have already said, there is in this case no evidence that the proxies or any of them were not given voluntarily, and they are none the less voluntary from the mere fact that they were given in response to the request, even the urgent request, of an officer or agent of the association. Practically speaking, no election of any kind is ever held without more or less canvassing and solicitation of voters for support. The purpose of the statute forbidding such solicitation is not to disfranchise the member or members so solicited, but rather to prohibit and punish the misuse by agents of their position in the organization to promote the selfish interests of themselves or of others. If this statute is violated, the demands of justice are satisfied by the punishment of the offender, under the provisions of Section 1821-z, Code Supplement, 1913. It would be rather a perversion of justice to penalize the member giving his proxy by invalidating his vote, not because of any wrong on his part, but because of the wrong of the agent soliciting it, and thus displace an officer chosen by a clear majority, in favor of a candidate receiving a minority vote. By way of illustration, our statute relating to public elections prohibits all electioneering and solicitation of votes

within any polling place, or within 100 feet thereof, and makes a violation of such regulation punishable as a misdemeanor; yet no one will seriously argue that, if any person disregards this prohibition, and electioneers or solicits votes within the prescribed limits, it has the effect to disfranchise the voters who are so wrongfully approached, or to afford any ground for successful challenge of their right to vote when they come to the polls for that purpose. At the annual election which is here contested, there were cast, as we have seen, 1,145 votes for Meredith, as against 247 for the relator. No member of this apparently large majority is produced, to allege or testify that his vote so cast did not express his personal preference between the candidates, or to say that he was in any manner deceived or misled by the solicitation of his proxy, or that the giving of his proxy was otherwise than purely voluntary.

It is argued for appellant that, since the return card on which the proxies were printed was addressed and mailed to the association, they should be considered as proxies given to the association, and therefore as not available for use by Mr. Hewitt. The objection is unsound. The proxies are, in express words, given to Hewitt, or, in case of his absence from the meeting, to McCoy. The form in this respect seems to be unexceptionable. So far as the mailing address was concerned, it was entirely proper that they be sent direct to the association. The statute, as we have seen, provides that all proxies must be "filed with the company" at least one day before the election, and it is quite immaterial whether the member giving his proxy sends it direct to the company or sends it to the person authorized to act for him, if such person files it in time.

The conclusion above announced, that the alleged or admitted solicitation of the proxies is not, of itself, a sufficient objection to the validity of the votes so cast, renders it unnecessary for us to discuss or decide other questions argued

by counsel. The judgment of the district court is correct, and it must be—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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GEORGE E. TALMAGE, Appellant, v. TOWN OF WASHTA et al.,  
Appellees.

**TELEGRAPHS AND TELEPHONES: Ordinance Authorization of Toll Lines.** Telephone toll lines—those operating solely between the cities and towns of the state—require no ordinance authorization as a condition precedent to the right to occupy streets and alleys. (See Secs. 776, 2158, Code, 1897.)

*Appeal from Cherokee District Court.*—WILLIAM HUTCHINSON, Judge.

MAY 17, 1918.

THE opinion states the case.—*Reversed and remanded*.

*J. D. F. Smith*, for appellant.

*Herrick & Herrick*, for appellees.

WEAVER, J.—The plaintiff's petition in equity states his case substantially as follows: He is the owner of a telephone toll line, extending from a point within the town of Washta to the neighboring towns of Quimby, Holstein, Anrelia, and Fielding. He does not own or operate, or ask to be permitted to own or operate, a local telephone exchange in Washta, but uses and proposes to use such line solely as a means of communication between his office or toll station and the other towns with which his line is connected, as above stated. He alleges, however, that the defendants, Town of Washta and its mayor and council, deny his right to have or maintain such line within the corporate limits, and have cut down his poles and rolled up his wires, and rendered his line of no use or avail for its intended purpose.

He further avers that the telephone line, as constructed by him, was erected with care, and that no objection is raised thereto by reason of any defect or fault in its construction or use, but that defendants claim the absolute right to forbid and prevent the maintenance of such line within the town. He alleges that the mayor of the town is, himself, the president of a local telephone company, which owns and operates a local exchange therein, under a franchise granted for that purpose; and that defendants assert that such franchise is exclusive, and because thereof no toll line can be permitted to enter the town or maintain a toll station therein. Plaintiff avers his willingness to comply with all reasonable rules and regulations which may be imposed upon him with reference to the construction and maintenance of his toll line and station, and he asks that his right to maintain the same may be judicially declared and confirmed, and that defendants be enjoined from interfering with his exercise of such right.

To this petition, the defendant interposed a general demurrer. This being sustained, plaintiff elected to stand upon his pleading without amendment. Judgment was thereupon entered, dismissing the petition, and plaintiff appeals.

The telephone, as a public convenience, serves two quite distinct uses. In one, it competes with the telegraph, extending its lines from town to town and city to city, affording means of quick communication between persons separated by very considerable distances. In the other, it provides networks of numerous lines of a purely local character, extending from a central station in each city to the homes, offices, shops, and business places therein. In performing services of the first kind, its success and efficiency depend primarily upon its right and opportunity to overcome the handicap of mere distance, and to provide a means of communication between more or less widely separated cities and towns. Each place so served is, in a sense, a mere way or relay station,

and its connection is effected by a single wire, or, at most, very few wires, which enter and leave town by the most direct course. They cast but a slightly increased burden upon the streets of the town, and add but little to its burden of police supervision. On the other hand, the ordinary telephone exchange is, generally speaking, a purely local concern. From its central office, its tentacles reach out into nearly every building or place within the corporate limits, where people live or labor or transact business. Its poles crowd the streets and its web of wires fill the air until the proper regulation of its business and the maintenance of its system without undue interference with the ordinary use of the streets and public places for other legitimate purposes present a very serious problem for the consideration of the municipalities where they are established. That the city or town which is asked to grant a franchise for a business making such great demand upon its streets and public ways, and proposing to perform a public service of such universal convenience and importance to the people, should be given power or choice in selecting the person or party to whom the authority shall be given, and to prescribe the reasonable conditions of such grant, is too just and proper to admit of discussion; and it was doubtless with this thought that the legislature enacted Section 776 of the Code of 1897. This statute, as the same has been construed by the courts, clothes cities and towns with the authority to grant or refuse to grant franchises for the use of its streets and public places for telephone purposes, and to prescribe regulations for the exercise of such franchise rights. *Farmers Tel. Co. v. Town of Washta*, 157 Iowa 447. But it has been settled, in several cases, that this requirement does not affect the rights of telephone companies in cities and towns where their business was established prior to the enactment of the Code of 1897. *Chamberlain v. Iowa Tel. Co.*, 119 Iowa 619; *State ex rel. Shaver v. Iowa Tel. Co.*, 175 Iowa 607. This distinction

has been drawn on the theory that, prior to the enactment of the Code, the general right of telephone companies to occupy the streets had been conferred by the provision now embraced in Code Section 2158. The chapter in which this section is found was originally enacted with sole reference to telegraph companies and telegraph lines. The first section (now Code Section 2158) granted, in general terms, a right of way for telegraph lines "along the public roads of the state, or across the rivers or over any lands belonging to the state or any private individual," and prescribed rules for the prompt and speedy transmission of messages, and penalties for neglect or willful failure in performance of their duties. Years later, when the telephone came into existence, and had demonstrated its usefulness in the performance of services of a similar character, the statute just referred to was amended by inserting the words "or telephone" immediately after the word "telegraph" wherever it occurred in the original text of the chapter, thus giving to the two methods of communicating intelligence by wire and transacting such business for the accommodation of the public, identical standing before the law.

It is the opinion of the writer (who, in this respect, speaks here for himself alone) that, in thus amending the telegraph statute to admit the telephone to the same general rights, and to charge its use with the same duties and liabilities, the legislature had no thought that it was granting to telephone companies generally a universal franchise to establish and maintain local exchanges, but rather, that it was placing the telephone on equality with the telegraph in the use of the public roads as a right of way, by which to extend its lines from town to town and from place to place, and thus enable it to carry on a business which, up to that time, had been the special function and privilege of the telegraph. The adoption of this view by my colleagues is not necessary, however, to the result we have reached upon

this appeal; but it serves to confirm my own judgment in the correctness of that conclusion, and I express it for whatever it may be worth.

We are agreed upon the proposition that the statute, as it stood when it related to the telegraph alone, did not require the granting of a municipal franchise as a condition precedent to the construction of such a line into and through any city or town, or to the maintenance therein of an office for the transaction of its business with the public. If this be correct, it is very clear that the amended statute, which simply coupled the telephone with the telegraph, without other change therein, cannot be said to subject either the telegraph company or telephone company to such necessity.

It only remains to inquire whether the situation is so affected by the enactment of Code Section 776 that the appellant must secure a franchise from the appellee town before he can lawfully erect a toll line therein. In our judgment, this inquiry must be answered in the negative. The general question was somewhat vaguely suggested in the opinion of this court in *Farmers Tel. Co. v. Town of Washta*, supra, but left undecided. It was again mentioned by Justice Deemer in *State ex rel. Shaver v. Iowa Tel Co.*, supra, but again was passed without answer, as being unnecessary to the disposition of that case. The language used by the learned writer of that opinion is as follows:

"There may be some doubt, in construing Sections 775, 776, and 2158 together, whether cities and towns may now regulate toll lines within their limits. It may be that the state still retains its right to do this, under Section 2158. Perhaps no grant from the city is necessary to obtain the right to erect a toll line within the limits of the city; and it may be that, after obtaining a grant from the state, the city may still regulate the placing of the poles, wires, etc., for toll lines within its limits, by general and uniform regulations applying to all toll lines alike. Upon this and



other propositions, we express no opinion, as it is not necessary to a decision of the case."

Viewing the question, then, as still an open one, we are led to the conclusion that, whether the legislature, in enacting Code Sections 2158 to 2164, did or did not have in mind the differentiation between the telephone as a competitor with the telegraph for linking widely separated cities and towns by wire, and the telephone system as it exists in the localized service of an individual city or town, we are satisfied that, in enacting Section 776, the distinction was recognized, and that the requirement of a franchise from the municipality was intended to apply only to the right to establish and carry on the localized business which is ordinarily accomplished through a central office or exchange. It is this business, as we have already noted, which necessitates the multitude of poles and wires, calling most insistent-ly for police supervision and regulation, and presenting many other features rendering its control and direct responsibility to the local authorities a matter of material importance to the local public. In other words, we think that, in the absence of any expressed or necessarily implied legislative intent to the contrary, the right to maintain a telephone toll line or telegraph line into or through a city or town, thus affording connection with other places and centers of population beyond the confines of the local jurisdiction, is provided for by the Code chapter on telegraphs and telephones, and that the exercise of the right so given is not conditioned upon the procurement of a franchise from each municipality into which or through which the line is extended. The reasons for making the establishment and operation of a local exchange subject to the consent of the city or town, as well as to a large measure of municipal regulation, have little, if any, application to toll lines. A local system or exchange, the primary purpose of which is to supply the needs of the local population for intercommunication, is, or should be,

recognized as a natural monopoly. That is, a single system, properly regulated and administered, will serve the convenience of any given city or town better and more effectively than two or more systems, covering the same territory and competing for the favor of the same clientage; but, were it not for Code Section 776, placing control of franchises of this character in the several cities and towns, these municipalities would be powerless to protect themselves against such conditions, and it would be legally possible for all their streets, alleys, and public places to be crowded and burdened with the lines of warring rivals. Such inconvenience cannot well result from competition between toll lines; and, if competition or rivalry does arise between them, there is no apparent reason for giving to any city or town the right to throw the weight of its authority into the scale for the advantage of either competitor. Code Section 776, to which we have referred, provides that no franchise shall be granted for the occupation of the streets, highways, avenues, alleys, or public places of any city or town, for the use of telephones or other public utilities, except upon public consent, expressed by a vote of the people; and, while it does not, in express terms, draw the distinction we have made, between telephone toll lines and local systems of telephone exchange, we are of the opinion that such distinction is fairly implied. Such construction gives effect both to Code Section 2158 and to Section 776. Upon any other theory, it would be difficult to sustain one without, in some measure, abrogating the other.

It follows that the demurrer to plaintiff's petition should have been overruled. In so holding, it is proper to here say that this decision is not to be construed as in any sense a denial of the authority of the town, under Code Section 775, to prescribe reasonable rules and regulations under which the plaintiff may construct and maintain his toll

line. That authority seems to be clearly contemplated by the statute.

The judgment below is reversed, and cause remanded, with instructions to the trial court to overrule the demurrer, and for such further proceedings as may be in harmony with the views herein expressed.—*Reversed and remanded.*

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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W. J. TAYLOR, Appellant, v. W. J. FREVERT, Appellee.

**WATERS AND WATERCOURSES: Natural Obstruction In Course**

- 1 of Natural Drainage. A dominant landowner has a legal right to remove from the course of natural drainage an obstructing dyke or dam *formed wholly by nature*, no prescriptive right in the servient landowners appearing.

**WATERS AND WATERCOURSES: Natural Obstruction in Course**

- 2 of Natural Drainage—Prescription. Whether a servient landowner may acquire, by prescription, the right to the undisturbed maintenance of dyke or dam *formed wholly by nature* in the natural course of drainage, *quaere*. If such right may be acquired, the time available commences to run "*when such dyke begins to act as a substantial barrier to natural drainage.*"

**NUISANCE: Removal of Natural Obstruction in Course of Natural**

- 3 Drainage. The removal of an obstruction which *nature* has built up in the pathway of natural drainage does not necessarily constitute a continuing nuisance—may not constitute a nuisance at all.

**WATERS AND WATERCOURSES: Mutually Agreed Drainage—**

- 4 Damages. Where, by *mutual* agreement of two landowners, one of them installs an *agreed* drainage for the mutual benefit of both parties, and later, damage occurs to the one not installing, because the mutually installed drainage proves inadequate, the act of the parties in then mutually agreeing on a new or additional drainage constitutes a settlement of all prior claims for damages.

**APPEAL AND ERROR: Supplemental Abstract—Effect. A sup-**

- 5 plemental abstract by appellant, to which he makes no refer-

ence, directly or indirectly, in argument, will be passed without consideration.

*Appeal from Floyd District Court.*—J. J. CLARK, Judge.

FEBRUARY 16, 1918.

REHEARING DENIED MAY 17, 1918.

ACTION in equity to enjoin the defendant from maintaining a certain ditch, and for other relief. On trial to the court, the petition was dismissed, and plaintiff appeals.—*Affirmed.*

*F. & F. M. Lingenfelter*, for appellant.

*H. L. Lockwood*, for appellee. .

WEAVER, J.—The defendant owns a farm consisting of two 80-acre tracts, extending one mile east and west and one quarter of a mile north and south, excepting a strip one rod wide on the line between the two 80's, which is owned by the plaintiff as a means of access to land belonging to him on the north. Defendant also owns about 15 acres lying immediately north of the east 40 acres of the larger tract already mentioned. Plaintiff owns land bordering defendant's land on the west and on the north. The natural slope or drainage of the east part of defendant's land is to the northeast, across the southeast part of plaintiff's land, into a small stream, known as Flood Creek, which crosses the defendant's 15-acre tract. The slope or drainage of the western part of defendant's farm is to the south and west, across a corner of plaintiff's land, into a slough or depression on the land of one Roberts. In the year 1906, by agreement between the parties, defendant laid a 6-inch tile drain, extending from the western border of his land southwest across the corner of plaintiff's land, and discharging into the slough on the land of Roberts. Both plaintiff and defendant connected their drainage with this tile, and used it in common. In December, 1910, it having been dem-

1. WATERS AND WATERCOURSES: natural obstruction in course of natural drainage.

onstrated that the 6-inch outlet was not of sufficient capacity to fully care for such drainage, the parties entered into a written contract, by which defendant undertook, at his own expense, to replace such outlet with larger tile, or to lay a new outlet to carry off the drainage from his own land and disconnect it from the 6-inch tile. In other words, if we understand the effect of this agreement, defendant had the option to construct a new outlet for his drainage, and leave the old outlet to the sole use of the plaintiff, or to replace the old outlet with new tile of sufficient capacity to accommodate both. Defendant elected to take the former alternative, and made a new outlet of 8-inch tile, substantially parallel with the old outlet. Whether the contract was performed substantially according to its terms is one of the subjects of controversy in this case.

Another dispute exists as to the matter of drainage from defendant's east 80. As already mentioned, this land, in its natural state, slopes to the north and east, in the direction of Flood Creek. For about 30 years, a partition fence has been maintained, between the land of plaintiff on the north and the land of defendant on the south; and, with the surface in its natural condition, the drainage would pass from southwest to northeast, under the fence. In the course of time, the growth of grass and weeds along the fence served to catch and detain drifting earth and sand in sufficient quantities to gradually build up beneath the fence a ridge, or dike, of sufficient proportions to interrupt, in some degree, the flow of surface water. In the year 1903, the defendant, with spade or fork, removed or opened this dike, at a point where the fence crossed a slight natural depression, and this accelerated the discharge of the surface water in the direction of Flood Creek. The opening thus made and the discharge of the surface waters so provided had continued without interruption from 1903 until the commencement of this action, in 1914.

Plaintiff's petition states his alleged cause of action in two counts. The first count alleges that the opening or re-

moval of the dike under the partition fence was wrongful, and that the effect of such wrongful act has been to injure the plaintiff's land and to materially depreciate the value of the use of said land and to put the plaintiff to labor and expense to prevent and to repair damage therefrom. The second count sets up the contract between the two parties concerning the tile drainage above mentioned, and alleges that defendant violated its terms, in that he failed to disconnect his drainage from the old 6-inch tile outlet, thereby injuriously interfering with the operation of plaintiff's drainage. Further complaint is made that defendant "failed to construct the original tile drain" across the corner of plaintiff's land of sufficient capacity to properly drain such land.

The defendant denies that he failed to perform his agreement with plaintiff, or has wrongfully diverted the drainage or flow of water from his land to that of the plaintiff.

The court found for the defendant, and dismissed both counts of the petition.

The first inquiry suggested by the appeal concerns the alleged wrong of the defendant in removing the dike under the partition fence in 1903. The facts are somewhat peculiar or unusual, in that it was conceded that

2. WATERS AND WATERCOURSES:  
natural ob-  
struction in  
course of nat-  
ural drainage:  
prescription.

the natural drainage was from the defendant's land to the plaintiff's, but had been interrupted by the gradual building of the dike by drifting sand. It is the contention of the plaintiff, in argument, that he is entitled to the protection which this dike afforded, because it had existed "from time immemorial." If, by this expression, counsel mean that the dike had existed so long that the statute of limitations could be interposed against the defendant's right, to remove it, the record hardly bears out the contention. Plaintiff avers that the line fence had been built about 30 years, but it does not follow that the dike or ridge had existed that length of time. On the contrary, the natural and reasonable conclusion is that it had not. In the nature of things, the accumulation of sand and dirt was a matter of slow and gradual growth, covering a considerable period of time, and there

is no evidence showing, with any definiteness or certainty, when it had acquired such proportions as to materially interfere with the natural flow of surface water. Assuming, for the purposes of this case (but not deciding), that the right to have the dike maintained could be acquired as a matter of prescription, it would seem clear that the time available for that purpose would begin to run only when such dike began to act as a material or substantial barrier to the natural drainage; and of this date, as we have already said, there is no clear or satisfactory showing. The dike is described as being "under the fence," and we may assume that it rests equally upon the land of both parties. Until the prescriptive right, if any, attached, we can see no reason why either party might not lawfully level the accumulated sand and dirt, and allow the drainage to pursue its natural course. The act of defendant of which complaint is made was done in 1903, about the time he purchased and took possession of the land; and the flow of surface waters under the partition fence into the depression on plaintiff's land in the direction of Flood Creek had continued uninterrupted for more than eleven years when this suit was begun. To de-

3. NUISANCE: removal of natural obstruction in course of natural drainage. fendant's claim of the benefit of the statute of limitations in support of his right to such drainage, appellant replies that defendant's act was the creation of a continuing nuisance, and the right of action was not lost to restrain continuing injury or damage. But the rule thus invoked has no necessary application to a case of this character, where it is conceded that, under natural conditions, the plaintiff's is the servient estate, and his denial of the present existence of such servitude rests solely upon an alleged prescriptive right to the maintenance of a dike which serves to prevent or retard such drainage. If the statute may operate to create a right to the continued existence of the dike, it would seem to follow that it is equally available in support of the right to maintain the drainage unobstructed by the dike. But it is said that the effect of the dike is to

collect the water and cast it upon defendant's land in another and different manner than would be the case under natural conditions. The rule of the cases cited to this point has no application here. It was not defendant's act which prevented the surface water from flowing broadly over the surface, through or under the fence, to the land of the plaintiff. The cause of this obstruction was the dike, and for this dike the defendant is no more responsible than is the plaintiff; and if the effect of the dike was to carry the surface water eastward to the opening which defendant made under the fence into the natural depression in which it reached the creek, we think he cannot be said to have wrongfully diverted the natural course of drainage. Had the dike been constructed by the defendant or his grantors, a very different question would be presented. In our judgment, the trial court rightfully held that the plaintiff established no sufficient ground for the relief sought in the first count of his petition.

It is equally clear that plaintiff failed to make a case upon the other count of his petition. That the original 6-inch tile outlet was laid across the corner of plaintiff's land with his consent, and was, for a time, used by both parties in common, is not denied. With this as a starting point, the force and effect of the written contract is not open to misconstruction. What defendant undertook to do was "either to lay and maintain a tile as an outlet to the tile drainage [of his own land, describing it] and disconnect with the present outlet [describing it], or he will enlarge the present outlet \* \* \* by laying a tile sufficiently large to take care of the water tributary to said outlet on land belonging to parties to this contract." In other words, he was either to replace the 6-inch tile outlet with one of sufficient capacity to meet the needs of both parties, or was to construct a new outlet to carry off his own drainage, and leave the old outlet to the exclusive use of the plaintiff. He elected to follow the latter plan, and did lay a new 8-inch tile outlet for his own use, nearly parallel to the old one. The complaint of



the plaintiff is that the defendant failed to disconnect his own drainage system from the old outlet, with the result that the drainage of plaintiff's land is thereby injuriously affected. This question of fact is the subject of some conflict of testimony, but we find that the apparent preponderance of evidence sustains the defendant's claim that he did disconnect his drainage from the old outlet, and left the same to the exclusive use and control of the plaintiff.

A further claim is asserted, which, if we understand counsel, is to the effect that, when the original 6-inch tile outlet was constructed, in 1906, defendant agreed to make

**4. WATERS AND  
WATERCOURSES:  
mutually  
agreed drain-  
age: damages.**

it of sufficient capacity to carry off the drainage of the lands of both parties, but failed to do so; and that plaintiff sustained damage therefrom. If this be the claim, the evi-

dence does not sustain it; and, if we were to

give it the utmost effect, it makes no showing for equitable relief. The original 6-inch outlet seems to have been made by mutual contract and agreement, and for the mutual benefit of both parties; and, experience having demonstrated that a larger outlet was desirable, the parties entered into the written agreement to improve the condition in the manner already described. The mistake, if any, in laying the 6-inch outlet, was the mistake of both parties, and their subsequent agreement upon a plan to remedy it should be treated as a settlement or adjustment of their mutual rights or claims to that date, and the written agreement should be looked to for the determination of any controversy which has since arisen with respect to the outlet. Now, when we look to the pleadings to ascertain the precise nature of plaintiff's complaint in this respect, we find that the one and only charge of violation of the agreement by the defendant is that "the said defendant did not disconnect the original 6-inch tile running across plaintiff's land from the main tile on defendant's land, but, instead, constructed an additional 8-inch tile connecting with defendant's main tile upon his land, without disconnecting the said 6-inch tile from the main tile

on his land;" and that this has resulted in injury to plaintiff's system of drainage. This, and this only, is the cause of action alleged in the second count of the petition. It is said in argument, however, that defendant did not construct the new 8-inch outlet in a proper manner; that it was not laid deep enough, and was not laid at proper grade or with sufficient fall. The sufficient answer to this is, as already pointed out, that no claim of that kind is made in the petition, and no such issue joined.

From a supplemental abstract filed by the appellant, it appears that, after this appeal was taken, the plaintiff filed a supplemental petition in the district court, repleading most of the matter set up in the second count of the petition, and, in addition thereto, for the first time alleged that the new outlet was not laid at sufficient depth or proper grade, with the result that plaintiff's land has been overflowed and damaged. It is further alleged that defendant is about to connect further or additional drainage with said outlet, and, if permitted to do so, will occasion other and further damage to plaintiff's land before the issues in the main case can be determined on the appeal. To prevent such threatened injury, plaintiff asks that defendant be enjoined from increasing the drainage in said outlet until the issues involved in the pending appeal shall have been determined and adjudicated by the Supreme Court. On this showing, it is stated that a temporary writ of injunction was issued, as prayed, and that such matter is now pending in the district court, upon defendant's motion to dissolve the injunction. Counsel do not, in argument, refer to this supplemental showing, nor suggest in what manner it is thought to affect the rights of the parties on this appeal. We therefore pass it, without discussion or consideration.

The one complaint in the second count of the petition—the alleged failure of the defendant to disconnect his drainage from the old outlet—is not sustained by the evidence, and therefore presents no ground for equitable relief.

5. APPEAL AND  
ERROR: supplemental abstract: effect.

The trial court seems to have given the matters in dispute a careful consideration. By agreement of parties, the presiding judge made personal inspection of the premises, thus enabling him to appreciate and intelligently apply the testimony of the witnesses to the subject-matter of dispute, in a manner not possible to this court. We find no reason in the record for reaching any different conclusion, and the decree of the district court is, therefore,—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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JOHN WRIGHT, Appellant, v. M. A. JOHNSTON, Appellee.

**CORPORATIONS: What Constitutes Stock.** The term "certificate of stock," as applied to a corporate instrument which contains conditions *which tend to impair the corporate capital available for the satisfaction of creditors*, is a misnomer. Said instrument is not a "certificate of stock," in any legal sense—is simply an evidence of a debt owing by the corporation. It follows that, as to such an instrument, the statutory regulation of the issuance of *stock* for property other than money, has no application. (See Sec. 1641-b, *et seq.*, Code Supp. 1913.)

**PRINCIPLE APPLIED:** Johnston purchased 50 corporate shares of common stock, and paid par value therefor in cash—\$5,000. The corporation agreed to repurchase the stock if Johnston became dissatisfied therewith. Johnston did become dissatisfied, and the corporation repurchased, or took up, said stock, by paying Johnston \$2,000 in cash, and by issuing to him 30 shares, or \$3,000, of what was called "preferred stock." This latter so-called stock was issued without any application to the executive council, as provided by Sec. 1641-b, Code Supp., 1913. This so-called "preferred stock" provided:

1. That, before any dividends were paid on common stock, the "preferred stock" should receive, out of the net profits, 8% cumulative dividends, payable semiannually. This 8% was the *limit* on right to receive dividends.

2. That the holder of "preferred stock," in case of dissolution, should receive, out of the assets of the corporation, and before the common stock received anything, par value of stock, plus unpaid dividends. All remaining assets belonged to the common stock.

3. That the "preferred stock" *might* be purchased by the corporation, on three months' notice, by paying par, plus unpaid dividends.

4. That the "preferred stock" *must* be purchased by the corporation after six months' notice, or in case four successive dividends were passed, by paying par, plus unpaid dividends.

5. That the holders of "preferred stock" were not to be deemed stockholders, and possessed no corporate vote.

Sometime after Johnston received his so-called "preferred stock," he called upon the company for payment or repurchase in accordance with the terms of the certificate. Being refused payment, he brought suit. Sometime prior to this, Wright had become heavily interested in the corporation, and, to get rid of Johnston's suit, he purchased Johnston's 30 shares of "preferred stock." Later, Wright brought suit against Johnston, to recover what he had paid for the stock. His main theory was that Johnston's "preferred stock" was *void*, because issued without the authorization of the executive council, and, since it was void, he had suffered a total failure of consideration, and that Johnston should be held to an implied agreement to refund the money received for the void stock.

*Held*, that Johnston's so-called "preferred stock" was not stock at all—was merely an evidence of a corporate debt, which Wright, with full knowledge, had purchased; and that the statutes in question (Sec. 1641-b *et seq.*, Code Supp., 1913.) had no application to the case.

**PLEADING: Issue, Proof and Variance—Issuance of Corporate**

- 2 **Stock.** An issue on whether corporate stock was void because issued without authorization by the executive council (Sec. 1641-b *et seq.*, Code Supp., 1913), and because issued in excess of lawful authorization under its articles, necessarily involves the issue whether that which was issued was (a) *stock* or (b) merely evidence of a corporate debt.

*Appeal from Polk District Court.*—W. S. AYRES, Judge.

MAY 17, 1918.

Suit to recover money paid for stock in the Des Moines Stationery Company, and to cancel a note given in part payment thereof, and require defendant to return to plaintiff a certain note and mortgage hypothecated as collateral security for the payment thereof. On hearing, the petition was dismissed. The plaintiff appeals.—*Affirmed*.

*Royal & Royal*, for appellant.

*William B. Brown*, and *Brammer, Lehmann & Seevers*,  
for appellee.

LADD, J.—I. On April 24, 1915, plaintiff bought of defendant 30 shares of so-called preferred stock in the Des Moines Stationery Company, at the agreed price of \$3,240, paying \$50 in cash and \$540 in property, and giving his note for the balance of \$2,650. To secure the payment of this note, he put up a \$2,800 note and mortgage as collateral security. Since then, \$400 has been paid on this note. Plaintiff says that, to induce him to enter into the deal, defendant falsely represented that he held said shares of stock issued by the company, and that they were worth par value; that he relied thereon in making the purchase; and that the certificate for 30 shares of capital stock was void and the said representations of defendant untrue, as he well knew, when making them. Recovery of the money paid, with interest, is prayed, together with the surrender of the note given and the collateral security. The defendant alleged that he paid par value for the stock, denied having made any representations, and averred that plaintiff, as officer in charge of the books of the company, knew of its condition better than this defendant, and further pleaded that a part of the consideration for sale of stock was the settlement and dismissal of an action against the company for the par value of said stock with dividends.

Such are the issues, and a recital of the facts seems essential to a full understanding of the case. The company was organized with capital of \$50,000, divided into shares of \$100 each, with the option of beginning business with 180 shares issued. It did so in 1909, as soon as the required shares were disposed of, the same being paid by property valued at \$7,898, and the remainder in cash. On June 13, 1913, defendant entered into a contract with the company to purchase 50 shares of stock, on condition that the company

1. CORPORATIONS:  
what consti-  
tutes stock.

repurchase if he became dissatisfied within a year; and a certificate was issued accordingly, for which he paid \$5,000, became vice-president, and received a salary of \$100 per month. Defendant having become dissatisfied, it was arranged that he surrender this stock and receive in lieu thereof \$2,000 in cash and 30 shares of preferred stock; and this was done, February 21, 1914. He then resigned as officer and director of the company, and ceased to be in its employment. In December of that year, suit was brought by defendant against the company for the face value of, and accrued interest on, the 30 shares of preferred stock. About March 1, 1915, following, Roovart, then president of the company, requested plaintiff to talk with defendant's attorney about the case, and he met both defendant and his attorney. It may as well be said here that the plaintiff had acquired from Roovart 75 shares of stock in the company, February 12, 1915, and, three days later, entered its employment as a clerk. According to his testimony, he made no investigation other than looking over the trial balances of Roovart, then president of the company, and the goods shown him on the shelves and in the basement. He did not examine the books, and paid no attention to daily sales, or whether bills were being paid.

After negotiating with defendant and his attorney, the purchase of the stock was made, as aforesaid, and the suit dismissed. A reading of the record has satisfied us that no fraud was practiced on plaintiff, and we do not understand error to be predicated on this phase of the case. On April 23, 1915, the day before the purchase of defendant's stock, Roovart resigned, and plaintiff succeeded him as president of the company, having discovered for the first time that Roovart had parted with all his stock. The record leaves no doubt that, up to this time, and until after the deal for the preferred stock and the dismissal of the suit, plaintiff was without information as to the financial condition of the company. This is somewhat confirmed by his purchase of 15 shares on March 30th previous, and nothing appears to have happened in the meantime to advise him differently. Soon

thereafter, he was awakened to the situation by the coming in of bills, with no money to meet them, and by Roovart's disposition of his interest. An expert accountant was employed to examine the accounts. His report was that, on February 13, 1915, the assets, computed at face value, amounted to \$22,917.40, and the liabilities, to \$18,329.32. The difference between these was reduced, by June 30th following, to \$3,185.01. The books had been badly kept, and the inventory of January 1, 1915, inflated. That the company was unable to meet its bills as they became due, and that the actual value of its assets probably was not enough to satisfy its liabilities on April 24, 1915, the day the deal between the parties was closed, is not open to controversy.

II. When defendant purchased 50 shares of common stock, he paid par value therefor in cash, on June 3, 1913, and there were then outstanding 137 shares of common stock and 51 shares of preferred stock. At the time the defendant surrendered the 50 shares of common stock for \$2,000 in money and 30 shares of preferred stock, February 21, 1914, there were, besides these, 150 shares of common stock, and 20 shares were issued to Roovart on that day, and 28 shares of preferred, issued and outstanding. On the day of the deal complained of, April 24, 1915, there were 155 shares of common stock, of which 75 were held by plaintiff, and 80 were in the name of one Coffin, and 26 shares of preferred stock were outstanding. Though the original issuance of the 50 shares of common stock to defendant overran the permissible issue at the time, all such stock was surrendered, and the entire issue was reduced to 150 or 170 shares, and there were but 172 of these shares outstanding at the time plaintiff acquired the 30 shares of preferred stock. If, then, the so-called preferred stock was not really stock at all, but merely an evidence of indebtedness, no liability for an over-issue of stock can be based thereon. Authority for issuing certificates of preferred stock is found in an amendment to the articles of incorporation, in words following:

"Amendment to Articles of Incorporation.

"Preferred stock, of the par value of \$100 per share, not

exceeding in amount 25% of the par value of the common stock then outstanding, may be issued at any time by unanimous vote of the common stock then outstanding. Said preferred stock shall receive cumulative dividends at the rate of 8% per fiscal year, paid semiannually out of the net profits, but shall be entitled to no dividends after the 8% cumulative dividend shall have been paid. All unpaid dividends on the preferred stock shall be paid before unpaid dividends are paid on the common stock. In the event of the dissolution or liquidation of the corporation, the holders of the preferred stock shall receive the par value of their preferred stock, plus unpaid dividends thereon, out of the assets of the corporation, before the holders of the common stock receive any of said assets. Any surplus assets shall go to the holders of the common stock. The corporation may, at any time, convert a portion of its common stock into preferred stock, of the nature above described, but at no time shall the preferred stock exceed 25% of the par value of the common stock then outstanding. The corporation may purchase the preferred stock, or any portion thereof, at par, plus unpaid dividends thereon, at any time, upon giving 3 months' notice by mail to the holder or owner of said stock, as shown by the books of the company, and the corporation shall purchase said preferred stock, or any portion thereof, at par, plus unpaid dividends, upon 6 months' notice given the company by mail at any time after July 1, 1910, by the holder of such stock, or, in the event that four consecutive dividends on said preferred stock be passed, said corporation shall thereupon purchase said preferred stock at par, plus unpaid dividends thereon, within 6 months thereafter. No mortgage of any of the corporate assets shall be executed without the written consent of the holders of the preferred stock then outstanding. The word 'stockholders,' as used herein, shall refer to the holders of common stock only, and the holders of preferred stock shall not be entitled to vote."

Ordinarily, stock is said to be preferred when it is entitled to dividends from the earnings or income of the cor-



poration before any other dividends are paid. But such other conditions may be included as may be agreed upon, short of making the certificates something other than certificates of stock,—and that is precisely what has been accomplished by this corporation. The designation of stock as preferred does not make it such, nor define the rights of the holder thereunder. As remarked in *Heller, Hirsch & Co. v. National Marine Bank*, 89 Md. 602 (73 Am. St. 212) :

“Courts are not influenced by mere names. They look beyond these, and give to the subject dealt with the character—the status—which its properties denote it possesses. The qualities and properties of a thing are its essentials—they define and mark what it is—the name is purely accidental—it is no part of the thing named. If, then, the thing which the statute contemplates possesses the characteristics and qualities of preferred stock—and possesses none other—it is preferred stock; but if, on the other hand, it possesses characteristics and qualities that are entirely foreign to preferred stock, as strictly defined; and that are descriptive of something else, then the thing is obviously either not ordinary preferred stock, or not preferred stock at all, even though it be called preferred stock, and have, in addition to its own qualities, some of the characteristics that do pertain to preferred stock.”

See, also, *Burt v. Rattle*, 31 Ohio St. 116. What the certificates are, as evidenced by their terms and the articles of incorporation authorizing their issuance, and not what they are denominated, must determine their character. It may be that, as between shareholders and the corporation, one class, as those having preferred stock, may be accorded preferences, as that dividends be first paid from the profits; and, if profits are not sufficient for this purpose, that cumulated dividends be first paid from the assets on liquidation after satisfaction of all indebtedness, and even that the par value be returned to preferred shareholders before any of the assets are distributed to the holders of common stock.

*Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Miller v. Ratterman*, 47 Ohio St. 141, 163 (24 N. E. 496); *Warren v. King*, 108 U. S. 389; *Wilson v. Parvin*, 119 Fed. 652; *In re Espuela Land & Cattle Co.*, 2 Ch. D. (1909) 187. It is largely a matter of contract, and, in the absence of statutory limitations, it seems that any condition may be included in one class of stock which does not tend to impair the corporate capital available for the satisfaction of creditors. The amendment to the articles under consideration and the preferred stock issued in pursuance thereof do this very thing. Though providing that dividends are to be paid from profits, and that, if not paid therefrom, unpaid dividends and par value of preferred stock are to be paid out of the assets before holders of common stock, preferred stockholders may not share in any surplus assets, and the right to vote is denied them. Not only is the corporation permitted to repay them the par value of their shares plus unpaid dividends, on three months' notice, but they may be compelled to do so, at the option of the shareholders; for it is stipulated that "the corporation purchase said preferred stock or any portion thereof on six months' notice, or in event of four consecutive dividends being passed." Thus, the preferred shareholder neither participates in the management of the corporation or the assets, after being reimbursed money paid in and unpaid dividends. Though assured dividends, he is not allowed to share the profits. The only risk taken is that of his stock's being retired, at the option of the company or on his election, before the corporation has become insolvent. The attitude of the preferred shareholder on these conditions is that of creditor. He invests his money, is assured a fixed rate of interest, and may enforce repayment of the money, with interest, on specified notice. The only possible gain is the rate, definitely fixed. The only risk is possibility of a shareholder's liability in event of insolvency before he is repaid voluntarily or according to the terms of the amendment to the articles.

It was observed in *Warren v. King*, 108 U. S. 389 (27 L. Ed. 769), that "his [shareholder's] chance of gain by the operations of the corporation throws on him, as respects creditors, the entire risk of the loss of his share of the capital, which must go to satisfy the creditors in case of misfortune. He cannot be both creditor and debtor by virtue of his ownership of stock." In *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 36 L. R. A. 826, the late Justice Lurton, speaking for the United States Circuit Court of Appeals, declared that:

"There is a wide difference between the relation of a creditor and a stockholder to the corporate property. One cannot well be a creditor, as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital stock until the debts of the corporation are paid. These principles are elementary. *Warren v. King*, 108 U. S. 389 (27 L. Ed. 769); *Cook, Stock & Stockholders* (3d Ed.) 271. The chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to capital. 'He cannot be both creditor and debtor by virtue of his ownership of stock.' *Warren v. King*, 108 U. S. 389 (27 L. Ed. 769). If the purpose in providing for these peculiar shares was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby. *Cook, Stock & Stockholders* (2d Ed.) 270, 271; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; *McCutcheon v. Merz Capsule Co.*, 37 U. S. App. 586 (31 L. R. A. 415, 19 C. C. A. 108-115, 71 Fed. 787); *Morrow v. Nashville Iron, Steel & C. Co.*, 87 Tenn. 262 (3 L. R. A. 37)."

In *Burt v. Rattle*, 31 Ohio St. 116, a certificate for 50 shares of so-called preferred stock in a corporation convertible into common stock at the option of the holder was issued to Rattle. It guaranteed to the holder the payment of semiannual dividends at the rate of 4%, and "the final payment of the entire amount of said shares, at their par value, on the 1st day of January, 1876, at which time such dividends shall cease." Payment of interest and par value was secured by bond and mortgage, and after an assignment of the property of the company for the benefit of creditors. The assignee refused to recognize this or other like certificates, and thereupon, the holder instituted foreclosure proceedings. The assignee set up, by way of defense, that the holder of the certificate was a mere shareholder, and that the company was without authority to execute the bond and mortgage. On hearing, the court held that the certificates of so-called stock, issued by the corporation, "cannot be regarded, in any view, as anything more than promises to pay money with interest." This was affirmed on appeal, the court declaring the transaction "a loaning of money," and "not the creation of additional members of the corporation." In the course of the opinion, it is said that the so-called preferred shareholders "have no right to vote, or to take any part in the possession or control of the concern. They gain nothing by its success, and lose nothing by its failure. They have no participation in either the profits or losses. They are strangers to the company, have no interest in it, and look alone to its promise and its mortgage for remuneration."

In that case, the preferred shareholder was relieved from liability to creditors, as shareholder, and this was made one ground for the decision. See also *West Chester & P. R. Co. v. Jackson*, 77 Pa. St. 321; *Williams v. Parker*, 136 Mass. 204; *National Salt Co. v. Ingraham*, 122 Fed. 40.

The so-called certificates of preferred stock have all the characteristics of evidences of indebtedness and none of those of stock certificates, and we are of opinion that they are absolutely void as *stock certificates*.

III. Appellant insists that the point last considered was not raised in the pleadings. The petition alleged that the 30 shares of preferred stock obtained from plaintiff were void, for that Sections 1641-b, 1641-c, 1641-d, and 1627 of the Code Supplement, 1913, were not observed; and further, that the pretended certificate was, in part, for shares in excess of the number authorized. There was also a general denial. Necessarily involved was the issue whether a certificate of shares of capital stock was issued at all, and that is the precise issue decided against appellant. The point presented was raised.

2. PLEADING:  
issue, proof,  
and variance:  
issuance of  
corporate  
stock.

IV. The amendment to the articles limited the number of shares to 25% of those of common stock. There were then outstanding, when the certificate of 30 shares was transferred by defendant to plaintiff, 26 shares of preferred stock and 171 shares of common stock. It follows that the certificate so transferred was for  $13\frac{1}{4}$  shares more than was authorized.

To the extent of \$1,675 at least, plus unpaid dividends, the certificate represented an indebtedness against the corporation. Though evidences of indebtedness in this form were limited, it does not appear that any limitation of indebtedness differently evidenced was contained in the articles; and, as the corporation received the full amount of money represented by the certificate and made use of in its business, it would not seem that it would be in a situation to invoke the doctrine of *ultra vires*. *Beach v. Wakefield*, 107 Iowa 567. At any rate, plaintiff was well aware that suit was pending for the par value of this certificate, with unpaid dividends; and, as the consideration paid by him was in settlement of that action, as well as for the assignment of the certificate, he necessarily, in the absence of fraud, took his chances on whether the certificate was valid for the entire amount, or only \$1,675, with unpaid interest.

What we have said disposes of other contentions, and

the decree dismissing the petition is—*Affirmed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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HONORA ALLEN, Appellee, v. CITY OF FORT DODGE, Appellant.

**MUNICIPAL CORPORATIONS: Streets, Etc.—Obstructions—Snow**

- 1 and Ice. Principle reaffirmed that the mere accumulation of ice and snow upon a public street, with resultant injury to a pedestrian, does not fix liability upon the city. Contra if such accumulations become dangerous by reason of travel thereover, and the city, after express or implied notice, might have eliminated the danger by the exercise of reasonable care.

**TRIAL: Instructions—Exceptions—Waiver. Instructions, unques-**

- 2 tioned until motion for new trial is filed, are unassailable. (Sec. 3705-a, Code Supp., 1913,—now repealed.)

**TRIAL: Instructions—Applicability to Pleadings. Instructions**

- 3 which specifically state the grounds of negligence alleged by the plaintiff, and explicitly limit the jury's consideration thereto,—in full keeping with the entire theory of the trial,—are not rendered erroneous because a hypercritical analysis of the language employed *might* lead the jury to infer that other grounds of negligence were embraced in the charge.

**MUNICIPAL CORPORATIONS: Streets, Etc.—Obstructions—De-**

- 4 gree of Care. No duty is imposed upon a city to keep its streets in a reasonably safe condition: the duty imposed is to exercise reasonable care to see to it that its streets are maintained in a reasonably safe condition.

**MUNICIPAL CORPORATIONS: Streets, Etc.—Obstructions—Pow-**

- 5 er to Remove, and Assess Costs. The statutory power of a city to remove snow, etc., from sidewalks and to assess the cost of such removal to abutting property (Sec. 781, Code, 1897), is wholly immaterial on the issue of the city's negligence in allowing such accumulations to remain on the street in a dangerous condition.

*Appeal from Webster District Court.—R. M. WRIGHT, Judge.*

MAY 20, 1918.

THIS is an action to recover damages for personal injury, occasioned by a fall on a sidewalk alleged to have been

permitted by the city to become dangerous on account of accumulated snow and ice thereon. It was alleged that the snow and ice were permitted by the city to remain on the walk for an unreasonable time after it became rough, rounded, and uneven, by travel over the walk. Judgment for the plaintiff in the court below. Defendant appeals.—*Affirmed.*

*Mitchell & Files*, for appellant.

*Kenyon, Kelleher & Price*, for appellee.

GAYNOR, J.—This action is brought to recover damages for personal injuries alleged to have been sustained as a result of a fall on one of the sidewalks of defendant city. The injury is alleged to have occurred on December 25, 1915. The action is bottomed on negligence. The negligence charged is, in substance, that the city permitted snow and ice that had accumulated through natural causes to remain there, after it had become rough, rounded, irregular, and uneven, and that this condition rendered the walk dangerous and unsafe for travel, and was the proximate cause of the fall and the injury resulting therefrom. The negligence upon which plaintiff predicates her right to recover is charged in her petition in the following language:

"(1) The defendant was negligent in allowing said obstruction to accumulate and remain upon the sidewalk.

"(2) The defendant was negligent in that the surface of said sidewalk was uneven with holes, depressions, and pockets therein, and the snow and ice were allowed to accumulate where the said surface was so irregular and uneven, in the manner aforesaid.

"(3) The defendant was negligent in permitting the snow and ice to accumulate and become slippery, rough, rounded, irregular, and uneven.

"(4) The defendant was negligent in failing to remove the rough, rounded, irregular, and slippery accumulations of ice, and in failing to take any precaution, by sprinkling sand

and ashes thereon, to make the same reasonably safe for public travel."

The answer was a general denial. The cause was tried to a jury, and a verdict returned for the plaintiff. Judgment being entered on the verdict, defendant appeals.

The plaintiff was a woman about 80 years of age. On this particular morning, about the hour of 10 A. M., she was proceeding on her way to church, along one of the walks of defendant, and reached a certain point on one of these side walks, and there slipped and fell, and received severe injury. She claims that her fall was due to the rough, rounded, and uneven condition of the walk at that point, and that this was what caused her to fall.

The fact of fall and injury is not in dispute, and we think there was sufficient to go to the jury as to the rough, rounded, and uneven condition of the walk at the place where she fell. The jury could well have found, under the record, that the walk was, at the time of her fall, substantially as she alleges it to be in her petition. There is sufficient evidence, though not particularly strong, that the walk had been in that condition for such a length of time before the injury that the city, if it did not in fact know the condition, could, and therefore should, have known and remedied it before the fall. The fact question was fairly submitted to the jury, and they found for the plaintiff. There is sufficient evidence to sustain the verdict, and we do not, therefore, interfere. Defendant, however, claims that error was committed on the trial to its prejudice. There are but three errors assigned:

(1) Error in the instructions given by the court to the jury.

(2) Error in refusing instructions asked by the defendant.

(3) Failure to give instructions on a matter on which it is claimed the instructions should have been given, in order to enable the jury to determine the rights of the parties under the record made.



Before proceeding to a discussion of the errors assigned and relied upon, we have to say that it is settled law that there is liability on the part of a city when it is shown that it has failed to use reasonable care to keep its sidewalks in a reasonably safe condition for travel, and this failure has resulted in injury to one using the street in the usual and ordinary way. A city is not the insurer of the safety of those who use its sidewalks, but it assumes a duty to all who travel upon its walks, to use reasonable care to see that the walks are reasonably safe for travel. Conditions may arise over which the city has no control, and which, by the exercise of even reasonable care, it cannot avoid, or remedy. It is not liable for ice accumulating on the street in the course of nature, because the city cannot prevent this, and so the failure to protect against it does not lay the foundation for a charge of negligence. But when snow and ice fall and are permitted to remain upon the walk and to be traveled over by pedestrians for such a length of time that it becomes rough, rounded, uneven, and irregular, rendering the walk dangerous for travel, and it is made apparent that this condition could have been prevented or remedied by the city by the exercise of reasonable care, and injury results from the condition thus shown to exist, then the failure to remove or protect against it becomes actionable negligence. The negligence is not in a condition found, but in the failure on the part of the city to remedy the condition, and this only when it is shown that it is the duty of the city to remedy, and the remedy is within the reach of the city. Conditions in a sidewalk, therefore, which do not lie within the power of the city to remedy, and which, by the exercise of reasonable care for the safety of pedestrians, it could not remedy, do not lay the foundation for actionable negligence. The primary thought is that a duty does rest upon the city to exercise reasonable care to keep its sidewalks in a reasonably safe condition. This presupposes that the condition complained of could have been remedied by the exercise of

such care. So, in the consideration of all these questions of negligence on the part of cities touching the care of sidewalks, we must not only look to the duty generally, but to the cause and character of the defect. This is nearly always a question for the jury. Conditions, however, may arise that could not have been prevented or remedied by the city. For these no action lies. In this case, snow and ice had been accumulating for some time, on a street much traveled by pedestrians, and at a point near the heart of the city. It had become rounded, irregular, and uneven, through travel upon the street. It had been permitted to remain so for at least several days. It was for the jury to say whether that condition rendered the sidewalk dangerous and unsafe; whether the city violated any duty to pedestrians in failing to remove the condition thus produced; whether, by the exercise of reasonable care, it could have made the walk, notwithstanding these conditions, reasonably safe for travel. A city is not liable for ice that forms upon its walks unless it is made to appear that the ice renders the sidewalks dangerous and unsafe, and it is further made to appear that the city, by the exercise of reasonable care, could have so changed the condition as to render it reasonably safe. So the courts have made a distinction between snow that falls and ice that forms in the course of nature,—though slippery, and though liable to cause a fall upon the walk, if walked upon,—and the act of the city in permitting it to remain and become rough, rounded, and uneven, by travel upon the walk. Thus it is said that, where cold follows a melting, and the snow becomes a film of ice on the sidewalk which it is almost impossible to move, the municipality may, without being guilty of negligence, wait for a change of temperature to remedy the condition. *Beirness v. City of Missouri Valley*, 162 Iowa 720, 723. The suggested thought is that no liability attaches for a condition in a walk until it appears that the city could have prevented or remedied the condition before the injury, by the exercise of reasonable care. So, in order to create liability, it must not only appear that it was

the duty of the city to remedy the particular condition or defect complained of, but also that the defect was of such a character that it rendered the walk unsafe, and that the city, by the exercise of reasonable care for the safety of travelers, could and should have remedied the defect before the injury. This is the basis for the rule that a city is not liable for defects in its walks of which it has no notice, unless sufficient time has elapsed, after the defect came into existence, so that the city, by the exercise of reasonable care for the safety of travelers, could and should have discovered and remedied the defect before the injury. That a city is liable for injuries which result from conditions in a walk such as are complained of here, see *Huston v. City of Council Bluffs*, 101 Iowa 33; *Broburg v. City of Des Moines*, 63 Iowa 523. In these cases, the rule laid down in *Cook v. City of Milwaukee*, 24 Wis. 270, 274, is followed and approved. The rule stated in that case is that, when ice and snow are suffered to remain on a sidewalk, in such an uneven and rounded form that a person cannot walk over it, using due care, without danger of falling down, it constitutes a defect for which the city or town is liable. In the *Huston* case, this rule was approved, citing the *Broburg* case, as follows:

"The mere fact that a street is in a dangerous condition because of ice and snow, rendering the walks slippery by reason of the operation of natural causes, should not render the city liable, even if such ice and snow are not removed in a reasonable time. But when it becomes, by reason of the travel thereon, or other causes, rounded or in ridges, then it may be that the city should be required to remove such ice and snow."

So we have no hesitancy in saying that, under these authorities, the condition here shown constitutes actionable negligence.

It is contended by the defendant, however, that the court erred in its instructions to the jury; that it erred in giving Instructions Nos. 3, 7, 8, 9½, and 10.

These instructions were submitted to counsel before they were read to the jury. No objections were made to any instructions except the 3d, 7th, and 10th. In the review of these instructions, we are confined to the objections urged by counsel before the instructions were read. No objections were urged to Instructions Nos. 8 and 9½.

At the time this trial was had, Section 3705-a of the Supplement to the Code, 1913, was in force, which provided that all objections or exceptions to instructions must be made before the instructions are read to the jury, and must point out the grounds thereof specifically and with reasonable exactness; but, upon a showing in a motion for a new trial that an error in such instructions was not discovered by the party at the time of the trial, such objections or exceptions may be made in the same manner in such motion for a new trial.

Instructions Nos. 8 and 9½ were not objected to before the reading, but were objected to in the motion for a new trial. There was no showing, however, that the errors complained of were not discovered in time to interpose them before the reading. We had occasion to pass upon this question recently in *Dimond v. Peace River L. & D. Co.*, 182 Iowa 400; *Chumbley v. Courtney*, 181 Iowa 482; *Eley v. Chicago G. W. R. Co.*, (Iowa) 166 N. W. 739.

It is claimed that the court erred in giving the third instruction. It is claimed that by it the court submitted to the jury for consideration defects in the walk itself, and that there was no evidence that the walk itself was defective.

To intelligently understand this instruction, all its parts must be considered. The court submitted four grounds of negligence, and said:

"And the acts or omissions to act which plaintiff says constitute the negligence of which she complains, and upon which she predicates her right to recover, are: [Here the court set out plaintiff's charge of negligence in the words

in which it was charged in the petition, as hereinbefore set out.] \* \* \* These are the only acts or omissions to act, on the part of the defendant, which, if proven, may be considered in determining whether she has shown a right to recover."

A sidewalk is that portion of the street set apart for the use of pedestrians. The thing or condition which renders the sidewalk, so set apart, dangerous and unsafe, is the thing or condition out of which the actionable negligence, if any, must arise, whether it be on the surface or under the surface, if it be in the line of travel. It may be that there was not sufficient evidence to justify a jury in finding that the sidewalk itself—meaning thereby the thing placed on the ground, set apart for a walk—was defective, though there is some evidence of defects in the construction. But, however that may be, defendant was not prejudiced by the court's simply stating all negligence charged in the petition, even though the jury might not be able to say from the evidence that all claims were proven. The jury could well find that the surface of the walk was dangerous for travel. The surface was the top of that set apart for travel, and the jury could not have been misled into thinking that anything else was referred to in this statement of the issue. The court, however, told the jury in this instruction that no liability could be predicated on any act of negligence charged, unless it was proven by the evidence. The mixture of snow and ice which rendered the sidewalk unsafe for travel, rough, rounded, and uneven as it was, was on the top of that portion of the ground set apart for travel. It was, therefore, on the surface of the walk. If this rough, irregular, and rounded ice made the sidewalk dangerous, it made it so because it rendered the surface of the sidewalk dangerous for travel. The whole theory upon which the case was tried was that the snow and ice permitted to accumulate and remain upon this walk rendered the surface of the walk rough, uneven, rounded, and irregular, and dangerous for travel, and that this condition was the proximate cause of plain-

tiff's injury. We must give the jury credit for some slight intelligence, and we must assume that they had a fair knowledge of what they were called upon to try and determine from the whole record made, and could not have been misled by the matters complained of, found in this instruction. We find no reversible error here.

It is next contended that the court erred in giving the 7th instruction.

This instruction does not correctly state the law. It tells the jury that the city is not an insurer of the safety of those passing along or upon its streets or sidewalks, but that it is charged, under the law, with the duty of placing and maintaining its streets and sidewalks in a reasonably safe condition. The law does not impose a duty upon a city of keeping its streets and sidewalks in a reasonably safe condition, but does impose upon the city the duty of exercising reasonable care to see to it that its sidewalks are maintained in a reasonably safe condition. This, however, does not avail the defendant in this case, for the reason that the court, in the same instruction, told the jury, touching the duty of the city to keep its sidewalks in repair and in condition, that this duty was and should be determined and measured by the care exercised by reasonably prudent men under like circumstances and conditions, and said, practically, that the duty of the city was to exercise such care as reasonably prudent and careful persons would have exercised in the endeavor to make and maintain the walk in a reasonably safe condition.

It is next contended that the court erred in refusing to give instructions asked by the defendant. We have examined those instructions, and have to say that, in so far as they express the law correctly, they were fully given by the court in its own instructions. Therefore, a refusal could not and did not prejudice the rights of the defendant.

It is next contended that the court failed to call the

4. MUNICIPAL  
CORPORATIONS:  
streets, etc.:  
obstructions:  
degree of care.

jury's attention to the provisions of Section 781 of the Code of 1897, which reads:

"They [meaning municipalities] shall  
 5. MUNICIPAL have power to remove snow, ice or accumula-  
 CORPORATIONS: streets, etc.: tions from abutting property from the side-  
 obstructions: power to re- walk, without notice to the property owner,  
 move, and as- if the same has remained upon the walk for  
 sess costs. the period of ten hours, and assess the expenses thereof on  
 the property from the front of which such snow, ice or accu-  
 mulations shall be removed."

It will be noted that this section does not attempt to regulate the duty which the city owes to the traveling public. It only regulates the expense of such removal between the city and the property owner, and we think the court would not have been justified in calling the attention of the jury to this, and that to do so would have injected confusion into the record.

We find no reversible error in the case, and the cause is—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, J.J., concur.

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EVA FREEBY, Administratrix, Appellant, v. TOWN OF SIBLEY  
 et al., Appellees.

**TRIAL: Instructions—Joint Negligent Wrongdoers.** In an action  
 1 against several alleged negligent wrongdoers, the court must, on  
 request, either in the instructions or in the forms of verdict  
 submitted, plainly tell the jury that it may find against one  
 defendant and in favor of another, even though it be alleged  
 that the negligence complained of was an omission or violation  
 of a *joint* duty. (See Sec. 3730, Code, 1897.)

**TRIAL: Instructions—When Requests are Timely.** The statutory  
 2 requirement that requests for instructions must be made *before*  
 the arguments are commenced (Sec. 3705-a, Code Supp., 1913,  
 now repealed), does not apply to an instruction which it is the  
 duty of the court to give *without any request*, in order that  
 the issues may be properly presented to the jury. So held  
 where, *after* argument, the court was requested to charge that

it might find against one of two alleged negligent wrongdoers and in favor of the other.

**PARTIES: Defendants—Joinder—Tort.** Principle recognized that  
 3 any number of parties may be joined as defendants in an action for damages for a negligence which is alleged to have been an omission or violation of the *joint and common duty of all defendants*, and that a recovery may be had against some of the defendants and not necessarily against all the defendants.

**ACTIONS: Nature and Form—Abolition of Forms—Tort and Negli-**  
 4 **gence.** Recovery depends upon what is *alleged* and *proven*, not upon the *name* which counsel may see fit to give to his action. So held where the trial court drew a distinction between an action for *tort*, and an action for *negligence*. (See Secs. 3426, 3639, Code, 1897.)

**TRIAL: Instructions—Verdict—Urging Instructions.** Verdict-urging  
 5 instructions are objectionable which assume to tell the jury, as a reason why an agreement ought to be reached, that, if the case is retried, such retrial must be on the same pleadings and evidence as the present trial, and that a retrial would simply add to the burden of the successful party.

*Appeal from Osceola District Court.*—W. D. BOIES, Judge.

MAY 20, 1918.

ACTION at law to recover damages for the death of plaintiff's intestate. Verdict and judgment for defendants, and plaintiff appeals.—*Reversed*.

*C. R. Metcalf*, for appellant.

*Clark & Dwinell*, for appellees.

WEAVER, J.—The defendant town owns and operates a municipal water and gas plant, of which, at the time here in question, the defendant Clayton was superintendent, and the deceased was an assistant or helper in the operation of said plant. On June 14, 1914, while in said employment in and about said business, the deceased came in contact with a rapidly revolving shaft, upon which his clothing or person was caught in such manner that he was drawn into

1. **TRIAL: in-**  
**structions:**  
**joint negli-**  
**gent wrong-**  
**doers.**



the moving machinery and killed. The plaintiff, as the administratrix of the deceased, brings this action, joining therein, as codefendants, the town of Sibley and the superintendent Clayton, alleging in her petition that deceased came to his death by reason of the negligence of said defendants, and without contributory negligence on his part. It is charged that the plant and machinery were negligently constructed and maintained, thereby making the operation dangerous; that the pulleys provided for the belting employed in such operation were left unguarded, and had protruding bolt ends, which were not covered; and that they were not provided with belt shifters or otherwise protected, as provided by law. It is further alleged that deceased had been in said employment for only a short time, and was without experience in such work, as the defendants well knew; and, under the order or direction of the superintendent, he was placed alone in charge of the operation of the plant at night, and it was while in such service, and in the line of his duty, that he was drawn into the machinery and killed; and that such accident was occasioned by reason of the defective condition of the machinery and of its unguarded condition, of which complaint is made.

The defendants deny the several allegations of negligence contained in the petition, and, by way of affirmative defense, allege that deceased had full knowledge of the dangers attending the operation of the machinery, and was expressly warned against exposing himself to contact therewith and voluntarily assumed the risk arising from defendants' alleged negligence. They also allege that, after the decease of Freeby, the town entered into a settlement with plaintiff in her individual capacity, and paid her the sum of \$150 in full of all her claims for damages on account of her husband's death.

On the trial, there was evidence tending to sustain the plaintiff's petition as to the alleged defective and dangerous and unguarded condition of the machinery. It was shown that, at the time the intestate was killed, he was attending

the operation of the plant alone, and no living witness undertakes to tell how the accident occurred. It appears that the principal shaft by which the machinery was operated was located some twelve feet above the floor, and carried several pulleys for belting. The means provided for getting up to the shaft to adjust the belting or to perform any other duty connected with the care of the machinery at that point was a ladder, with curved ends or hangers at the top. When used for this purpose, the ladder was kept in position by hanging the hooks at the top over the shaft, the bottom of the ladder resting on the floor. When discovered, Freeby's dead body lay on the floor under the shaft near the foot of the ladder, which was hooked over the shaft in the usual way. His right arm was torn off, left arm broken, and skull crushed, and the severed hand was found wedged into one of the pulleys at the shaft; but the exact manner of the accident is not clearly shown.

As it is not questioned that the case made was one for the jury, we shall not extend this opinion for any review of the testimony, but give attention to one or two propositions which appear decisive of the appeal.

I. In its charge to the jury, the trial court nowhere instructed that, to entitle plaintiff to recover, it was not necessary to find both defendants negligent, as charged, or that, if the evidence was found to justify it, the jury could find in her favor against either defendant alone. On the contrary, wherever the charge stated the issues, or referred to the contending parties and the rules governing their respective rights in the case, the defendants were, in each instance, spoken of jointly, or in the plural form; and nowhere is there any intimation of their several or individual liability. At the close of the arguments, and after the court's charge had been prepared, but before it had been given to the jury, plaintiff's counsel asked the court to submit with its charge a form of verdict to be used in case the jury should find against one defendant alone, and to inform the jury that such a verdict was allowable. The court re-

fused the request, and submitted to the jury but two forms of verdict, as follows:

"VERDICT No. 1.

"We, the jury, find for the plaintiff, Mrs. Eva Freeby, as administratrix of the estate of William H. Freeby, deceased, and assess the amount of her recovery against the defendants, at \$.....

"\_\_\_\_\_"

Foreman.

"VERDICT No. 2.

"We, the jury, find for the defendants.

"Signed \_\_\_\_\_"

Foreman.

The only reason assigned by the court, at the time, for its refusal of the request, was that it was made after the arguments had been concluded and the instructions prepared, and not before argument, as provided by statute. Error is assigned by appellant upon this ruling.

The statute, as it existed at the time of the trial below (Section 3705-a, Code Supplement, 1913), provided that all requests for instructions should be presented to the judge

before argument to the jury, and before the reading of the charge to the jury. It also provided that the judge, before reading

his charge to the jury, should present it to counsel on either side, and give reasonable time for its examination, and that, this being done, all objections thereto must be made and exceptions thereto taken before the charge was read to the jury. It was not provided that the court should have its charge prepared and completed before counsel's argument to the jury was begun, nor was it required that counsel should assume to offer objection or take exception to the charge until it was completed by the court; and this may be, and in ordinary practice is, not complete much before the arguments for counsel are closed. It seems quite clear, therefore, that objections and exceptions to the charge

2. TRIAL: In-  
structions:  
when requests  
are timely.

case, the submission of forms of verdict, it certainly does require, in the absence of such forms, clear and specific directions as to the various findings which are allowable in the case being tried, and such information as will enable the jury to frame its own verdict. Still more obvious is the justice of the proposition that, when the court does assume to submit forms of verdict to the jury, it should not omit therefrom any one or more of the verdicts which may properly be returned upon any of the issues. The effect of such omission, unless obviated by the specific and unmistakable terms of the charge itself, must necessarily be quite misleading. In this case, as we have seen, the court did submit forms of verdict, but only such as would fit a finding for plaintiff against both defendants, or for both defendants against the plaintiff; and the charge nowhere informs or suggests to the jury that it could find for the plaintiff against one of the codefendants individually. When this omission was discovered by counsel for plaintiff, before the charge was read to the jury, he could rightfully interpose an objection thereto; and in our judgment, the court, having its attention called to the error before submission, should have corrected it. Appellee cites the opinion of this court in *Shelberg v. Jones*, 170 Iowa 19, as holding that such an omission is not necessarily prejudicial to the opposing party; but the precedent tends rather to support the view we have here expressed than otherwise. We there overruled the exception taken to the failure of the court to submit a form of verdict as to each individual defendant, for the very sufficient reason that, as shown in the opinion, the court had, in fact, not only given instructions upon the subject of "liability, both joint and individual, of the defendants, in case plaintiff was entitled to a verdict," but the jury did, in fact, also return a special finding "that each and all of the defendants had united in the wrongful act."

That the court and counsel for appellees both misconceived the true rule applicable to cases of this kind is made still more apparent by reference to the language used by the

4. **ACTIONS: na-  
ture and form:** trial judge in overruling plaintiff's motion  
**abolition of** for a new trial, and adopted by counsel in  
**forms: tort** argument to this court. Giving reasons for  
**and negligence.** its ruling, the court said:

"Counsel for plaintiff bases his contention for a new trial primarily upon the idea that this action is on a tort, and not on negligence. It will be noticed from the reading of the petition that the matter of tort is not suggested; it is an action against the defendants jointly for joint negligence. That is repeated in every instance of the petition. The case was tried as one in negligence; was argued to the jury as one in negligence; and the question of tort was not suggested to the court until after the arguments were concluded, and the plaintiff asked certain other form or forms of verdicts to be submitted to the jury. It seems to me that, where the petition is drawn in the form it is,—this one before me,—that the court has the right, and it is the duty of the court, to instruct upon the case made by the pleadings and the manner in which this case is presented by the petition and tried. I think the court was justified in giving the instructions it did. It seems to me, when you come to read the petition, and note the broad field it covers, there should be an instruction at least reasonably in view of the case as pleaded and the case as tried. I do not believe a party can adopt the theory of joint negligence, as was done in this petition, and then complain that the defendants were not jointly liable, and at the end of the trial, turn it into a tort action, and base the objection thereon."

Passing the obvious objection to this reasoning, that forms of action are no longer observed in this state (Code Sections 3426 and 3639), and that, when the plaintiff has made a plain statement of facts, he may recover as damages thereon whatever the law may allow, either for breach of contract or tort (*Lee v. Coon Rapids Bank*, 166 Iowa 242, 248), it may be added that the distinction sought to be drawn between an action based upon an alleged negligence and one based on tort, is one which does not exist. The word

"tort," as used in law, is of broader and more comprehensive meaning than negligence, but it includes negligence. See Cooley on Torts (3d Ed.), 3 *et seq.*, and authorities collated in 38 Cyc. 415 and note. Perhaps as complete a definition of tort as can be compressed into few words is given in the Standard Dictionary (1896 Ed.), as follows:

"Any wrongful act, neglect, or fault whereby legal damage is caused to the person or property or reputation of another."

Negligence involves the element of a breach of duty, and this is a legal wrong, a tort. It follows, therefore, of necessity that, in drawing a distinction between an action in tort and an action to recover damages for negligence, and thus excluding the idea of plaintiff's right to recover against either of the individual defendants, the court erred, to her prejudice.

II. The jury, having considered the case for a considerable period without coming to an agreement, were recalled into court, and, after some interrogation, were returned to the jury room, with an additional instruction, as follows:

5. TRIAL: instructions:  
verdict-  
urging instructions.

"It is important that you agree upon a verdict in this case, if you can satisfy your minds as to the rights of the case between the parties. This case must be determined by some jury; it must be determined upon the same pleadings and evidence; a disagreement will simply add to the burden of the successful party. It is the duty of each juror to lay aside all pride of judgment, and carefully review the ground of his opinion; the case has been exhaustively tried; a new trial will entail a large expense. You may again retire for deliberation, and try and arrive at a verdict that you may deem fair and just."

Exception is taken by appellant to this instruction, in that it misdirects the jurors, and suggests improper reasons or inducements for them to reach an agreement. The state

ment that, in case of a retrial, the suit must be tried on the same pleadings and evidence, and that a disagreement would simply add to the burden of the successful party, is challenged by the appellant, and we are inclined to the view that the objection is well taken. Were the record without other material error, we might not reverse on this ground alone; but, in view of the fact that a retrial must be had on other exceptions, we mention this so that the objection may be avoided in the further trial of the case. On another trial, the issues may or may not be identical with those presented on the first hearing, and the evidence then offered may or may not be the same which the jury then had before it. It may be added that the suggestion that a new trial would add to the burden of the successful party could be true only on the theory that the same party proves successful on both trials, and this is a result which ought not to be taken for granted.

Some other objections argued might be of material character had they been properly preserved in the record, but they have not been so presented as to call for consideration or decision.

For the reasons stated, the judgment below is reversed, and cause remanded for new trial.—*Reversed and remanded.*

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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MRS. B. M. GEER, Appellee, v. CITY OF DES MOINES, Appellant.

**MUNICIPAL CORPORATIONS: Non-Negligent Defects—Elevated Obstructions.** While the maintenance of a slight *depression* in a sidewalk might be denominated non-negligence *per se*, yet the maintenance of an equally slight *elevation* in the sidewalk may present a jury question on the issue of negligence. So held where a section of a cement walk had been *elevated* from one to three inches above the surrounding walk by the growth of a tree.

*Appeal from Polk District Court.*—C. A. DUDLEY, Judge.

MAY 20, 1918.

ACTION at law to recover damages for personal injury. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

*H. W. Byers, Guy A. Miller, and Paul Hewitt, for appellant.*

*Parker & Riley, for appellee.*

WEAVER, J.—The city of Des Moines has constructed and maintains a cement sidewalk on the east side of West Eighteenth Street between College Avenue on the north and Clark Street on the south. This walk, the plaintiff alleges, was by the plaintiff negligently permitted to become and remain out of repair, in such manner that one section or block of the cement was lifted or raised several inches above the adjoining block or section, creating a defect or obstruction over which a person using the walk was liable to trip and stumble or fall. It is further alleged that this condition had continued a year or more, and had been expressly called to the attention of the city officers; and that plaintiff, while lawfully using the walk, and in the exercise of due care for her own safety, struck her foot against such obstruction, and was thereby caused to fall, breaking her thigh and inflicting upon her other painful and permanent injuries, for all of which she asks compensation in damages. The defendant denies the plaintiff's claim, and denies that it was in any manner negligent as charged. The evidence shows, without material conflict, that the cement walk, at the place in question, was about three feet wide; that a piece of it had been lifted above the general level or grade by the growth of a root of a tree standing near at hand, and that, on the evening in question, the plaintiff, accompanied by one or more friends, was passing along the walk, when she stumbled over this obstruction and fell, sustain-



ing an impacted fracture of her right femur, close to the head of the bone. The injury was of a painful character, and caused a permanent shortening of the limb. Her knee was also severely wrenched and bruised. There is some conflict in the testimony as to the height of the obstruction in the walk, caused by the lifting of the cement, the estimates varying from one inch to three inches. Others had stumbled over it and some had fallen there, and complaint of these conditions had been made to the city's sidewalk inspector. The defendant's evidence was confined to the matter of the height to which the cement block or section of the walk was raised above the adjoining section. At the close of the testimony, the defendant moved for a directed verdict in its favor, on the ground that the testimony was insufficient, as a matter of law, to support a verdict for the plaintiff. The motion was denied, and the jury found for plaintiff, assessing her recovery at \$750.

In argument to this court, appellant's counsel rely solely upon the proposition that the defect in the sidewalk was of such slight and trivial character that the court should hold, as a matter of law, that the city is not chargeable with negligence in failing to remedy it. It is conceded that the evidence undoubtedly shows that there was a defect in the sidewalk; but counsel say it "was not such a defect that plaintiff can say that reasonable diligence or ordinary care would require that the defect be remedied so that the sidewalk be made perfectly level and without unevenness." It may well be admitted that the law does not require the city to maintain its streets and walks in a state of absolute perfection, or to keep them free from minute and trifling variations in their evenness of surface such as do not, in ordinary use, render them unsafe for travel by persons exercising reasonable care. Stated in other words, if the defect be so slight that injury therefrom to travelers exercising proper care is not reasonably to be anticipated,

then there is no actionable negligence. But, generally speaking, the duty of care on the part of the city is not dependent upon the mere question of the size or proportions of the defect complained of. Size and visibility are sometimes material considerations upon the question of constructive notice of its existence; but, notice being admitted or proved, a defect is not necessarily trivial because it is small. For example, a spike left protruding an inch or two from the surface of an otherwise sound and well constructed plank walk, presents a defect of very small physical proportions, but one from which injury and danger to pedestrians may clearly be apprehended; and if the city, having notice of such condition, fails to use diligence in remedying it, with the result that a traveler is injured, it would hardly be claimed that the smallness of such defect relieved the city from the charge of negligence. In the case at bar, there was evidence from which the jury could find that a section or block of the cement from which the walk was made had been lifted to a height of from one to three inches. That such an obstruction in an otherwise smooth walk is one against which a pedestrian is likely to stumble and fall is very manifest, and this is particularly true when the vision of the traveler is obscured by darkness, as is here shown to be the case. That such was the character of this obstruction is also shown by the fact that several others had stumbled and fallen over it. It cannot be said, as a matter of law, that the pedestrian is bound to keep his eyes glued to the walk on which he travels, or that he assumes the risk of every defect which close inspection of every footstep may reveal. His duty in the premises is reasonable care and caution, but he has the right to assume that the city has also used reasonable care and caution to see that the walk it has provided for the public use is free from traps and defects which render it dangerous. Bearing generally upon this discussion, see *Patterson v. City of Council Bluffs*, 91

Iowa 732; *Baxter v. City of Cedar Rapids*, 103 Iowa 599; *Rusch v. City of Dubuque*, 116 Iowa 403; and other cases in which these precedents have been followed. To hold that, as a matter of law, the admitted defect in the walk was not of such character as to charge the city with negligence in failing to remedy it within a reasonable time after notice, actual or constructive, of its existence, would be to establish a precedent out of harmony with our adjudged cases, and inconsistent with the spirit of the statute which imposes upon cities and towns the duty to maintain their public ways free from nuisances and reasonably safe for their intended use. The appellant relies principally upon the recent case of *Johnson v. City of Ames*, 181 Iowa 65, but we do not regard it as controlling upon the facts now before us. In the *Johnson* case, the defect complained of was a slight depression in the surface of the walk; and, among other things, one of the important questions to be considered was that of constructive notice to the city. Concerning this, we said:

"It must have been a defect of such a character as, in view of its location and the use made of the walk, to attract the attention of the officers of the city and cause them, in the exercise of that degree of caution an ordinarily prudent person would exercise under like circumstances, to anticipate danger therefrom to the pedestrian passing along the walk; and we are of opinion that the defect was not such as thus to put the city on its guard."

In so holding, the opinion draws a distinction between a slight depression and a slight elevation in a walk,—a difference which, within limits, may be of material consideration. In this case, there is no question raised as to the fact or sufficiency of notice if the obstruction was one which the city should have removed or remedied. The cited opinion does not negative the duty of the city to exercise reasonable care in the inspection and oversight of its walks,

or its duty to remove an obstruction which is manifestly a danger to pedestrians. Neither can it be construed as holding, as a matter of law, that the existence of an obstruction or stumbling block in a sidewalk is not a defect constituting actionable negligence on the part of the city simply because it is not more than two or three inches in height. On the contrary, the opinion in that case expressly recognized the authority of *Barter v. City of Cedar Rapids*, 103 Iowa 599, where the defect shown was the lifting of the loose end of a plank at the junction of a street crossing with a sidewalk. On the trial of that case, the defendant, adopting the precise theory relied upon by appellant in the instant case, asked the court to instruct the jury that, if the crosswalk was only raised about two inches above the sidewalk, then it was reasonably safe and convenient for the public; and refusal of such instruction was assigned as error. We there recognized the fact that, in some other jurisdictions, the rule thus contended for had been adhered to, but we declined to follow it, and said:

"It may be that the conclusions reached in those cases were authorized by the facts upon which they were based, but we do not think it can be said, as a matter of law, that an obstruction in a sidewalk or street crossing two inches high cannot be such a defect that the city or town in which it exists may be liable for injuries which it causes. It is manifest that such an obstruction may easily cause most serious accidents to persons using the walk, even though they be free from negligence. Indeed, at times they may be much more dangerous than larger obstructions, because less readily discoverable. Whether an obstruction or other defect in a walk is of a character to make the municipality which permits it to exist responsible for it, does not necessarily depend upon the size of the defect, but upon the effects which may be reasonably apprehended from it upon persons who use the walk in a proper manner. These will

vary with the circumstances of different cases, and whether the municipality is liable for a defect in its streets or walks will, as a rule, be a question of fact, to be determined by the jury under the instruction of the court, and not a mere question of law, to be determined by the court alone. The evidence in this case authorized the jury to find that the defect in question was of a serious character, even though the plank which tripped the decedent was not more than two inches higher than the sidewalk, and the instruction under consideration was properly refused."

This statement of the law is so clear and comprehensive, and so fully meets and negatives the proposition for which appellant here contends, that little more need be said, unless we are to overrule that decision, and with it numerous others, in which we have adhered to the same doctrine. This we are not ready to do. It may be true that our statute and case law hold cities and towns to a stricter degree of liability than obtains in some states, but we think the rule cannot be said to be essentially unjust, or that it has not been productive of compensating benefits and advantages. It is a matter of common knowledge and observation that the improvement in the convenience and safety of public ways in the cities and towns of the state has been very marked; and in most municipalities, dilapidated, rough, and unsafe sidewalks, which were once exceedingly common, have very generally disappeared. No sound reason exists for relaxing the rules heretofore approved in cases of this kind. The case appears to have been fairly tried; the evidence supports the finding for plaintiff; and the damages awarded her are, in view of the severity of her injury, very moderate.

The judgment below is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

C. O. GRAY, Appellant, v. E. W. LA PLANT et al., Appellees.

**VENDOR AND PURCHASER: Rescission by Purchaser—Fraud—**

- 1 **Non-Necessity to Show Scienter.** *Scienter* need not be proven, in order to effect a rescission for fraud.

**VENDOR AND PURCHASER: Rescission by Purchaser—Laches—**

- 2 **Change of Position.** Courts are prone to excuse a delayed rescission for fraud, when the position of the one against whom rescission is sought has not been changed (a) by the intervention of right in favor of third parties, (b) by the incurring of expense, or (c) by the loss of valuable evidence. So held where the rescission was delayed some fifteen months after possession of the land was taken.

*Appeal from Linn District Court.*—F. O. ELLISON, Judge.

MAY 20, 1918.

SUIT in equity for rescission. The opinion states the facts.—*Reversed and remanded.*

*Hamiel & Mather* and *Treichler & Treichler*, for appellant.

*Crissman & Linville* and *E. A. Johnson*, for appellees.

STEVENS, J.—This is a suit in equity for the cancellation of a written instrument transferring to defendant the title to a section of Canada land, and six promissory notes, aggregating \$17,475, and asking judgment against the defendant for \$3,510, which, it is claimed, was paid to him as a part of the transaction in which the above conveyance and notes were executed. The exact nature of the instrument conveying the Canada land to defendant does not appear in the record. It is referred to in the petition as an assignment, and in the argument of counsel for appellant both as an assignment and a deed, but no question appears to be made upon this point, and we will hereafter refer to it as a deed.

It is the claim of appellant that, on or about November 14, 1914, he entered into negotiations with defendant for the purchase of a certain 231-acre tract of land in Benton County, Iowa, of which defendant was then the owner; that the defendant falsely represented to him that the land was of the fair and reasonable market value of \$250 per acre, that the land was well tiled out, and that it was not subject to overflow from a creek thereon to such an extent as to damage the land. Appellant testified that he had never before seen the land, and was not familiar with land or its value in the vicinity of the tract in question.

Shortly thereafter, a contract in writing was entered into, by the terms of which plaintiff agreed to, and, on March 5, 1915, did, convey the Canada land to defendant, paid him \$3,510 in cash, to satisfy a mortgage upon the Canada land, executed six promissory notes, aggregating the sum of \$17,475, to defendant, securing the payment thereof by a second mortgage upon the Benton County land, and assumed and agreed to pay a prior mortgage thereon for \$24,000, in consideration of which defendant conveyed to plaintiff the 231-acre tract.

It is the contention of appellee that, prior to the execution of the papers, appellant visited and inspected the land for himself; that nothing was done by defendant to prevent him from fully and freely informing himself of its value, its susceptibility to overflow, the extent of the tiling therein and its fair value; and that he entered into possession of the land on March 1, 1915; that he has continued in possession thereof; that he has leased it, collected the rents, listed the same for sale with real estate agents, and has thereby fully ratified the contract; and, further, that he has been guilty of laches in commencing and prosecuting this suit. The court dismissed plaintiff's petition, and rendered judgment in favor of defendant for costs. Plaintiff appeals.

I. The season of 1914 was a favorable one for the cultivation of wet land, and in November, when plaintiff visited the tract in question with defendant and his agent, there was a good crop of corn thereon. It is not denied that the subject of tiling, overflow, and market value of the land was discussed by plaintiff and defendant, and also by plaintiff and defendant's agent. The defendant claimed that the land cost him \$56,000; but it developed upon the trial that \$19,000 of this amount was represented by a house-moving outfit, worth not to exceed \$3,500 or \$4,000. Defendant testified that he showed plaintiff the several tile outlets on the premises, and that whatever representation was made by him as to the extent of the tiling upon the farm was but a repetition of the representations of his grantor, and that he so informed plaintiff; denied that he told plaintiff that the land was not subject to overflow from the creek, but, instead, told him he could see the situation for himself. It is conceded by appellant that he was shown certain tile outlets on the farm, but he claims that the defendant told him the land was all well tiled out, except the pasture. The term "well tiled out" may not be susceptible of precise definition, but it is clear from the evidence that the land in question was so inadequately and imperfectly tiled that it could not possibly be classed as "well tiled out." There was but little tiling on the farm, and this had been put in by an inexperienced workman; and a profile offered in evidence indicated that its construction was so faulty as to render it practically valueless. The farm was not, to any reasonable extent, tiled out. Defendant's agent also admitted telling plaintiff that he understood that the land was well tiled out, and that Smith, a former owner thereof, had repeatedly so informed him. The evidence also shows that the overflow from the creek seriously affects a large part of one 80 of the farm. The land was not worth to exceed \$150 to \$170 per acre, and defend-



ant testified, upon a former occasion, that it was not worth to exceed \$150 to \$155 per acre. The farm was a flat, wet tract of land, of doubtful value, except in exceedingly favorable seasons, for cultivation; and there is no doubt that plaintiff was wholly misled and deceived as to the true condition and value of the land. Concerning the representations of value, plaintiff testified:

"I asked Mr. LaPlant what he considered the farm worth, and he said, '\$250 per acre.' After getting back to Cedar Rapids, we went to the Hunter Land Company's office, and Mr. Soper wanted to know if I was going to deal. I told him I was in doubt as to what it was worth. He said the only way was to make a bid. Finally, I told him I would not want it at more than \$230 per acre. Mr. LaPlant said he ought to have more than that; that it cost a good deal more than that. Mr. Soper then said, in the presence of Mr. LaPlant, that there was no question but what the farm was worth \$250 per acre; that Mr. LaPlant was no farmer; that the farm was worrying him, and he had concluded to dispose of it and give somebody a bargain, and they would cut the price some to get rid of it; and said, in order to dispose of it, would take \$235 per acre. Mr. Soper said, if I would deal for the farm and list it back with them, I would not have it a year from that time; that the farm was worth all that LaPlant asked for it."

The Canada land was put in at \$20 per acre. The only evidence of its value offered upon the trial was that it was worth \$17.50 per acre, thus indicating that its value was somewhat inflated in the trade; but, in any view of the evidence, appellee profited by the transaction from \$10,000 to \$15,000.

It is suggested by counsel for appellee that the evidence fails to show that defendant knew that the land was not well tiled out, or that it was subject to greater overflow

1. **VENDOR AND  
PURCHASER:**  
rescission by  
purchaser:  
fraud: non-  
necessity to  
show *scienter*.

than it is claimed he represented. Whether this claim is well founded or not, the price paid for the land by defendant was consciously misrepresented to plaintiff, and the land was not tiled out, and was subject to overflow, as above stated. It was not necessary for him to prove *scienter*. *Weise v. Grove*, 123 Iowa 585; *Clapp v. Greenlee*, 100 Iowa 586; *Gray v. Bricker*, 182 Iowa 816.

In our opinion, the evidence of fraud is clear, satisfactory, and convincing, and unless plaintiff has ratified the contract or been guilty of laches, the prayer of his petition should have been granted.

II. It is urged by counsel for appellee that, because of the long delay of plaintiff after he discovered, or should have discovered, the alleged fraud, in notifying defendant thereof, and in failing to commence proceedings

2. **VENDOR AND  
PURCHASER:**  
rescission by  
purchaser:  
laches: change  
of position.

ings for rescission within a reasonable time, the relief prayed is inequitable, and he is estopped from asking cancellation of the deed and notes. It is well settled that, ordinarily, where a party seeks to rescind a contract on the ground of fraud or mistake, he must do so within a reasonable time after the discovery thereof, or after he should have discovered the same. *Rawson v. Harger*, 48 Iowa 269; *Campbell v. Spears*, 120 Iowa 670; *Wilson v. Calhoun*, 170 Iowa 111; *Brechwald v. Small*, 180 Iowa 22. Delay in the commencement of proceedings for rescission may, however, be excused upon various grounds, and, unless there has been some change in the situation of the parties, is often permitted under circumstances which would otherwise bar recovery. The Supreme Court of Rhode Island, in *Chase v. Chase*, 20 R. I. 202 (37 Atl. 804), expresses the rule as follows:

"Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as

parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief."

Such is the general holding. *O'Connor v. O'Connor*, 100 Iowa 476; *Campbell v. Spears*, supra; *Curtis v. Armagast*, 158 Iowa 507; *Wilson v. Calhoun*, supra; *Gray v. Bricker*, supra; *Carbine v. McCoy*, 85 Ga. 185 (11 S. E. 651); *Grewing v. Minneapolis Threshing-Mach. Co.*, 12 S. D. 127 (80 N. W. 177); *Harker v. Scudder*, 15 Colo. App. 69 (61 Pac. 197); *Allore v. Jewell*, 94 U. S. 506 (24 L. Ed. 260); *Ackman v. Potter*, 239 Ill. 578 (88 N. E. 231).

The excuse offered by appellant for the delay in commencing this suit was that the year 1914 was dry, and that, prior to March 1, 1915, when he entered into possession of the land, there was nothing in the condition of the farm or surroundings to impart notice to him or put him upon inquiry as to the truth of the representations alleged; that the year 1915 was exceedingly wet, and that farm lands generally, in the vicinity of the tract in question, were also so wet that they yielded but little; that the land was in possession of a tenant, and that he was absent in Canada from June first to Thanksgiving, and attributed the failure of the land to produce a crop to the unfavorable conditions prevailing generally in the vicinity thereof; that, in May, 1916, he discovered that the lower portion of the farm was swampy, and the higher land in bad condition. By

July, it became quite apparent that the land was not adequately tiled, and plaintiff learned that a large part of one 80 had been overflowed from the creek. He thereupon made inquiry, and learned the facts concerning the value, the extent of the tiling, and the susceptibility of a large portion of one 80 to overflow. He went upon the land and dug up the tile, and learned definitely that the quantity was wholly inadequate, and afforded little or no drainage for the land.

This suit was commenced in August, 1916. The situation of the parties was, at the time, unchanged. It is not claimed that other interests have intervened, that defendant had incurred expense, or that valuable evidence has been lost to him, or that he has suffered prejudice in any way by reason of the delay. We are, therefore, constrained to hold that the delay of plaintiff in bringing suit should not bar his right of recovery herein.

It is true that appellant has retained possession of the land, leased it, and collected the rent, and, shortly after the purchase thereof, placed it in the hands of a real estate agent for sale. These matters should, of course, be considered and given weight in determining the question whether plaintiff delayed bringing the suit for the purpose of enabling him to sell the land at a profit, or to otherwise dispose of it to his advantage; but the whole record must be considered in ascertaining the cause of his failure to earlier seek cancellation and rescission of the contract. When the record as a whole is carefully read and considered, it does not tend to impeach his good faith or to show ratification.

Other matters discussed by counsel, while having some bearing upon the issues and the final determination of the questions involved upon this appeal, are not, as we view them, of such controlling importance as to require separate notice or consideration. It is our conclusion, from

the whole record, that the decree of the court below should have been in favor of appellant. There should be a cancellation of the deed conveying the Canada land to defendant, and of the notes executed by plaintiff to defendant, and judgment in favor of plaintiff against the defendant for the full amount of the money paid, with interest, as provided by law. The judgment and decree of the district court is, therefore, reversed, and the cause remanded for such further proceedings as are necessary to effect a proper accounting between the parties, and for decree in harmony with the views herein expressed.—*Reversed and remanded.*

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

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IN RE ESTATE OF GUTHRIE.

**HOMESTEAD: Surviving Issue—Right of Exemption.** Homesteads which pass to the owner's issue are exempt from the debts of such ancestral owner contracted subsequent to the acquisition of the homestead, whether the issue take by *will* or by *descent*. (Sec. 2985, Code, 1897.)

*Appeal from Mahaska District Court.*—K. E. WILLCOCKSON, Judge.

MAY 20, 1918.

APPEAL by creditors of the estate from an order holding certain property to be exempt from liability for payment of their claims. The material facts are stated in the opinion.—*Affirmed.*

*Roberts & Webber* and *John R. Howard*, for appellants.

*Burrell & Devitt* and *Malcolm & True*, for appellees.

WEAVER, J.—James D. Guthrie died testate, January 22, 1916. He was the head of a family, and held title to a forty-acre tract of land which he had occupied as a homestead for

forty years or more. His surviving family consisted of five children, two of whom were born to him in lawful wedlock, and three who had been regularly and legally adopted by him. By his will, which has been duly admitted to probate, he bequeathed to each of his adopted children the sum of \$25, and directed that, after paying the further sum of \$800 to his daughter, Alice M. Stuart, the residue of his estate should be equally divided between said daughter and his son, Leonard Colwell Guthrie. S. V. Reynolds, named as executor of the will, accepted the trust, and letters testamentary were duly issued to him. In due time, creditors presented claims against the estate, to the amount of \$6,000 or more. A considerable proportion of these claims had been reduced to judgment in the lifetime of the testator and more than ten years before his death, but no claim is made that any of the debts were contracted before the property in question acquired its homestead character. Aside from his homestead property and certain exempt household furniture of small value, the testator left little or no estate. The creditors, adopting the theory that the homestead was liable for the payment of their claims, demanded of the executor that he make application to the court for authority to sell the property, and that the proceeds thereof be applied to the satisfaction, in whole or in part, of their several demands. To protect himself in the premises, the executor filed a petition in court setting forth the facts as above related, asked that the creditors and the beneficiaries of the estate be called in, and that the status of the homestead property, whether exempt or otherwise, be determined. The parties in interest appeared to the proceeding, and, after consideration of the conceded facts, the court found and adjudged that the property was not subject to sale for payment of the claims of the creditors. From this finding the creditors appeal.

The proceedings are somewhat out of the ordinary, but the court seems to have had jurisdiction of the parties and of the property in question, and there is no apparent reason for not disposing of the case on its merits.

The proposition contended for by the appellants is that, as the heirs took the property by the will of the ancestor instead of by descent from him, under the provisions of our statute they took it divested of the homestead exemption, and the creditors are entitled to exhaust it in payment of their claims.

The point made is ruled against the appellants by the decision in *Swisher v. Swisher*, 157 Iowa 55, 64. Counsel rely on *Rice v. Burkhardt*, 130 Iowa 520, and *Voris v. West*, 180 Iowa 138; but these cases are not parallel with the case before us, either in fact or in principle. In each of those cases, the heir or devisee of the homestead was claiming exemption therefor from liability for his own debts, and its exemption from liability for the debts of his ancestor was in no manner involved or considered. In the *Voris* case, it was held that the privilege of exemption of the homestead from liability for the debts of the heir or devisee does not exist where the deceased owner of the homestead leaves a surviving spouse; and in the *Rice* case, it was also held that there was not such right in the heir or devisee when he takes by purchase, and not by descent. In the *Swisher* case, we for the first time had occasion to consider whether the homestead exemption which is provided for the owner and his family against liability for his debts is lost simply because, instead of leaving it at his death as intestate property, he devises it to some or all of the members of his family, for whose protection the exemption is expressly provided. After a somewhat extended examination of the statute, we answered the inquiry in the negative; and we see no good reason for now holding otherwise. The homestead right is carefully guarded by the express provision which makes it applicable in all cases "where there is no special declaration of statute to the contrary." Code Section 2972. There is a special declaration in Code Section 2986 which provides for the removal or extinction of the exemption when the ancestor dies intestate and there is *no surviving spouse or issue*; but the statute will be searched in vain for any express

or necessarily implied provision giving any such effect to the act of the owner in devising the homestead; and especially is this the case where the devise is made to one whom the statute is intended to protect. The owner could have conveyed it in his lifetime to the same persons named in his will, and they could maintain their title free from the claims of his creditors, though not free from the claims of their own creditors; and if there be any good reason in the statute, or outside of it, for making his devise any less effective than his deed, it is certainly not apparent. There are no appealing or persuasive equities in favor of appellants which should lead the court to seek an excuse for sustaining their claim. The credits were extended to the deceased after his homestead rights had been acquired. The creditors cannot say they trusted him on the strength of his ownership of this property, which they knew the law exempted; and they are not wronged, either in a legal or a moral sense, in denying them recourse upon the homestead. In the language of the Kentucky court:

"The owner of a homestead has power, under the statute, to convey, by deed, and pass a good title to the property. \* \* \* We see no reason why he may not do practically the same thing by will, because his creditors are prejudiced in one state of the case no more than the other; in fact, they are not wronged in either; but, in both, the object of the law, which is to secure to every housekeeper with a family, the certain and uninterrupted enjoyment of a homestead, is accomplished." *Myers' Guardian v. Myers' Admr.*, 89 Ky. 442, 446. See *Pendergest v. Heekin*, 94 Ky. 384.

The same rule is affirmed in *Eckstein v. Radl*, 72 Minn. 95. Again, the statute provides that, subject only to the rights of a surviving spouse, the owner of a homestead may devise it by will, like other real estate. Code Section 2987. In other words, subject to the right of the surviving spouse (which is a right of occupancy only), the owner of the homestead may devise it to whom he pleases, just as, with the consent of the spouse, he may sell and convey it or give it away



in his lifetime. In neither case do his creditors suffer wrong, nor is the property thereby exposed to seizure for payment of their claims. *Delashmut v. Trau*, 44 Iowa 613; *Officer & Pusey v. Evans*, 48 Iowa 557; *Stubblefield v. Gadd*, 112 Iowa 681; *Citizens' Savings Bank v. Glick*, 134 Iowa 323; *Larson v. Curran*, 121 Minn. 104 (140 N. W. 337); *Eckstein v. Radl*, 72 Minn. 95 (75 N. W. 112); *Dettmer v. Behrens*, 106 Iowa 585, 587; *Burdick v. Kent*, 52 Iowa 583; *Johnson v. Harrison*, 41 Wis. 385; *Myers' Guardian v. Myers' Admr.*, 89 Ky. 442. Our statute, which makes the homestead devisable by will (Code Section 2987) does not, even by indirection, suggest that such a devise is subject to claims of creditors against whom the homestead right had been acquired. It does make such devise subject to the right of the surviving spouse, and the expression of this one condition alone implies the exclusion of all others. Speaking on this subject, and applying a statute very similar to our own, the Minnesota court says:

"The whole trend of legislation on the subject of the descent of the homestead free from debts is indicative of a policy that creditors of the deceased shall have no recourse to the homestead, unless the debtor leaves no spouse or children, and either makes no devise thereof, or clearly indicates an intention to make a devise thereof subject to the claims of his creditors." *Larson v. Curran*, 121 Minn. 104 (140 N. W. 337).

In Wisconsin, the statute is perhaps a little more explicit on the subject than is ours; but the court there, speaking generally upon the course of modern legislation upon homestead rights, says:

"The spirit and policy of all the legislation upon the subject plainly are to exempt the homestead and its proceeds absolutely from the mere personal debts of the owner. If the owner disposes of it by will, it descends to the devisee free from the incumbrance of all judgments and claims against the testator; and if he dies intestate, it descends to

his widow or heirs." *Johnson v. Harrison*, 41 Wis. 381, 385.

In the case of *Cross v. Benson*, 68 Kan. 495, the husband, H. C. Cross, owning a homestead, died, testate, devising the property to his widow, who elected to take under the will. Later, the widow died testate, devising the homestead to one Newman; and thereafter, creditors of H. C. Cross sought to subject the homestead to the payment of their claims. In that state, the homestead exemption right is fixed by a constitutional provision, which declares that the homestead (describing its limits) shall be exempt from forced sale under legal process, and shall not be alienated without the joint consent of husband and wife. Certain exceptions to the application of this provision are made, but are not here material. The creditors, in support of their claim, argued, as is argued here, that the exemption ceased with the death of Cross; also that the taking of title by the widow under the will, instead of under the statute of descent, operated to abrogate the homestead right. Refusing to so hold, the court says:

"The homestead privilege was no more disturbed than it would have been had H. C. Cross deeded the lots to his wife in his lifetime, and while she was occupying them as a homestead. She continued in the enjoyment of precisely the same right to immunity from the loss of her hearthstone at the suit of her husband's creditors as before his death."

We applied the same principle in the *Swisher* case.

Considerable confusion in thought and argument on this subject has grown out of a failure to discriminate between a loss or abandonment of the homestead right by a surviving spouse, and a loss of the homestead exemption from liability for the debts of the deceased owner. Nearly all of the homestead cases coming before the courts have involved questions of descent and distribution, rather than questions of exemption. They have involved the effect of election by the surviving spouse between homestead and dower; between homestead rights and rights under the will of the deceased spouse; also, contests between the survivor and the heirs

over the existence of any homestead, and over its alleged surrender or abandonment by the survivor; and in some instances, the right of heirs to hold the homestead exempt against the claims of their own creditors: but cases are very rare (if there be any) in which general creditors of a deceased owner, holding claims against him which accrued after the homestead was acquired, have asserted any right to subject it to payment of their demands, where it is conceded that the deceased owner left either a surviving spouse or issue. The lack of any precedents for sustaining such a claim is doubtless due to the explicit terms of the statute, which exempts the homestead of every family from judicial sale, where there is no special declaration of statute to the contrary (Code Section 2972), and preserves such exemption in favor of the surviving spouse and heirs (Code Section 2985). It is doubtless true that, except as against the rights of the surviving spouse, the owner may, by will, subject the homestead to the payment of his debts (Code Sections 2985 and 2987); but, in the absence of any such state of facts, the statute provides but one condition under which the exemption with which the homestead is clothed will be removed, and the property subjected to the payment of the general creditors of the deceased owner, and that is where he leaves no surviving spouse or issue (Code Section 2986). The surviving spouse may lose or waive her right of occupancy; the homestead as to her may be abandoned or cease to exist: but none of these conditions can have the effect to destroy the exemption, if there be issue. *Kite v. Kite*, 79 Iowa 491; *Johnson v. Gaylord*, 41 Iowa 362, 366; *Orman v. Orman*, 26 Iowa 361; *Porter v. Perkins*, 125 Iowa 55; *In re Estate of Coulson*, 95 Iowa 696. In other words, assuming the acquirement of a homestead by the debtor before the date of his indebtedness to a general creditor, and the death of such debtor, leaving issue who take the title to the homestead by inheritance or by will or by deed (see *Dettmer v. Behrens*, 106 Iowa 587), such issue takes the title precisely as it existed at the owner's death, free from any charge or liability for the own-

er's debts,—not because of any homestead right in the issue, but because of the homestead right and exemption which had been acquired by the ancestor. Whether such issue takes it free also from liability for his own debts is made, by our decisions in *Rice v. Burkhart*, supra, and *Voris v. West*, supra, to depend, first, upon the fact as to whether title passes by descent or purchase; and second, whether the ancestor did or did not leave a surviving spouse: but this question does not arise upon the present record. The distinction between exemption from liability for the debts of the ancestors and exemption as against the debts of the heirs is expressly recognized in the opinion in the *Voris* case. The exemption as against the debts of the ancestor is, as we have said, clear and positive, and is declared, by the law which created it, to apply in every case where there is no special statutory direction to the contrary. There is no statutory exception applicable to the circumstances of this case, and the exemption must be preserved.

The judgment below was right, and it is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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ALVIN A. JEFFRIES, Appellee, v. IOWA RAILWAY AND LIGHT  
COMPANY, Appellant.

**EVIDENCE: Opinion Evidence—Examination of Experts.**

- 1 pert who answers an opinion question which assumes the existence of a certain fact, *which fact the expert has not yet testified to*, will be presumed to have had such fact in mind in giving such answer, when the record shows that, subsequent to such answer, he did testify to the existence of such missing fact, and knew thereof before he gave said answer.

**APPEAL AND ERROR: Harmless Error—Curing Error by Instruc-**

- 2 tions. The erroneous admission, on a matter not in issue, of non-inflammatory evidence bearing on the amount of recovery, is cured by specific instructions to the jury to wholly disregard the same in making up their verdict.

*Appeal from Linn District Court.*—MILO P. SMITH, Judge.

MAY 20, 1918.

ACTION for damages. Judgment for plaintiff. Defendant appeals.—*Affirmed*.

*John A. Reed, William Smith, and Dutcher, Davis & Hambrecht*, for appellant.

*Rickel & Dennis*, for appellee.

STEVENS, J.—I. Plaintiff was injured while riding a motorcycle upon Fifth Avenue at its intersection with Fourth Street in the city of Cedar Rapids. The allegations of negligence, in substance, are that defendant had removed paving block from between the rails of its track, which passes over and upon Fifth Avenue and across Fourth Street in said city, and that it had negligently permitted same to remain in a dangerous condition for an unreasonable length of time, without placing barriers, lights, or other warnings near the same, as required by the ordinance of said city. The defect was obscured by snow, and a blizzard was in progress at the time. The jury returned a verdict in favor of plaintiff for \$5,000.

Plaintiff's injuries consisted of a partial severance of the urethra, and some injury to the prostate gland. An operation, which consisted of placing, and securing by stitching, the severed parts of the urethra in position to unite, was performed by a surgeon in the employment of defendant. Upon the trial, a medical witness, who had previously made a physical examination of plaintiff, was asked the following question:

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opinion evidence:  
examination of  
experts.

"I'll ask you, Doctor, now, in what way an affected or enlarged prostate gland, one afflicted or inflamed such as you say you found in the plaintiff, will affect, if at all, the ejaculatory ducts?"

The specific objection to the question was that it assumed that the witness had testified to an inflamed condition of the prostate gland, and the record discloses that he had

not done so. It does appear, however, that the witness later testified that the prostate gland was inflamed to some extent. It should, therefore, be assumed that the witness, in answering the question, had in mind the condition which he later testified he had previously found to exist, and that the answer was the same as it would have been had the question been propounded after he had given his testimony upon this point. It necessarily follows, therefore, that no prejudice resulted to defendant on account of the error complained of.

II. Medical experts, called on behalf of appellee, testified to the presence of scar tissue at the point where the urethra was severed, and that the same might produce stricture. One of these witnesses was asked

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by counsel for appellee whether or not death can occur from stricture. This was objected to, upon the ground that it was incompetent, irrelevant, immaterial, purely speculative, and that no such claim was made in the petition. The petition, however, alleged, in general terms at least, injuries to the parts in question. Evidence was offered to show the extent of the injuries. It is true that the jury would not have been justified in finding, from the evidence introduced, that appellee was likely to die from stricture or other injuries. To this extent, the evidence sought may have been somewhat speculative in character; but the court limited the jury, in its consideration of the evidence, to the injuries actually received, and to such damages in the future, if any, as it was reasonably certain from the evidence that he would suffer, and specifically instructed it to allow nothing on the mere possibility of plaintiff's death from his injuries.

Counsel for appellant requested the court to instruct the jury as follows:

"Evidence is before you that, in some cases, death may result from a stricture of the urethra; but it is not in evidence that there is any probability this plaintiff will die of such stricture. Therefore, you will not consider, as ground for allowing or fixing the damage in this case, the chance or

possibility of death of plaintiff on account of his injury."

This instruction was refused, and the court, as a part of its seventh instruction, told the jury:

"But you will not allow anything on the mere possibility of the death of plaintiff on account of his injury."

It is argued by counsel for appellant that, had the requested instruction been given, the prejudicial effect of the above testimony would have been cured, but that the instruction given was not broad enough to do so. We are, however, quite sure that the instruction given was sufficiently specific to inform the jury that no damages were to be allowed on account of the mere possibility of the death of plaintiff.

Objections now urged to Instruction No. 5 were not made in the court below, and cannot be considered upon this appeal.

III. Complaint is made of the court's instruction upon the weight to be given to the testimony of expert medical witnesses. No exception was taken to this instruction until after the verdict. Exceptions were, however, taken thereto in the motion for new trial. The exceptions urged to this instruction in argument are rather technical, and based largely upon a somewhat unfortunate use of words. While there is some merit in counsel's contention, we are quite clear that the jury could not well have misunderstood or been misled thereby, and we are not, therefore, disposed to reverse on account of the exceptions urged. Finding no reversible error in the record, the judgment of the court below is—*Affirmed*.

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

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W. M. KEELEY, Appellant, v. C. H. BEENBLOSSOM et al.,  
Appellees.

**LANDLORD AND TENANT: When Assignment Works Surrender**  
1 of Lease. A tenant's obligation to pay rent is not terminated by the naked fact that the tenant, with the consent of the land-

lord, assigns the lease, and the landlord thereafter receives the rent from the assignee; but such result will follow from the additional act of the landlord in exacting from the assignee conditions separate and distinct from those exacted of the former tenant.

**LANDLORD AND TENANT: Scope of Lien.** A lien on the property of an original tenant, reserved solely "to secure the rent at any time remaining unpaid," may not be enforced for the payment of damages done to the property by one to whom such tenant has, with the consent of the landlord, assigned the lease.

*Appeal from Washington District Court.*—JOHN F. TALBOTT, Judge.

MAY 20, 1918.

SUIT in equity to recover an amount claimed to be due for rent of real estate, and to foreclose a lien by which the payment of such claim is alleged to be secured. The issues were tried to the court, which found for the plaintiff, as prayed, against the defendant Beenblossom, and dismissed the petition as against the other defendants. Plaintiff appeals.—*Affirmed.*

*Eicher & Livingstone*, for appellant.

*Charles A. Dewey*, and *Brookhart Brothers*, for appellees.

WEAVER, J.—Under date of February 27, 1912, the plaintiff, in writing, leased a part of a certain building and lot in the city of Washington, Iowa, to I. W. Shenefelt, for the term of three years, at \$70 per month, payable on the last day of each month. Among other things, the lease provided that the tenant should not assign the same without the lessor's consent in writing. On May 13, 1913, Shenefelt assigned the lease to J. W. Cox. The plaintiff, in writing, consented to the assignment; but, as a condition thereof, required the assignee to agree to other terms, in addition to those contained in the lease as made between

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lease.



plaintiff and Shenefelt. For example, these additional terms limited the use to which the building could be put, to the keeping of a restaurant therein; prohibited loud talking, singing, and playing of musical instruments therein; prohibited the display of goods on the sidewalk and the placing of signs and paintings on said building; and inserted other stipulations, none of which had been made a part of the original contract. Cox took possession under the lease as thus modified, and continued therein until September, 1913, when he transferred all his rights and interest in the premises to C. H. Beenblossom. No written assignment was made by Cox, but the evidence fairly shows the transfer and the acquiescence of the plaintiff therein. The rent, as it fell due, was paid by Shenefelt direct to plaintiff until the assignment to Cox, who thereafter paid the same to plaintiff until Beenblossom took possession. For nearly or quite two years thereafter, Beenblossom paid the rent; but plaintiff claims that he finally defaulted therein, leaving several of the later installments unpaid. To recover this claim for rent and certain items of expense and damages alleged to be due under the terms of the lease, and to foreclose the lien reserved to secure the rent, this action was begun, February 24, 1916. The defendant Beenblossom did not appear to the action, and a decree was entered against him, as prayed. Shenefelt and Cox filed separate answers, denying plaintiff's claim, and further alleging that plaintiff had consented to the assignment of the lease from Shenefelt to Cox and from Cox to Beenblossom, and had, in each instance, accepted the assignee as his tenant, and released the assignor from further liability for the payment of rent. On trial to the court, the issues were found in favor of the answering defendants, the petition was dismissed, and plaintiff has appealed.

I. Giving first attention to the issue between plaintiff and Shenefelt, it is very clear that plaintiff has no right of recovery. It is true, of course, as argued by appellant, that the mere assignment of a lease has no effect to release the tenant from his contract obligation to pay the agreed rent

Cox would have been entitled to have the lien enforced for the rent alone, and not for the payment of damages occasioned by Beenblossom's negligence, an item for which, on no proper theory of the case, could Cox be held accountable. Again, while plaintiff claims that he kept a book account of the various items sued upon, and that they were charged to the account of Shenefelt, he nowhere says that any of them were ever charged to Cox. Indeed, plaintiff's own version of the consent he gave to the transfer from Cox to Beenblossom inferentially negatives the idea that he expected or understood that Cox was to remain liable on the lease; for he says:

"Finally, I told him (Cox) I would make no objection to his selling out, but that any deal he made should not work a release of the obligations of Shenefelt to pay the rent and obey the lease unless performed by Beenblossom."

In other words, he permitted the latter to be substituted as tenant, relying not upon any continued obligation of Cox, but upon that of Beenblossom, and upon what he seems to have conceived to be the continuing obligation of Shenefelt. Altogether, the conduct of the parties, including the plaintiff, is more consistent with the conclusion that plaintiff accepted the tenancy of Beenblossom as a substitute for that of Cox, releasing the latter from further obligation, after his surrender of the possession.

It follows that the decree below is right, and it is, therefore,—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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HARRIET M. KENDALL, Appellee, v. CITY OF DES MOINES,  
Appellant.

**NEGLIGENCE: Operation of Automobile—Necessary Degree of Control.** The operator of an automobile is not *necessarily* guilty of negligence *per se* by failing to have the automobile under such control that he can stop it within the distance that he can plainly see obstructions ahead of him. So held where the op-

erator, on a dark and misty night, drove into a negligently guarded excavation in a public street.

*Appeal from Des Moines Municipal Court.*—JOSEPH E. MEYER, Judge.

MAY 20, 1918.

ACTION for damages on account of the alleged negligence of the defendant city in failing to provide proper barriers and to place warning lights at a ditch in one of its streets. Judgment for plaintiff. Defendant appeals.—*Affirmed.*

*H. W. Byers, Guy A. Miller, and D. Cole McMartin*, for appellant.

*Cummins, Hume & Bradshaw*, for appellee.

STEVENS, J.—This is an action for damages to an automobile, which plaintiff alleges in her petition resulted on account of a dangerous excavation in one of the streets of defendant city, while said automobile was being driven by an employee of the Kendall Auto Taxicab Service Company, to whom it was leased. The excavation complained of was about 20 inches in width and 3 feet in depth, and extended entirely across East Fourteenth Street, on the south side of its intersection with Hull Avenue. A barricade, consisting of 2-inch planks laid on top of a series of tiling stood on end, was placed about 3 feet north of the ditch, extending the full length thereof. The tiling were about 2½ feet in height. No signal lights were placed on or near the barriers.

The negligence charged in plaintiff's petition is the alleged failure of defendant to properly guard the excavation or ditch by placing signal lights near enough thereto to warn travelers of the danger thereof.

Counsel for appellant do not, in argument, contend that defendant was not negligent in failing to place proper signal lights in the vicinity of the excavation, as a warning to travelers upon the street, but rely for reversal entirely upon the alleged contributory negligence of the driver of the auto-

mobile. We gather from the evidence that the night in question was dark, somewhat misty and hazy, and the place where the excavation and barriers were located, dimly lighted. It appears to be conceded that the only street light in the vicinity was an incandescent light, which, the driver of the automobile testified, did not sufficiently light the street to reveal the presence of the barriers or the excavation. The accident occurred about midnight, and was observed only by the occupants of the automobile.

The contention of counsel for appellant is that the driver of the automobile was negligent in operating same at such a high rate of speed that he was unable to bring it to a complete stop within the distance the barriers across the street were visible to him by the headlights of his automobile: that is, we are asked to hold that the driver of an automobile upon the streets of a city at night must have the same under control, and must not drive it at a rate of speed in excess of that which will enable him to stop the same within the distance obstructions in the street are discernible to him within the radius of the lights thereon.

Our attention is called to *Lauson v. Town of Fond du Lac*, 141 Wis. 57 (123 N. W. 629), *West Construction Co. v. White*, 130 Tenn. 520 (172 S. W. 301), and *Knorrville R. & L. Co. v. Vangilder*, 132 Tenn. 487 (178 S. W. 1117), in each of which the court held it to be the duty of the driver of an automobile upon the streets of cities, or highways, in the nighttime, to drive the same at such a rate of speed that it may be brought to a standstill within the distance that he can plainly see objects or obstructions ahead of him, and that the failure to do this, in case of accident, will amount to contributory negligence. This, the Wisconsin court declares, is the minimum degree of care that should be required.

It is now provided by statute in Wisconsin that:

" \* \* \* It shall be unlawful for any person to operate or drive any automobile, motorcycle, or other similar motor vehicle along or upon any public highway of this state at

such a rate of speed that such automobile, motorcycle, or other similar motor vehicle cannot be brought to a complete stop within the distance ahead that the driver or operator thereof can, with the aid of the lights thereon, in connection with the lights from other sources, see an object the size of a person." Statutes 1915, Section 1636-52.

In *Raymond v. Sauk County*, (Wis.) 166 N. W. 29, the Wisconsin court extended the doctrine of the above cases to the operation of automobiles in the daytime.

It is settled law of this state that cities must keep their streets free from obstructions and nuisances which interfere with ordinary public travel, and this duty applies to automobiles, as well as other vehicles. *Wolford v. City of Grinnell*, 179 Iowa 689; *House v. Cramer*, 134 Iowa 374; *Simmons v. Lewis*, 146 Iowa 316; Section 753, Code.

The driver of an automobile has the right to assume that the street is in a safe condition for travel, and that the city has exercised a proper degree of diligence and caution to keep it so. *Frazee v. City of Cedar Rapids*, 151 Iowa 251; *Frohs v. City of Dubuque*, 169 Iowa 431. It is, however, the duty of the driver of an automobile to exercise ordinary and reasonable care for his own safety and that of the property entrusted to his care. Ordinary care, as applied to the driver of an automobile, is such care as prudent men in such occupation ordinarily use, taking into consideration the time, place, condition of the highway, weather, the character of the instrumentality employed, the presence of other travelers or vehicles upon the streets, the extent to which the same is lighted, and many other facts and circumstances often present and necessary to be considered. Under the doctrine of the Wisconsin and Tennessee cases, the duty of the driver of an automobile is to have the same constantly under such control and driven at such a rate of speed as will enable him to stop within the distance within which objects are visible by the rays of its headlights. A failure to do this amounts to contributory negligence, and the driver could not recover, in case of injury resulting from a collision of

the automobile with an object thus visible to the driver.

It is the general rule that the driver of an automobile is required to use reasonable and ordinary care for his own safety, and cannot be held to the absolute duty of observing all defects and obstructions in the highway, but must make such observations as the circumstances reasonably require. *Geise v. Mercer Bottling Co.*, 87 N. J. L. 224 (94 Atl. 24), *Sweet v. Salt Lake City*, 43 Utah 306 (134 Pac. 1167); *Wells v. City of Lisbon*, 21 N. D. 34 (128 N. W. 308); *City of Valparaiso v. Chester*, 176 Ind. 636 (96 N. E. 765); *Dunkin v. City of Hoquiam*, 56 Wash. 47 (105 Pac. 149); *Loose v. Township of Deerfield*, 187 Mich. 206 (153 N. W. 913).

In the case at bar, the driver of the automobile testified that he was driving the same at 15 or 20 miles per hour; that he was looking ahead, but did not observe the barriers until he was too close to avoid collision therewith; that he had the car under control, but, on account of the slippery condition of the street at the intersection, which was not paved, was unable to manage the car so as to avoid running into the ditch. We take the following extracts from the abstract of the driver's testimony:

"I was not exceeding 20 miles an hour, coming down East 14th Street. I came down East 14th to Hull Avenue, approaching Hull Avenue at 15 to 20 miles an hour. I was not paying any attention to my passengers. The pavement on East 14th is concrete. I didn't know, at that time, how far south that paving extended. I ran off into the mud just a little before I came to the intersection of Hull Avenue. I had the dimmers on. When I got to the corner, I noticed a kind of a dark outline. I immediately threw in my clutch, pushed down my brakes, and tried to swing out. I lost all control, and the front wheel hit the ditch enough to throw me over. The barricade was down on the right-hand side. When I approached the intersection, I was looking ahead, and had the car under control. I first saw the obstruction at the crossing,—that is, the north line,—and about the width of the street away. The intersection was

muddy, with a crystalized top on it. When I threw in my clutch and put on the brake, I couldn't stop, and I pulled on the emergency, but couldn't do anything then; so I tried to throw it out to the side, but, when a car is skidding, you cannot handle her. The car was skidding in the mud. I intended to go straight down 14th Street. I don't remember seeing any of the barricade, to tell the truth, at all, right at the start, before the accident. It looked like a blur, or a dark outline. It was right across 14th Street on the south side. \* \* \* I steered the car to the west to clear myself. I thought it was something. I noticed it when I was on the crossing. When I saw it, I threw down the brakes as tight as I could, and tried to see what it was; got up a little closer and figured out what it was, and throwed my wheel clear around, trying to sheer out from it; and the barricade was down, and my left wheel hit, and that was what throwed me over. The barricade was down on the west side. The automobile was turned completely over, and I was fastened under the wheel. I turned the engine off and got out the best I could, and broke out the other side of the car, to get the passengers out. It was hazy that night. It was dark, very dark. I didn't see any red light or danger signal while I was coming down 14th Street. I saw an incandescent light on the telephone pole. No light came down to the ground at all."

He was the only witness called, who saw the accident, who testified to the speed of the automobile. Several witnesses residing in the vicinity testified that, from the noise the machine was making, in their judgment it was going at 30 or 35 miles per hour. Evidence of experiments made at the intersection in question, under circumstances similar to those existing on the night of the accident, tended to show that the barriers were discernible at a distance of 105 feet, and, with the full headlight of the automobile, for a distance of 325 feet, and that, notwithstanding the slippery condition of the street, the corner at the intersection was easily turned at the rate of 25 miles per hour.

An ordinance of the defendant city provided that the rate of speed of automobiles on the street in question, except at the intersection, shall not exceed 20 miles per hour, and that, upon approaching street intersections, same shall not exceed 12 miles per hour. The ordinances of said city further required:

"All excavations or trenches in streets, highways, avenues, or alleys shall be so guarded by proper railings or barricades and signal lights as to prevent injury to persons or property."

Ordinarily, the question of contributory negligence is for the jury. The driver of the car, at the time, had the right to assume that all parts of the street of defendant intended for travel were reasonably safe, but he was required to exercise ordinary care to observe or discern dangerous obstructions or excavations in the streets, and to avoid running into the same. It was also the duty of the defendant city to place signal lights at the point of danger, to warn travelers upon the highway thereof. It is conceded that no lights were placed in the vicinity of the barriers or excavations, on the night in question. We think that, under the evidence, it was clearly a question of fact for the jury to say whether or not the driver of the automobile was guilty of contributory negligence. The street was in general use by the public, and the duty of defendant in respect thereto was plain, and it is not contended that this duty was performed. Whether the driver of the automobile was guilty of contributory negligence was a question of fact for the jury. *Hanson v. City of Anamosa*, 177 Iowa 101; *Frohs v. Dubuque*, supra; *Loose v. Township of Deerfield*, supra; *Corcoran v. City of New York*, 188 N. Y. 131 (80 N. E. 660); *Abbott v. Board of County Commissioners*, 94 Kan. 553 (146 Pac. 998); *Sweet v. Salt Lake City*, supra; *Dunkin v. City*, supra; *City of Valparaiso v. Chester*, supra; *Wells v. City of Lisbon*, supra; *Sweetman v. City of Green Bay*, 147 Wis. 586; *Geise v. Mercer Bottling Co.*, supra.

The driver testified that he could not clearly see or de-



termine that there was an obstruction in the street; that he saw only a blurred outline; and that the slippery condition of the intersection caused the automobile to slide and become difficult to control. The paving ended near the intersection, and he claims not to have known this fact. Fast or reckless driving of automobiles upon the streets or highways is not, by any means, to be encouraged, but we do not feel inclined to adopt the doctrine of the Wisconsin and Tennessee courts.

The evidence in this case as to the speed of the automobile and the distance the barriers were discernible is in some conflict, and, upon the whole record, there was such dispute as to require submission to the jury of the question of contributory negligence. This is the only question argued.—*Affirmed*.

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

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C. N. McMILLAN, Plaintiff, v. J. W. ANDERSON, Judge,  
Defendant.

**INTOXICATING LIQUORS: Contempt—Unusual Quantities—Pre-**

1 **sumption.** Ten gallons of whisky in a dwelling house, and in the unfinished and inaccessible attic thereof, constitute an "unusual" quantity, and raise a presumption that such liquors were kept for the purpose of illegal sale. Evidence on the issue whether the same was kept solely for family use reviewed, and held not to overcome the presumption. (Sec. 2427, Code, 1897.)

SALINGER, J., dissents as to the scope of the review and the effect of the evidence.

**INTOXICATING LIQUORS: Contempt—Evidence—Reputation of**

2 **Place.** Evidence of the general reputation of a place where intoxicating liquors were found is admissible in an action to *enjoin*, but inadmissible in an action to punish for *contempt*. (See Sec. 2406, Code Supp., 1913.)

*Certiorari to Woodbury District Court.*—J. W. ANDERSON,  
Judge.

MAY 20, 1918.

WRIT of certiorari was issued on application of plaintiff, to which return was made, and the record is here for review.—*Annulled.*

*John F. Joseph, for plaintiff.*

*E. E. Baron, for defendant.*

LADD, J.—Barney Kopel, during the period in question, occupied the second story of the dwelling house known as 1216 Sixth Street, Sioux City, as a residence. On May 25, 1917, a decree of court enjoined him from maintaining his place of residence as a liquor nuisance. Thereafter, on August 6, 1917, the plaintiff herein filed an information, alleging that Kopel had violated the terms of the decree by selling and keeping for sale in his residence intoxicating liquors, and therefore was guilty of contempt of court. A precept was thereupon issued, requiring Kopel to be brought before defendant herein, as judge of the fourth judicial district, which was done, and he denied the charge; but, upon hearing, he was found not guilty. Thereupon, a writ of certiorari was sued out, bringing the proceedings here for review. The evidence discloses that, on July 23, 1917, shortly after 2 o'clock in the afternoon, four policemen searched the premises of Kopel for intoxicating liquors, and found eight gallons and eight quarts of whisky in the attic, to which there was neither stairway nor ladder. It was reached by having one of them climb on another's shoulders and crawl through a hole in the ceiling. The attic was unfinished, and empty, save for this whisky and a couple of empty bottles and a broken one. The eight quarts were in quart bottles in a beer crate. The eight gallons were in jugs, which were in cartons. On the other hand, defendant, who had resided in Sioux City about twelve years, testified that his occupation, since the entry of the decree, had been buying iron and junk in the country and shipping by

1. INTOXICATING  
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presumption.

the carload to Sioux City; that he usually returned to the city Saturday, stayed over Sunday, and went back to the country on Monday; that the liquors belonged to him; that he bought the liquor found, and no more, at Jefferson, South Dakota, some time in May.

"Q. For what purposes were you keeping that liquor? A. For my family use. Q. For yourself? A. Myself and my family and my wife. Q. Have you sold or kept for sale any liquor since May 26, 1917? A. No, sir. Q. And this liquor that was found there was yours, and kept for your own use? A. Yes, sir."

Witness further testified that, prior to May 1st, he had dealt in intoxicating liquors.

"Q. You are not a drinking man, are you? A. I take a little drink. Q. When. A. When I feel like it. Q. What do you drink usually? A. Whisky. Q. Drink beer? A. Sometimes. Q. How does it come you did not have any beer up there? A. This about closing time, and whatever beer I had, we drank it up. Q. When did you put this in? A. In May. Q. Before the injunction was granted? A. Yes, sir. \* \* \* Q. Who put that up there? A. I did. Q. How did you get up? A. Well, we got the stepladder there all the time. Q. You kept a stepladder there handy? A. Well, that is the only place, you know, I could have to put it. I live on the second floor. On the first floor lives Resnick, and he occupies the basement; and I put it there, and that is the only safe place I find to put it away."

He testified that he had used none of the liquor since obtaining it, but that "just had a bottle, not very much," in his house.

The fact of finding intoxicating liquors in unusual quantities in a private dwelling house or its dependencies is "presumptive evidence that such liquors are kept for illegal sale." Sec. 2427, Code. The law does not prescribe a test or criterion by resort to which we may ascertain what quantity of intoxicating liquors is to be regarded as usual, and how much more must be added to render the quantity

"unusual." Much depends upon the character of the liquor. There may be so much of any kind, however, as to put the inquiry at rest, and we are of opinion that ten gallons of whisky is an unusual quantity to be found in a private dwelling house.

The only other inquiry is whether the accused has, by his showing, overcome the presumption of guilt which otherwise must obtain. His sole contention is that he was keeping the whisky for the use of himself, family, and wife. But how many compose his family, or whether any member thereof or his wife used whisky as a beverage, was not disclosed. Even the accused only claimed to take "a little drink." Though claiming to have kept the seized whisky for use in his family, none had been drunk for two months; and this was explained by saying he "just had a bottle, not very much." This evidence falls far short of rebutting the presumption of guilt. In the first place, the quantity exceeded many times the amount of liquor of that kind likely to be kept on hand in the home by a family making use of it as a beverage; and in the second place, Kopel's testimony does not show that he or his family so used it. Indeed, it could have been consumed by either only in exceedingly small quantities; for "a bottle, not very much," appears to have lasted more than two months. The accused utterly failed to obviate the presumption of guilt of keeping the whisky for the purpose of unlawful sale; and for this reason, he should have been found guilty of contempt, in that he violated the terms of the decree enjoining him from keeping for sale or selling intoxicating liquors on the premises. See *State v. Thompson, Judge*, 130 Iowa 227; *State v. Hale*, 91 Iowa 367, 368; *State v. Wilson*, 152 Iowa 529; *Shidler v. Keenan Bros.*, 167 Iowa 70.

We give no consideration to the evidence that Kopel had the reputation of being a bootlegger, and that the place where he lived was reputed to be a place where intoxicating

2. INTOXICATING  
LIQUORS:  
contempt: evi-  
dence: reputa-  
tion of place.

liquors were kept and sold. The trial court rightly ruled such evidence not admissible. Section 2406 of the Code Supplement, 1913, authorizes the consideration of evidence of the general reputation of a place in determining whether such a liquor nuisance exists as shall be enjoined; but the section following, relating to prosecution of contempts in violating injunctions issued under said Section 2406, contains no such provision; and, of course, in the absence of statute so authorizing, evidence of this kind may not be received. It is not to be overlooked that the accused claimed to have procured the whisky prior to the entry of the decree, but that this was done, according to his story, after he had quit the business of selling intoxicants in violation of law, on May 1st, and for his personal use and that of his family. Had he admitted having procured it for illegal disposition, and claimed that, as this was prevented by the decree, it had remained there since, without design to sell or use, an entirely different question would have been presented. Undoubtedly, this was not true; else he would have so asserted, instead of claiming that he had purchased for use of himself and family,—which, as we think, the evidence conclusively failed to establish. In other words, the evidence utterly failed to meet the presumptive evidence of guilt raised by keeping whisky in unusual quantities in his dwelling house; and there is no escape from the conclusion that the accused is guilty of contempt of court, in that he violated the injunction against keeping for unlawful sale. No mere stage performance can obviate this result. What was said in *Nies v. Anderson*, *Judge*, 179 Iowa 326, concerning the quantum of proof exacted, does not conflict with this finding. The strictures of the dissent are not warranted by this record. The order of acquittal is annulled, and the cause remanded for judgment in harmony with this opinion.—*Annulled and remanded.*

PRESTON, C. J., WEAVER, EVANS, GAYNOR, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). Appellate tribunals must use fixed standards in determining whether a person charged is guilty or innocent. Though these standards are used, it may sometimes happen that the innocent suffer and the guilty escape. But, if our decisions are to be precedents, and their publication is to be a guide, rather than a trap, these standards must be used, and used in every case. We must not follow our decisions in one instance and disregard them in another. We must not profess to adhere to them and yet, in effect, overrule them. In my opinion, this is what the majority has done in dealing with *Nies v. Anderson*, Judge, 179 Iowa 326. The opinion says that it is not in conflict with what was said in the *Nies* case "concerning the quantum of proof exacted." Conceding for the majority absolute good faith, I still think that its opinion manifestly conflicts with the *Nies* case. In that case, after reviewing what will suffice to annul an acquittal, we said, "On the whole, we think the rule is that the review is not *de novo*," and that the evidence, "to sustain a finding of guilty, must amount to more than the mere preponderance which sustains an ordinary recovery on the law side." I cannot escape the conclusion that the majority is indulging in a review *de novo*, and that, moreover, it proposes to annul an acquittal though the evidence of guilt, instead of being more than a mere preponderance, is less than a preponderance, and, at most, not more than a preponderance.

The only evidence of guilt is that eight gallons and eight quarts of whisky were found in a private dwelling, occupied by Kopel, the person charged with violation of injunction. In some cases, the finding of liquor raises an inference of fact that it is kept with intent to be sold in violation of law. But the same statute which raises this inference declares that, when the liquor is found in a private dwelling house or its dependencies, the presumption is raised only if an "unusual" quantity be found there. To be

gin with, then, the complainant has no evidence, unless he prove by more than a preponderance, that the quantity found was an unusual one. Finding it in such quantities raises an inference of fact. Whether it be such quantity is, therefore, necessarily a pure question of fact. Since we may not review the finding of the trial court upon this question of fact, *de novo*, and since that the quantity found is an unusual one must be established by more than a preponderance, it follows that we can interfere with an acquittal only if the quantity is so large as that all reasonable minds will find it to be unusual, or there be strong evidence that, though the quantity is not so large as this, it is, in fact, an unusual quantity, under the circumstances. There is no law rule which declares that eight gallons and eight quarts is an unusual quantity, under any and all circumstances. In this case, then, the *complainant* must prove by more than a preponderance that the attendant circumstances show that what was found was more than is usual.

This situation the majority avoids in two ways: First, by simply assuming that to exist which it was the duty of the complainant to establish by more than a preponderance. This is done by statements such as:

"The quantity exceeded many times the amount of liquor of that kind likely to be kept on hand in the home by a family making use of it as a beverage."

Second, by the simple expedient of putting the shoe on the wrong foot, and holding that the complainant has proved the quantity found was an unusual quantity because Kopel has failed to prove that the quantity was a usual one. This is illustrated by the statement that "Kopel's testimony does not show that he or his family used it," and that, though he testifies it was kept to be used by the family, the failure of proof on Kopel's part effects that "the evidence conclusively fails to establish that he purchased for use of himself and family." Again, it is said "he has not disclosed the size of his family." In other words, if the defendant does not prove he is innocent, this constitutes proof of his guilt. The whole

opinion at this point is an argument that, because Kopel has failed to show this, that, or the other thing, it does not appear that the quantity found was not more than a usual quantity. As I view it, it is for the complainant to show how large the family was, and how much liquor it used or did not use, or anything else which bears upon the claim that Kopel kept on hand an unusual quantity of liquor. I am unable to agree that the failure of the complainant to adduce circumstances that prove the quantity was unusual is cured because Kopel did not show that the quantity was usual.

II. But pass all this, and assume that the quantity found was an unusual one. What have you then? Not more than if a credible witness had testified to facts which raised a presumption that Kopel was keeping this liquor in violation of law. Suppose such witness had so testified, and Kopel had then, on oath, said that he kept the liquor for the use of himself and his family. Surely, guilt would not then be established by even a preponderance, to say nothing of more than a preponderance. Kopel did so testify. The majority, which professes to adhere to the rule that it may not review *de novo*, brushes this sworn denial aside, brushes aside the conclusion of the trial judge, who heard Kopel testify, and declares, on a review professedly not *de novo*, and though more than a preponderance is required, that a sufficient quantum of evidence is adduced to justify the setting aside of the finding of the trial court. To put it in the language of the majority, that "the evidence utterly failed to meet the presumptive evidence of guilt raised by keeping whisky in unusual quantities in his dwelling house." All that it has, except the conflict between the said presumption and the denial of Kopel, is that not much of the liquor had been used. Now, if this proves that it was not intended for use, it proves just as much that it was not intended for sale. If one does not intend to use because he has not used, then he



does not intend to sell because he has not sold.

Within a month, this court has declared that, even on a review *de novo*, a finding of the trial judge will be given great weight, in dealing with a mere conflict in testimony, and with the credibility of witnesses. The majority opinion, in this case throws that declaration to the winds, and refuses to apply its doctrine and that of the *Nies* case, even where it is still conceded, in words at least, that we are not authorized to indulge in trial *de novo*.

I am most strongly persuaded that we have no right to interfere with the finding of the trial court in this case.

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JENNIE MALLOY, Appellee, v. STODDARD CONSTRUCTION COMPANY, Appellant.

**TRIAL: Reception of Evidence—Non-Explanatory Questions.** The

- 1 exclusion of a question is justified by the fact that it is wholly non-explanatory of the character or nature of the testimony sought to be introduced, and counsel fails to enlighten the court thereon.

**TRIAL: Reception of Evidence—Objections—Waiver.** He who has

- 2 his testimony rejected on the objection of only one of several defendants, each of whom pleads separate and distinct defenses, must insist on the admissibility of such testimony against the non-objecting defendants, or the objections will be waived.

**NEGLIGENCE: Acts Constituting—Independent Contractors.** Ad-

- 3 mission by one that he was under a duty to perform a certain act necessarily excludes any claim that he had passed such duty to an independent contractor.

**EVIDENCE: Documentary Evidence—City Ordinance—Negligence.**

- 4 Ordinances regulating the use of streets in private building operations are admissible in connection with the evidence that such regulations were violated, with resulting injury to another.

**NEGLIGENCE: Evidence—Weight and Sufficiency.** Evidence re-

- 5 viewed, and held to present a jury question whether evidence of the violation of ordinance requirements in the use of a street covered the point in the street where plaintiff claims to have been injured.

**NEGLIGENCE: Contributory Negligence—Obstructed Street—**

6 **Choice of Ways.** It is not necessarily negligence *per se* for a pedestrian, though blind, to attempt to pass over obstructions in a much used and, to him, convenient street, of which obstructions he had prior knowledge.

**TRIAL: Verdict—\$1,250—Excessiveness. Verdict for \$1,250 for per-**

7 sonal injury sustained. A bone in the arch of plaintiff's foot was slightly misplaced, with consequent swelling, pain, and lameness. A year after the injury, a full cure had not been effected, and probability existed that the defect would be permanent.

*Appeal from Webster District Court.—E. M. McCALL, Judge.*

MAY 20, 1918.

ACTION at law to recover damages for personal injury. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

*Kenyon, Kelleher & Price*, for appellant.

*H. W. Stowe*, for appellee.

WEAVER, J.—South Seventh Street in the city of Fort Dodge extends in a southerly direction from the principal business section of the city, crossing the right of way of the Illinois Central Railway Company. The railway track is carried over and across the street upon a bridge elevated sufficiently to permit the free and unobstructed use of the public way. South of the railroad and west of Seventh Street, the railway company maintains a roundhouse, for use in connection with its business. In the year 1915, the company undertook to enlarge and improve its roundhouse accommodations, and let the contract therefor to the Stoddard Construction Company. The performance of the work involved the tearing down of a part of a brick structure standing near Seventh Street, the excavation of certain pits, and the leveling or excavation of a site for the extension of the roundhouse in the direction of the railway track on the north. The old brick wall standing near Seventh Street

was torn down by the contractor by the use of a cable operated by a dummy engine, and the earth from the pits was loaded in cars and hauled away to some distance. For the excavation of the enlarged site of the roundhouse, scrapers were employed; and in this manner the earth was moved to the east and north, across the sidewalk and traveled roadway, and dumped upon the railroad right of way. This last mentioned work was performed by William Qualey, under a contract or agreement of some kind with the Stoddard Construction Company. This part of the work was begun about September 25, 1917, and continued several weeks. The plaintiff lives on the south side of the railroad, and the most direct and convenient route between her home and the business section is South Seventh Street and the sidewalk already referred to. Plaintiff is a married woman, 35 years old, and is nearly blind. On the evening of October 4, 1915, accompanied by her son, a boy of 13 years, she was returning from town along the sidewalk on the west side of Seventh Street. As they reached a point south of the viaduct and near the roundhouse, the boy, whose arm plaintiff held, stumbled, and dropped some of the groceries which he was carrying; and, as he was engaged in gathering them up, his mother fell, and received the injuries of which she complains. It is her claim that her fall was caused by stepping upon or against a brick which, with other rubbish, had been dropped or left on the sidewalk by the appellant in the wrecking of the old roundhouse wall and the removal of the debris and earth from said premises to the opposite side of the street. Charging negligence with respect to such condition, she brought this action, uniting as defendants therein the Stoddard Construction Company, the Illinois Central Railway Company, the city of Fort Dodge, and William Qualey. The last named person has since died, and his administratrix, Margaret Qualey, has been substituted as one of the defendants. At the close of the trial

below, the court directed a verdict in favor of the railway company; and, upon submission to the jury of the issues as to the other defendants, a verdict was returned in plaintiff's favor against the Stoddard Construction Company only. There is no appeal by the plaintiff, and the consideration of the case in this court will be confined to the questions raised by the appeal of the construction company.

The petition sets out the alleged facts concerning the plaintiff's injury, and charges that it was occasioned without fault on her part, by the obstruction of the walk, negligently occasioned by the defendant in prosecuting said work, and negligently permitted to remain and continue, creating a source of danger to persons lawfully making use of the public way. The defendant's answer is a simple denial of all the allegations of the petition.

I. There was evidence tending to show that appellant wrecked a part of the old brick wall of the roundhouse, and that, in the progress of that work, brick and debris so produced fell upon or were scattered over the sidewalk. It is also probable that some of the brick of the old wall were scattered over the earth which was later excavated for the enlargement of the building; and that, in scraping out this earth and brick, some of these materials were dropped upon the walk, creating a degree of obstruction to its public use. Plaintiff charges negligence in these respects, and avers that it was the proximate cause of her injury. Defendant contends that the rubbish cast upon the walk in wrecking the wall had been removed before plaintiff's injury; and that whatever obstruction may have existed at that time and place was caused by William Qualey, who alone was responsible for the work of excavation and removal of the material across the walk; and that for Qualey's negligence, if any, appellant cannot be held liable. Bearing upon this

1. TRIAL: recep-  
tion of evi-  
dence: non-ex-  
planatory ques-  
tions.

proposition, we may consider the first assignment of error which is argued by counsel.

The vice-president of the construction company, being examined as a witness, testified that, as representative of said company, he was present at Fort Dodge during the week beginning August 24, 1915, and after that at intervals of a week or two weeks, during the progress of the work. He further says:

"Arrangements were made for the removal or excavation of a portion of that work which was excavated there. That arrangement was an oral contract. Dirt was excavated under the contract thus made. \* \* \* The dirt that was removed under our arrangement with another person was removed by scrapers. It was worked out into Seventh Street under the viaduct and onto the I. C. right of way."

In the further development of this witness' testimony this record was made: On direct examination by appellant's counsel the witness was interrogated as follows:

"Q. What was the arrangement under which that portion of the dirt was removed, which was removed out over the sidewalk under the viaduct and onto the right of way? Mr. Thomas: If it is intended by this question to call for the terms of the oral contract, or anything connected with it to which this witness has referred, we want to cross-examine him before he answers. Mr. Price: The purpose of this question is not to ask, at this time, with whom the oral contract was made, but what the terms of the oral contract were. Mr. Thomas: Then we object to the answer to the question before we have a chance to cross-examine, on the ground that no proper foundation is laid. The Court: Sustained, and counsel will be permitted to cross-examine the witness in regard to those matters which he desires. (Defendant Stoddard Company excepts.)"

Being cross-examined by Mr. Thomas, whose appear-

ance in the case was for the administratrix of the estate of William Qualey alone, and having answered that the person with whom he had an oral arrangement to make the excavation was William Qualey, counsel for the administratrix objected to the competency of the witness to testify to any agreement made with the deceased; and the objection was sustained. On further re-direct examination, the witness said, in substance, that Qualey did the work with his own teams, tools, and employees, and the construction company took no part therein.

Counsel for appellant, complaining of the rulings, say they "simply ruined the construction company's defense." The point sought to be made, if we understand counsel, is that the testimony ruled out was intended to show that Qualey was an independent contractor, and that, if there was any negligence in obstructing the sidewalk, it was the negligence of the independent contractor, and not of the appellant. The correctness of the rulings upon the objection of the defendant Qualey to the competency of the witness may well be doubted; but even if wrong, we think the error was without prejudice to this appellant. The defense here suggested had not been pleaded; and, although the question of Qualey's being an independent contractor was probably one which could have been raised under an answer pleading a denial only, counsel should have at least explained the character or nature of the testimony they proposed to introduce. As will be seen by the quotation above made from the abstract, counsel asked no more than "What arrangement was made under which the dirt was removed out over the sidewalk and onto the right of way?" The question carries with it no suggestion as to the person, if any, with whom such arrangement was made, nor how nor why such arrangement was supposed to be material or relevant to the issues being tried. Indeed, counsel for appellant at the time stated to the court that he was not asking with whom

the contract was made, "but what the terms of the oral contract were." In other words, he was asking the witness to testify to the fact and terms of an oral contract with some person as yet unnamed and unknown. That such testimony was immaterial is too clear for argument, and appellant suffered no prejudice by its exclusion.

Again, each of the four parties named as defendants appeared by their own counsel, and each pleaded a separate and distinct defense. The objection to the competency of the witness to testify to the construction company's dealings with Qualey was raised by counsel for the administratrix alone; and it was still competent for appellant to insist that, if such objection were sustained on the demand of Qualey's administratrix, the evidence was yet admissible on the issue joined between the appellant and plaintiff. No such demand was made or refused, and the objection must be treated as waived.

Still again, it is to be said that the matter which counsel now say they desired to elicit from this witness appears to have been quite fully developed in other portions of his examination, as well as in the testimony of other witnesses.

II. We are, furthermore, of the opinion that defendant's own showing demonstrates that Qualey was not an independent contractor, and that appellant did not expect or require him to assume the duty of cleaning the sidewalk of the obstructions caused by moving the excavated materials across its course. Appellant's superintendent of the work in question, Mr. Shontz, testifying for the defense, says that the construction company did the work of wrecking the old wall; and, after describing the manner in which Qualey did the work of excavation, and stating the fact that, at times at least, this work left dirt and debris on the sidewalk, he says:

2. TRIAL: reception of evidence: objections: waiver.

3. NEGLIGENCE: acts constituting independent contractors.

"It was my business to see that the sidewalk was clean. I made an attempt to keep that sidewalk clean all the time. I testified on direct examination that, up where Qualey's men cleared off the walk, it was cleaned off part of the time. I did not look every night to see if it was clear. There was not all kinds of rubbish on the walk all the time. I never saw any rubbish on the sidewalk at quitting time. If I had, it would have been cleaned off, because it was my duty. \* \* \* It was my business to keep the walk by the round-house clean. In a way, that included the place where Qualey was doing his work."

This testimony is nowhere denied, and the situation so revealed by the appellant itself is inconsistent with the defense asserted in argument. It makes little difference what may have been the terms of the contract or agreement in other respects between the construction company and Qualey, so long as it is admitted that the duty remained upon the company to clean or care for the walk. This situation makes it unnecessary for us to consider the general proposition as to how far, if at all, it is competent for a principal contractor, who undertakes a work a part of which, in its nature, involves more or less obstruction to the public use of a sidewalk, can avoid liability with respect to such use by subletting that part of the work to another contractor. It is sufficient, for the purposes of this case, to say that appellant, having by its contract undertaken the entire work, is *prima facie* answerable for the manner of its performance; and, if it would free itself from responsibility because the obligation had been assumed by a subcontractor, who alone became charged with the duty of keeping the walk clear of obstruction, there must be testimony upon which the jury would be justified in finding such to be the fact. The testimony before us not only fails to show the existence of such fact, but, as we have said, negatives it.

III. The plaintiff pleaded and put in evidence an or-



dinance of the city of Fort Dodge which, after stating that any person erecting a building upon a lot abutting on a public street may use one half the street for

4. EVIDENCE: documentary evidence: city ordinance: negligence: one who so uses the street shall maintain

suitable passageways and driveways around said material, and fence and protect the excavation made, if any, and at night shall place and maintain lights around the obstruction, to insure the safety of persons and teams in the use of the public ways. There was evidence that brick and lumber were piled by the side and on or near the walk, and that some of the work by mechanics in preparation of materials for the building was done on the walk, making it necessary for pedestrians to go out into the street; and that these conditions were frequent, if not continuous. The testimony in these respects was not without dispute; but its truth was for the jury, and made proper the admission of the city ordinance in evidence, as well as the court's reference thereto in its instructions. Appellant seeks to avoid this conclusion by

5. NEGLIGENCE: evidence: weight and sufficiency. insisting that such evidence as there is.

pointing to a neglect of this duty prescribed by ordinance, does not relate to the place or point on the walk where the plaintiff claims to have been hurt; but it fairly appears that practically all the walk abutting on the roundhouse property was more or less obstructed, in part by building materials and in part by the debris scattered and dropped thereon. The testimony does tend to show that the dirt and materials scattered by the scrapers were upon the more northerly portion of the street front, while the building materials were a little further south; but the exact spot where the plaintiff fell is not shown with absolute certainty, except that it was upon the walk fronting upon this property. She says it was soon after she passed through under the viaduct, but that she can't tell

how far she had gone. She had already "passed over quite a little bit" of the dirt, but "doesn't know about what distance from the bridge." At another stage of her examination, she says the place was "up near the end of the addition to the roundhouse, and not down by the old roundhouse." The nearest the son comes to locating the place is:

"Just as we got on the other side, on the south side of the viaduct. \* \* \* My mother fell at a point two or three feet south of the point where they were hauling the dirt across the sidewalk."

Speaking of the dirt on the walk where the men hauled the dirt across, he further says:

"We had passed over that dirt before mother fell, and had reached a part of the walk where there wasn't so much dirt. \* \* \* There was quite a few brick there, but further down there was more brick."

Of the continuous character of these obstructions, one witness, who used the walk daily, having located on a diagram a point "where they crossed with scrapers," says:

"Sometimes the teams would meet there, and there would be dirt the width of two teams. Lumber was piled right on the edge of the sidewalk; besides the lumber, there was brick. They set their saw horses on the sidewalk. The carpenters would put timbers on the saw horses that would cause us to pass out in the mud off the walk. There was not any bunch of brick piled on the walk, but that kept it dirty all the time,—half brick, whole brick, gravel, and such stuff, coming from the building, and at Figure X, dirt where they came through with their scrapers. From that point on down, it was dirty. There were half brick and whole brick and lumber. I wouldn't say how long the brick were scattered on the sidewalk. The sidewalk was dirty all summer when they worked there. It was late in the fall when they finished. It was not cleaned off before the excavation was completed."

In view of this and other testimony bearing in the same direction, the court cannot say, as a matter of law, that the obstruction complained of was not in that part of the walk south of the debris scattered by Qualey's scrapers, or that it was wholly north of the place where appellant occupied the street and walk with its materials and workmen, or that there is no evidence tending to show a failure by appellant to observe the caution required by the city ordinance, or that its negligence in this respect was not the cause of the plaintiff's injury.

IV. Is the plaintiff chargeable with contributory negligence, as a matter of law? It is so argued by the appellant, but the record will not permit such a ruling. It is

6. NEGLIGENCE: true that plaintiff and her son, who was  
contributory assisting and guiding her, had passed over  
negligence: ob- this sidewalk on the afternoon of the same  
structed street: day she was hurt, and that both of them  
choice of ways.  
knew of the general nature and character of the obstructions; but this alone does not negative plaintiff's right to recover. To dispose of the question on appellant's theory, the court should be able to say, as a matter of law, that the dangerous character of the walk was so clear and patent, and the peril of injury to one attempting its use was so great, that a prudent person would have sought some other route; and such is not the showing revealed by the record before us. Seventh Street not only appears to have been the direct and usual route between the plaintiff's home and the business section of the city, but the only other way suggested in the testimony was quite indirect, and by way of a street which was without sidewalks. Neither Seventh Street nor the sidewalk had been closed or barricaded, and both were being used to a greater or less extent by the public. Plaintiff had just taken that route to town, and we think it not unreasonable that she should have believed that she could make the return trip in safety. She may not have

exercised the best possible judgment or the highest degree of wisdom in so doing, but such failure does not necessarily constitute negligence, and the jury may still be justified in finding that she exercised the degree of care which the average or ordinarily prudent person would have used under similar circumstances.

V. Finally, it is argued that the damages assessed in plaintiff's favor, \$1,250, are excessive. Counsel say that the injury was, at most, a simple sprain of the ankle or

7. TRIAL: ver-  
dict: \$1,250:  
excessiveness.

foot, and the resulting inconvenience comparatively slight; but this is not quite correct. The medical evidence tends to show that there was no fracture of the bones of the ankle or foot, but also tends to show a displacement of one of the bones in the arch of the foot, leaving it slightly raised, making the plaintiff lame, and causing much pain and inconvenience. Immediately following the injury, plaintiff's foot and ankle became swollen; and on the following morning, she called in a physician, who treated the injured member four or five times. According to her story, it continues to pain her and to render it difficult for her to perform her usual work. On the trial below, a year after the injury, there was testimony tending to show that a cure had not yet been effected, and that the abnormal condition of the foot would be likely to be permanent, though there was a possibility of improvement, with proper treatment. The verdict is not so excessive as to suggest passion or prejudice on the part of the jury, and we find no sufficient ground for reversal on that score.

Other exceptions on the part of appellant are either not sustained by the record, or are clearly controlled by the conclusions we have already announced. The judgment of the district court is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

GERDON W. NOBLE, Appellant, v. EMORY H. ENGLISH, Appellee.

**INSURANCE: Refusal to Grant License.** The legislature may validly delegate to the commissioner of insurance the power to refuse, for good cause, licenses to act as agents of insurance companies, and such power is properly exercised by the commissioner in refusing a license on the sole ground that the applicant is a *nonresident* of the state; and especially is this true when the company for which applicant desires to act is a foreign company. (Sec. 1821-k, Code Supp., 1913.)

*Appeal from Polk District Court.*—LAWRENCE DEGRAFF, Judge.

MAY 20, 1918.

ACTION in mandamus. Opinion states the case. Judgment dismissing plaintiff's petition. Plaintiff appeals.—*Affirmed.*

*McClelland & Powers*, for appellant.

*H. M. Havner*, Attorney General, and *J. W. Kindig* and *C. A. Robbins*, Assistant Attorney Generals, for appellee.

GAYNOR, J.—This is an appeal from the ruling of the district court denying to the appellant a writ of mandamus compelling the commissioner of insurance to issue to this appellant a license to transact the business of an insurance agent within the state of Iowa. The company which the plaintiff desires to represent is a foreign company. The plaintiff is and was a resident of the city of Omaha, in the state of Nebraska. He made application for permission to represent the New England Mutual Life Insurance Company, of Boston, Massachusetts, an insurance company authorized to transact business in the state of Iowa in accordance with the laws thereof. The license was refused, on

the sole ground that the plaintiff was a nonresident of the state of Iowa. The plaintiff appeals.

A careful analysis of the cases bearing upon the question here under consideration suggests that much of the apparent conflict in the authorities may be accounted for by a consideration of the character of the right conferred and called into question in the several cases. It is the holding that any law which restricts the lawful dominion of an owner over his property or the conduct of his business should be general and uniform, and affect all persons or classes of persons, under like situations, the same. Before a common right or lawful conduct or the lawful use of property can be restricted, reasonable rules and conditions must be prescribed, to be observed in such conduct or business, and such as may be complied with by all citizens desiring to exercise the rights or privileges. The law itself may prescribe these rules and conditions to be observed, upon compliance with which permits or licenses to conduct the business may be granted by ministerial officers named in the law. Without this license or permit, the restriction becomes operative upon the citizen's failing to comply. When the conditions are prescribed, and their observance exacted by the law, it is the uniform holding of the courts that the lawmaking power may delegate to ministerial officers the right to determine whether these conditions have been complied with, as a condition precedent to issuing the license; and it seems to be the general holding that the test as to whether or not a permit or license shall be granted should be reasonable, and one which does not prohibit, by its unreasonable exaction, the exercise of the right, the conduct of the business, or the use of property.

There are certain businesses which may be regulated and controlled by the state through its police power, and the legislature, acting for the state, may prescribe the conditions under which the business may be carried on or the

rights exercised. It is manifest that the legislature, in seeking to control the management of businesses subject to its control and management, and the manner of exercising rights conferred, cannot always anticipate and foresee all the conditions that may arise, affecting the conduct of the business or the exercise of the right, which may affect the public interest. It may, therefore, delegate to the ministerial officers certain powers, somewhat judicial in their nature, the exercise of which is essential to the proper and effectual carrying out of the purpose and object of the law itself, in the control and management or conduct of the business subject to its regulation and sought to be regulated. Of course, it cannot delegate to these ministerial officers arbitrary and unlimited power—power to deny that which is legitimate and proper, and recognized as such by the state. The exercise of rights and privileges by individuals, even in the conduct of lawful business and the exercise of lawful right, may be regulated and controlled in the interests of the public. This is the theory of the license law; this is the theory upon which legislative regulation is based.

It follows that the right of every person to pursue any business or calling is subject to the right of the state, under its police power, to impose such restrictions and regulations as are apparently necessary for the protection of the public; and it follows that, where there is, in the state, the power to regulate a business or an occupation, it may confer discretionary powers upon ministerial officers, somewhat in their nature judicial, and the fact that the exercise of the power granted is in its nature judicial, does not make the granting of such power an impingement upon the prerogatives of the constitutional judicial authorities.

In *People v. Hasbrouck*, 11 Utah 291 (39 Pac. 918), the court used this language:

"The objection that the statute attempts to confer judicial power upon the board is not well founded. Many

ance in the case was for the administratrix of the estate of William Qualey alone, and having answered that the person with whom he had an oral arrangement to make the excavation was William Qualey, counsel for the administratrix objected to the competency of the witness to testify to any agreement made with the deceased; and the objection was sustained. On further re-direct examination, the witness said, in substance, that Qualey did the work with his own teams, tools, and employees, and the construction company took no part therein.

Counsel for appellant, complaining of the rulings, say they "simply ruined the construction company's defense." The point sought to be made, if we understand counsel, is that the testimony ruled out was intended to show that Qualey was an independent contractor, and that, if there was any negligence in obstructing the sidewalk, it was the negligence of the independent contractor, and not of the appellant. The correctness of the rulings upon the objection of the defendant Qualey to the competency of the witness may well be doubted; but even if wrong, we think the error was without prejudice to this appellant. The defense here suggested had not been pleaded; and, although the question of Qualey's being an independent contractor was probably one which could have been raised under an answer pleading a denial only, counsel should have at least explained the character or nature of the testimony they proposed to introduce. As will be seen by the quotation above made from the abstract, counsel asked no more than "What arrangement was made under which the dirt was removed out over the sidewalk and onto the right of way?" The question carries with it no suggestion as to the person, if any, with whom such arrangement was made, nor how nor why such arrangement was supposed to be material or relevant to the issues being tried. Indeed, counsel for appellant at the time stated to the court that he was not asking with whom



the contract was made, "but what the terms of the oral contract were." In other words, he was asking the witness to testify to the fact and terms of an oral contract with some person as yet unnamed and unknown. That such testimony was immaterial is too clear for argument, and appellant suffered no prejudice by its exclusion.

Again, each of the four parties named as defendants appeared by their own counsel, and each pleaded a separate and distinct defense. The objection to the competency of the witness to testify to the construction company's dealings with Qualey was raised by counsel for the administratrix alone; and it was still competent for appellant to insist that, if such objection were sustained on the demand of Qualey's administratrix, the evidence was yet admissible on the issue joined between the appellant and plaintiff. No such demand was made or refused, and the objection must be treated as waived.

Still again, it is to be said that the matter which counsel now say they desired to elicit from this witness appears to have been quite fully developed in other portions of his examination, as well as in the testimony of other witnesses.

II. We are, furthermore, of the opinion that defendant's own showing demonstrates that Qualey was not an independent contractor, and that appellant did not expect or require him to assume the duty of cleaning the sidewalk of the obstructions caused by moving the excavated materials across its course. Appellant's superintendent of the work in question, Mr. Shontz, testifying for the defense, says that the construction company did the work of wrecking the old wall; and, after describing the manner in which Qualey did the work of excavation, and stating the fact that, at times at least, this work left dirt and debris on the sidewalk, he says:

2. TRIAL: reception of evidence: objections: waiver.

3. NEGLIGENCE: acts constituting independent contractors.

granted. The agent's rights cannot rise higher than the rights of his principal.

It is apparent that the legislature might have said in the statute that no agent shall represent this company who is not a resident of the state from which the authority to do business comes. In *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1 (54 L. Ed. 355), it was held that a state may exclude foreign corporations, and, upon admission, may impose such terms and conditions on their doing business as it deems to be consistent with public policy.

It is not questioned in this case that the power lay in the state to exclude this insurance company from doing business in this state. It is not questioned that the power lay in the state to regulate the manner in which the business should be transacted in this state. It is apparent that it could only be transacted through agents. It is true that the law itself does not prescribe what qualifications these agents shall possess. It has impliedly said:

"We consent that you may do business in this state under the conditions which we prescribe. You may do business through agents, but these agents must have a license from our commissioner, who is empowered by us to refuse anyone applying for permission to act as agent, when good cause exists why such application should be denied."

This does not give to the commissioner arbitrary power to capriciously refuse a license, but does vest in him the right to determine whether or not the person applying is one whose appointment will conserve the good of the state and of the public; and when good cause appears for denying a license to an applicant, and good cause exists, he is within the exercise of the delegated power in denying a license, and cannot be forced by mandamus to grant it until it is made to appear affirmatively that good cause for such refusal does not exist. We think it cannot be denied that.

when the power lies in the state to refuse to allow a foreign corporation to do business in the state, a grant of right may be upon such conditions and regulations as the state may impose. This state might have lawfully refused this company the right to do business at all in this state, or, granting the right, might impose conditions on its exercise. As said before, all its business is done through agents. The jurisdiction of this state over the company depends upon service of notice upon agents. The legislature might have said, "We will not permit you to do business in this state except through resident agents," and such condition would be a lawfully imposed condition. The state said, however: "You may do business through agents, but your agents must secure a license from our commissioner, who may refuse, for good cause." If this condition were a lawful condition, and one which the state might have imposed, it follows that it is a good condition, and one which the legislature has authorized its commissioner to impose. It is certainly a condition imposed in the interest of the public, and in the interest of a fair administration of the law of this state governing insurance companies.

In *Cook v. Howland*, 74 Vt. 393 (93 Am. St. 912, 59 L. R. A. 338), it is said:

"A corporation has legal existence only in the state of its creation. It may be permitted to do business in another sovereignty, or it may be entirely excluded therefrom. The question whether such permission shall be given rests wholly with the state which the corporation seeks to enter for that purpose; and, if permission is granted, it may be under such conditions and regulations as the state shall impose, providing matters of a Federal nature are not affected thereby, without invading the rights and privileges guaranteed by the provisions of the Constitution, \* \* \* for it is settled beyond question that a corporation is not a citizen, within the meaning thereof

[citing authorities]. But it is urged by the petitioner that the United States Life Insurance Company has received its license to do business in this jurisdiction; that the petitioner is seeking relief in his personal capacity alone [this action was in mandamus]; and that a refusal to grant him a license as requested, because he is not a resident of this state, when the law provides for issuing such license to a resident, is an abridgment of his rights and privileges as a citizen of one of the states, within the inhibition of the Constitution. As has already been seen, the condition whereby the corporation is licensed to conduct business by resident agents only, is valid and binding on the company in its corporate entity. It cannot be less so as to the agents of the company [citing authority]. To license an agent who is a resident of another state to conduct the business of a foreign insurance corporation in this state would be to give him a right to manage the business of his agency in a way prohibited to his principal,—a position incompatible with the governing principles of the law of agency.”

In *Hooper v. California*, 155 U. S. 648 (39 L. Ed. 297), the Supreme Court of the United States, speaking through Justice White, said:

“She [the state] has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws, as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company. \* \* \* The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to

render the enforcement of the conceded power efficacious to the fullest extent."

See also *Adams v. Thomas*, 246 Fed. 175; also, *Reetz v. Michigan*, 188 U. S. 505. In *State v. Briggs*, 45 Ore. 366 (2 Am. & Eng. Ann. Cases 424), a similar question to the one here was involved. It appears that the defendant had applied for the right to exercise the barber's trade. The statute of that state declared that it should be unlawful for any person not registered to practice the business of a barber or conduct a barber shop or barber school without the sanction of the board. The law provided for the appointment of a board of examiners, and defined its powers and duties, among which was the power to make such by-laws as it might deem necessary, not inconsistent with the Constitution of the state, and to prescribe the qualifications of a barber in the state. In that opinion, it was said:

"While the law defines what shall constitute a barber, it does not prescribe the standard or degree of knowledge, learning, experience or qualification which shall be required before applicant shall be licensed or authorized to follow the trade or calling, but leaves that matter to be determined by the board of examiners. This, it is argued, renders the act void, because it is a delegation of legislative authority, and vests in the board arbitrary and unregulated powers. The position of the defendant is that, while the legislature may lawfully regulate the trade or calling of a barber, and require all persons following it to register, or obtain certificates from the board of examiners, it must provide in the act the standard or qualification required, leaving to the board the mere duty of ascertaining whether the applicant possesses such qualification. Legislative power cannot be delegated, and the legislature cannot confer upon any person, officer, or tribunal the right to determine what the law shall be. This is a function which the legislature alone is authorized, under the Constitution, to exercise.

The constitutional inhibition, however, cannot be extended so as to prevent the legislature from conferring authority upon an administrative board to adopt suitable rules, by-laws, regulations, and requirements to aid in the successful carrying out and execution of the law it has passed. The doctrine on this subject is admirably stated by Mr. Justice Agnew, in *Locke's Appeal*, 72 Pa. 491 (13 Am. Rep. 716), as follows: 'Then the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' It is well settled by a long line of authorities \* \* \* that the power given to an administrative board like the one now under consideration to prescribe rules and regulations reasonably adapted to carry out the purposes and object for which the board is created does not constitute an improper delegation of legislative authority. \* \* \* It is sometimes said in opinions and in law books that, where a statute undertakes to regulate the licensing of callings, trades, or professions, the extent of the qualifications required of the licensee must be determined by the judgment of the legislature; but this does not mean that the legislature must necessarily provide in the act itself the exact qualifications required. It may delegate that power to a board or commission created and authorized by it, which, in the exercise of the authority vested in it, acts on behalf of the state; its conclusions and judgments, so long as exercised within the limits of the law, being the acts of the state and binding, as such. The nature and character of the profession,

trade, or calling intended to be licensed or regulated, often demands technical knowledge and learning, in order to designate accurately the qualifications which should be possessed by those designing to follow it. In the nature of things, this is a matter outside the ordinary scope of legislative wisdom. The prescribing of the proper qualifications of applicants for licenses by some agent of the state, learned in such profession or calling, is not legislation, but rather the exercise of a mere administrative power. A law, when it comes from the legislature, must be complete; but there are many matters affecting its execution and relating to methods of procedure which the legislature may properly delegate to some ministerial board or officer; and prescribing the qualifications of persons who shall be licensed to follow or engage in the practice of a given trade or profession is one of them. Now, is the law in question open to the objection that it confers upon the board of barber examiners power to prescribe varying standards of qualifications for different applicants, or arbitrarily to grant or refuse a license at will? The authority to prescribe the qualifications of a barber is a general grant of power and does not, like the laws held void in *Noel v. People*, 187 Ill. 587, and *Yick Wo v. Hopkins*, 118 U. S. 356, vest in the board that absolute discretion to grant or withhold licenses. The board is required to exercise the power conferred by prescribing fair and reasonable qualifications, appropriate to the calling intended to be regulated, operating generally and impartially upon all in like situations; and there is no pretense that it has not done so. If it should act arbitrarily or oppressively, its conduct might call for a remedy against the members of the board, but it would not furnish a ground for declaring the act invalid [citing authority]. The constitutionality of a law is to be determined by its provisions, and not by the manner in which it may be administered; \* \* \* and it must be

presumed that the board will exercise fairly and impartially the powers conferred."

It may be argued that the statute involved here does not empower this officer to make uniform rules under which licenses may be granted or withheld; but we think this authority is fairly implied in the power granted. The commissioner has so construed it, and has made a rule governing this very matter; and in these rules this record discloses the following:

"Ruling No.....

February 15, 1915.

"Re Sections 1683-r3 and 1821-k.

"Requisitions of Insurance Companies for Appointment of Non-resident Agents will not be honored.

"Section 1683-r3 vests in the commissioner of insurance the general control, supervision and direction of all insurance business transacted in the state of Iowa. In the exercise of such authority, there has come to the attention of this department numerous irregular practices in the transaction of insurance business by nonresident individuals heretofore appointed as agents of companies transacting an insurance business in Iowa. It is the opinion of the commissioner of insurance that a greater degree of satisfactory service from agents representing insurance companies in Iowa could be secured if all agents were residents of the state and subject to service at any time by the legal authorities. Section 1821-k provides that the commissioner of insurance may, for good cause, decline to issue an agent's license. The difficulty encountered in securing service on agents who are not residents of Iowa is held by this department as being good cause for declining to issue such license. Therefore, in order that there may be maintained a proper 'control, supervision and direction of all insurance business,' as provided for in Section 1683-r3, it is the holding of this department that a requisition made by any company in behalf of a nonresident agent will not be honored.



This holding to be effective with beginning of 1917 insurance year."

It is under this rule, so made, that the plaintiff is denied the license sought to be obtained in this suit. This commissioner is made the head of the insurance department of Iowa, given general control, supervision, and direction of all insurance business transacted in the state, and charged by the state with the execution of the laws relating to insurance (Section 1683-r3, Code Supplement, 1913), with authority to issue licenses to agents to represent the company in the state, and with power to refuse for good cause. A cause is good when it conserves the public interest, and we have no hesitancy in saying that the cause upon which this refusal is based, and the rule adopted by this commissioner, are just and reasonable, and made in the interest of the public, and its enforcement serves the public good. It is uniform, and affects all alike. It is a limitation which the legislature itself might have imposed,—a limitation which the courts recognize as within the power of the legislature to make. It is, therefore, a just and reasonable regulation, and one that it could delegate to its commissioner the power to make.

We are not unmindful of the authorities cited by the defendant. Some of them, we think, are distinguishable from the case at bar. Some, we are not inclined to follow. We refer to *Noel v. People*, 187 Ill. 587; *Yick Wo v. Hopkins*, 118 U. S. 356; and *Welch v. Maryland Casualty Co.*, 47 Okla. 293 (147 Pac. 1046).

For the reasons suggested, we think the district court was right in dismissing plaintiff's petition, and the cause is—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

TERO PETROFF & COMPANY, Appellee, v. EQUITY FIRE INSURANCE COMPANY, Appellant.

**INSURANCE: Change of Title—Waiver.** Right to rely on an  
1, 5 avoidance of a policy because of a change of title to the property insured is waived by causing the insured to spend time and incur expense in the preparation of proofs of loss, at a time when the insurer had full knowledge of such change of title.

**INSURANCE: Fraudulent Statements as to Insurance.** False statements as to the amount of insurance upon the property at the time of loss, will forfeit the policy only in case such statements are fraudulent—made with some design to conceal the truth.

**APPEAL AND ERROR: Harmless Error—Improper Evidence Bearing on Fully Established Fact.** Improper reception of evidence on an issue of fact abundantly shown by other competent evidence is harmless.

**INSURANCE: Furnishing Blanks and Making Proofs.** A provision  
4 to the effect that the act of the company in “furnishing” blanks for proofs of loss, or in the “making up” of proofs by an agent, shall not work a waiver of any right of the company, does not apply to a case where the company discovers grounds for a clear forfeiture, and *thereafter acts as though the policy was valid.*

**INSURANCE: Change of Title—Waiver.**

1, 5

*Appeal from Webster District Court.—E. M. McCALL, Judge.*

MAY 20, 1918.

ACTION at law upon an insurance policy to recover for loss and damage by fire. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*Kenyon, Kelleher & Price and R. F. Mitchell, for appellant.*

*Burnquist & Joyce, for appellee.*

WEAVER, J.—On September 14, 1915, the defendant company issued a policy of insurance to the firm of Tero Petroff & Company, indemnifying said firm in the sum of \$2,000 against loss or damage by fire on a stock of general merchandise in the town of Lehigh, in Webster County, Iowa, for the term of one year. At the date of this policy, the firm of Petroff & Company consisted of two parties, Tero Petroff and Mike Joe. Thereafter, in March, 1916, and while the policy was still in force, Mike Joe sold his interest in the partnership to one Chris Peters, who became an equal partner in the firm, which continued to carry on the business under the same name, Tero Petroff & Company, until the loss of the property by fire, which occurred in May, 1916. The policy provided, among other things, that the insured had the right to obtain other additional insurance on the property, in companies authorized to do business in the state of Iowa; and it is admitted that, before the fire occurred, the plaintiff, through the same agent who procured the policy in suit, had taken out additional insurance in another company, to the amount of \$500. That the property insured was lost by fire during the year covered by the policy sued upon is not denied, but defendant denies liability therefor on the following grounds:

(1) That, by the terms of said policy, it was to become void if, during the term therein named, any change or diminution, other than by the death of the insured, should take place in the interest, title, or possession of the insured property, or if any other person than the insured should thereafter acquire any interest in or lien upon said property or any part thereof; and defendant alleges that this provision was violated by the sale of Mike Joe's interest in the partnership and property, as hereinbefore mentioned, to Chris Peters, and that, by reason thereof, the

1. INSURANCE:  
change of  
title: waiver.

contract of insurance ceased to be of any further force or validity.

(2) For a second defense, defendant pleads that the policy, by its terms, provides as follows:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

And defendant alleges that, after the loss of the property by fire, Petroff and Peters, the parties then constituting the firm, did make oath and swear before a notary public that "the total insurance on said (insured) property or any part thereof at the time of the fire, including the above mentioned policy, was \$2,000, more or less," when in truth plaintiff had procured and then held another policy of \$500, making the total insurance on the property \$2,500. It is further averred that the statement so sworn to, as aforesaid, was falsely and fraudulently made, and that, by reason thereof, the contract of insurance became null and void, and defendant was relieved from all liability thereon.

By way of reply to these defenses, and also by amendment to the petition, the plaintiffs admit the sale of a half interest in the partnership and property to Peters, but aver that defendant has estopped itself and waived the right, if any it had, to claim a forfeiture of the policy on account of such sale, by its own conduct, to which more particular reference will hereinafter be made. Plaintiffs also admit making the sworn statement concerning the amount of their insurance, but deny that it was made fraudulently, and say that, at the time thereof, defendant had already been informed and knew of the additional policy of \$500, and that

it was at defendant's own request or direction that no mention was made of the later policy, in the sworn statement.

On the trial below, there was, at the close of all the evidence, no motion by either party for a directed verdict, and, upon submission of the issues by the court, the jury returned a verdict for plaintiff for \$1,864.

I. The first proposition upon which a reversal of the judgment below is asked is that the admitted sale of a half interest in the partnership of Tero Petroff & Company relieved the defendant from all liability upon its contract of insurance. Another point made, bearing upon the same question, is that the evidence is insufficient to sustain a finding that this defense was waived by the defendant.

Upon the principal proposition, as to the effect of the sale if objection thereto was not waived, the court instructed the jury in strict accord with appellant's contention, saying, in plain terms, that "such sale and transfer would constitute a breach of the terms of the policy of insurance and would render the same void, and no recovery can be had upon said policy unless you find, by a preponderance of the evidence, that plaintiffs have sustained the claim that defendant waived such breach of the terms of the policy." It would seem, therefore, that there is no occasion to discuss or pass upon the abstract correctness of the rule so applied, concerning the nature and effect of the forfeiture clause in question. The court having adopted the defendant's theory in this respect, and the plaintiff not appealing, the one question to which we are remitted upon this issue is whether the record is sufficient to sustain the finding that the defense was waived. The trial court, holding that, upon the record made, this question was one of fact, and not of law, submitted it to the jury, with the following instruction:

"In considering the question as to whether or not the defendant waived any breach of the terms of the policy,

which provided that the policy was to be forfeited in case of a transfer or change of title of the property covered by said policy without the consent of the defendant, you are instructed that, under the law, a party to a contract, such as an insurance policy, containing stipulations releasing such party from liability thereon, is at liberty, if he sees fit, to not insist on said conditions, but to waive the same; but, in order that the acts of such party shall constitute a waiver, he must act with full knowledge of the circumstances releasing him; and if, with a full knowledge of the circumstances releasing him, he consents to treat the contract as of binding force, and induces the other party to act in that belief, he will be deemed to have waived the conditions releasing him. So, in this case, if the plaintiff has established, by a preponderance of the evidence, that the defendant association, having had notice of the loss by fire of the property covered by the policy in suit, sent its manager, secretary or adjuster to the town of Lehigh to see the members of the plaintiff partnership, and, with full knowledge of the fact that a transfer had previously been made of an interest in the partnership property covered by the policy of insurance, the said manager, secretary or adjuster requested or induced the said partners of the plaintiff firm to leave their work and go to the city of Fort Dodge, at some expense to them, to make and furnish proof of loss under said policy, and at such time, such manager, secretary or adjuster, with knowledge of the transfer of the property covered by the insurance policy, without the consent of the defendant association intentionally gave the partners interested in the plaintiff partnership to understand that he was willing and ready to pay the loss resulting from the destruction by fire of the property insured. such conduct on the part of said manager, secretary or adjuster would be sufficient to establish the claim of plaintiff that said condition of forfeiture in the policy had been

waived by the defendant association. However, if you fail to find, by a preponderance of the evidence, that, at the time of the making out of the proof of loss, the manager and secretary of defendant association had full knowledge of such transfer and change of title in the property covered by the policy, or if you fail to find, by a preponderance of the evidence, that it was at the request or inducement of said manager or secretary that said proof of loss was prepared and the trip above referred to taken by the partners to the city of Fort Dodge, then the claim of plaintiff that the defendant waived any breach of the terms of said policy, by reason of there being a transfer or change in title to the property covered by said policy, has not been established, and you will give no heed thereto."

This instruction fairly and fully states the law of waiver, as applied to cases of this character, and the evidence upon the several matters of fact therein referred to affords ample justification for its submission to the jury. It clearly appears that, before any proofs of loss were made, the company and its representatives who figure in the transaction had notice and knowledge of the fact that the interest of Mike Joe in the partnership had been sold and transferred to Peters before the fire; and, if they intended to rely upon that fact as a forfeiture, and take advantage of their right to be released from the contract, ordinary fairness and frankness required them to speak, and deny liability. If they did not do so, but induced plaintiffs to proceed, and incur labor and expense to prepare their proofs of loss, promising them that, upon completion thereof, such loss would be paid, it would be a perversion of justice tantamount to a fraud to permit the insurer, after its demand had been complied with, to insist upon a forfeiture. Without going into the details, it is sufficient to say that the testimony, if believed by the jury, sustains a finding to this effect. The rule thus applied has been approved

by this court in *Rundell & Hough v. Anchor Fire Ins. Co.*, 128 Iowa 577; and there are many other precedents, of which that case is a type. It frequently happens that the grounds of forfeiture of insurance in a given case are more or less technical in character; and the insurer may elect, and often does elect, to disregard the objection, and to treat the policy as remaining in force, regardless of such breach of its terms. Having done so, the insurer retains no option to retrace its steps and rely upon such breach as a release of its contract obligation.

The trial court did not err in submitting this issue to the jury, and the verdict has sufficient support in the record.

II. Another ground of forfeiture of the insurance which is pressed upon our attention in argument is the plaintiffs' alleged fraudulent misstatement of the amount of insurance upon the goods at the date of the fire. To constitute a breach of the terms of the policy in this respect, the misstatement must have been fraudulent, or with some design or purpose to conceal the truth, or to deceive or mislead the insurer. The jury was so charged by the court, and instructed that, if plaintiffs' statement was thus tainted by a fraudulent design or purpose, they could not recover upon the policy. The evidence tended to show—indeed, it seems to be admitted—that this written statement was prepared by defendant's own agent, and by him submitted for plaintiffs' signatures and verification, with knowledge of the fact that a second policy had been taken out by the plaintiffs. Defendant and its agents having such knowledge, and plaintiffs knowing that fact, the allegations of fraud or deception, or intent to defraud or deceive, are quite effectively negated,—or at least it constitutes a showing upon which the jury could well find for the plaintiffs on that question. Whether failure to mention the policy was

2. INSURANCE:  
fraudulent  
statements as  
to insurance.



a matter of oversight on part of defendant's agent in preparing the writing, or on part of plaintiffs in signing, or was left out, as plaintiffs say, at the suggestion of the defendant's local agent, who secured both policies for plaintiff, is wholly immaterial, in the absence of a fraudulent intent. It is unnecessary, perhaps, to add that, if the theory of appellee's counsel be true, that the writing was prepared in that form by defendant's agent as a mere trick to entrap the plaintiffs, who are of foreign birth, and not well versed in our language, into a statement upon which a forfeiture could be claimed, the defense would be equally unavailing.

We find no error in the rulings below with respect to this issue.

III. The policy appears to have been obtained by one Williams, an agent to whom plaintiffs applied for insurance. Just the nature and extent of his agency for the defendant

company are not shown. Plaintiffs pleaded and offered to show that, when Mike Joe sold out to Peters, they notified Williams of the fact, and asked him to have the insurance changed, if any change was necessary, and that Williams informed them that none was required. They also claim that, when about to make up their proofs of loss, Williams told them it was not necessary to mention the later policy (which he also procured). Some argument is directed to this feature of the case; but it appears that the testimony, so far, at least, as relates to the change of ownership of the insured property, was ruled out, and, as the ruling was in appellant's favor, we need take no time in considering its admissibility. It is said, however, that Williams' advice as to the form of the proofs of loss should not have been admitted. Even if it should be held that the evidence of Williams' agency was insufficient to permit this testimony, we are satisfied that its admission would, at most, be

3. APPEAL AND  
ERROR: harm-  
less error: im-  
proper evi-  
dence bearing  
on fully es-  
tablished fact.

error without prejudice, for it is otherwise shown without dispute that, at the time the paper was prepared, defendant had notice and knowledge of the entire truth respecting the amount of insurance, and there was neither fraud nor intent to defraud on the part of plaintiff in making the statement.

Appellant also places some reliance on a clause contained in the blank proof of loss which it furnished, and which, after being filled out by defendant's agent, was signed by plaintiffs. The clause referred to reads as follows:

4. INSURANCE:  
furnishing  
blanks and  
making  
proofs.

"It is expressly understood and agreed that the furnishing of this proof of loss (Exhibit B) to the assured or making up proofs by an adjuster or any agent of the company or companies named herein is not a waiver of any rights of said company."

But this goes no further than to provide that the mere act of the company in furnishing the insured the forms or blanks upon which he can make his proofs, or the mere act of the insurer's agent in making out or filling up said proofs in due form, shall not be held as a waiver of any right on the part of the insurer. Obviously this provision has no material application here. No claim of waiver is made by the appellee on either of the grounds against which this agreement is intended to provide. We may go further, and

say that the insurer may properly take all reasonable measures to investigate and ascertain the truth in relation to any loss for which it is called upon to pay, without any

5. INSURANCE:  
change of  
title: waiver.

risk of being held to have waived its right to defend, if it has a defense. If, however, its investigation develops a fact on which a forfeiture may justly be claimed, and it desires and intends to rely thereon, it cannot, without waiving such defense, proceed thereafter as though the policy were valid, and induce the insured to expend time, labor, and

money in preparing and presenting proofs, in the belief and understanding that the loss will be paid when these formalities have been complied with. No agreement or condition intended to fence against a waiver can be devised so as to exempt either party from the obligations of good faith, or to deprive either party of the remedies which the law provides against fraud.

We are of the opinion that there is no reversible error in the record of this case, and the judgment of the district court is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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HARRY ROBERTS et al., Appellees, v. MADISON COUNTY et al.,  
Appellants.

**HIGHWAYS:** Destroying Undercrossing for Stock. Passageways under public highways, though long used by landowners as runways for stock (in instant case, some 15 years), may, in the construction of highway improvements, be replaced by lesser openings, in the absence of some definite, legal *reservation* by the landowner of right to have the openings maintained as such runways.

*Appeal from Madison District Court.*—LORIN N. HAYS,  
Judge.

MAY 20, 1918.

SUIT in equity to restrain the board of supervisors from removing a bridge under which plaintiffs claim a right to a passway for stock, and to substitute a small concrete culvert. Decree as prayed. Defendants appeal.—*Reversed*.

*Phil R. Wilkinson*, for appellants.

*Jno. A. and W. T. Guiher*, for appellees.

STEVENS, J.—The plaintiff Harry Roberts owned the fee, and his coplaintiff, Mary Roberts, the life use, of a tract of 120 acres in Madison County. About June 28, 1901, Wesley Roberts, father of Harry and deceased husband of Mary Roberts, who was then the owner thereof, with others filed a consent petition for a highway which crossed a part of the above tract, the petitioners specifically waiving claims for damages. The highway was established and opened as prayed. At a point where the same crossed the Roberts tract, there was a small gulley, or ravine, over which the bridge in controversy was constructed. Piling was driven in the ground on each side of the ravine, and planks were nailed thereto in such a manner as to support the dirt approaches to the bridge. A plank floor was placed on stringers, leaving an opening under the bridge through which stock passed from one side of the highway to the other. The highway divided a pasture upon the Roberts' premises, leaving about an equal acreage on each side. There was a perpetual spring on the east side of the highway, which supplied water for the stock in the pasture. Shortly after the bridge was erected, Roberts built fences on each side of the highway, securely attaching the wire on each side of the bridge to the plank abutments. The opening left under the bridge in question, and another somewhat similar, but, we gather from the evidence, smaller opening, which has also been closed, furnished the only way for stock to pass from one side of the highway to the other, and for the stock on the opposite side to reach a spring, used for watering purposes. The bridge and wire fence were maintained as constructed, until shortly prior to the commencement of this suit, when, plaintiffs allege in their petition, the defendant board of supervisors was threatening to remove the bridge and substitute therefor a small concrete culvert, thereby destroying the passway under the bridge.

It is further alleged in plaintiffs' petition that Wesley

Roberts gave the right of way for the road, upon an understanding and agreement that a bridge would be constructed and maintained at the point in question, with sufficient capacity thereunder to provide a suitable passway for stock; and this suit is brought to enjoin the defendants from removing the bridge and placing a small culvert over the ravine.

No direct evidence of an agreement between Wesley Roberts and the board of supervisors was offered upon the trial. The former members of the board of supervisors, who were called as witnesses, testified that they had no recollection of a conversation or agreement of any kind with him relative to the construction of the bridge or its maintenance so as to provide a passway thereunder for stock. Plaintiffs relied largely upon circumstances, to make out their claim. While there were circumstances shown in evidence that are somewhat persuasive, they fall far short of establishing an agreement on the part of the county to construct and maintain the passageway as claimed. It is argued that Wesley Roberts had no direct interest in the establishment of the highway; that he received no compensation for the land taken; that he was permitted to attach his fence to the bridge abutments, thereby providing a passway under the bridge for his stock, which was the only way it could pass from one side of the highway to the other; that defendants have permitted the fence to remain as constructed, and the opening under the bridge to be used as a passway for stock, ever since the bridge was constructed; and that it is extremely improbable that Roberts would, without compensation, have consented to a highway across his land, which divided his pasture, without a definite agreement or understanding that a passway would be left under the bridge of sufficient size to permit his stock on the opposite side of the road to have access to the spring.

The dimensions of the bridge are not shown, nor does

it appear from the evidence that same was constructed with a view to providing a passway for stock. So far as we are able to ascertain from the record, the bridge was no larger than was reasonably necessary to meet the requirements of the highway at this point and provide an adequate waterway; nor does it appear from the record that same was not constructed in the usual and customary manner of constructing bridges across similar ravines. So far as the evidence discloses, it may have been understood by Roberts that the necessary result of the construction of the usual and ordinary bridge across the ravine would be to provide the opening, which has been used as a convenient passway for stock since the bridge was built, and that no agreement or understanding with the officers of defendant county was necessary. Since the bridge was erected, public officers, charged with the construction of bridges and care of highways, have, doubtless, found that small, concrete culverts, or concrete bridges, are more economical to maintain; and it is a matter of common knowledge that they are quite generally being substituted for structures of the kind in question. In the absence of evidence tending to show an agreement on the part of the board of supervisors to erect and maintain the bridge in a manner to provide a passway thereunder for the stock, we would hardly be justified in holding that the present opening must be maintained. An agreement that the opening was to be left and perpetually maintained for the benefit of the landowner, cannot be inferred merely from the circumstances here shown. Perhaps a careful and prudent owner, realizing the importance of a passway for stock across or under the highway, would have made an agreement to that effect, and it may be quite improbable that Wesley Roberts would have granted the right of way without compensation, unless some obligation was assumed by the county to maintain such opening; but this, with the other circumstances shown, would not justify the

court in holding that there was such an agreement. We cannot infer therefrom that an agreement was made to that effect with the board of supervisors, or that the terms thereof required the maintenance of such opening.

Counsel for appellee rely upon *Agne v. Seitsinger*, 104 Iowa 482. The circumstances in that case were quite similar to those in the case at bar, except that the owner, who granted the right of way, reserved, in the petition, the right to attach his fence to the bridge abutments. The court emphasized this reservation, and held that the only reasonable purpose thereof was to provide an opening for stock to pass under the bridge, and that the real reservation intended must have been of a passway for that purpose. In the case at bar, the consent petition contained no reservation or condition whatever. No evidence was offered tending to show a reservation or agreement, as claimed.

It is also argued by counsel that a prescriptive right to have the opening maintained has been gained by the owner of the land, by virtue of the long attachment of the wire fence to the bridge abutments and the use of the passway, with the knowledge and acquiescence of the public. The public made no use of the opening, and stock passed through the same as a convenience, and the only way from one part of the pasture to the other. There was no reason why stock should not pass under the bridge. The public had no interest in the opening under the bridge except to provide a necessary waterway for plaintiff's land, and the attachment of the fence to the abutments by Roberts was a mere matter of convenience to him; but same was in no wise adverse to the public, and he acquired no right against it thereby. The board of supervisors had the right to remove the structure and provide a less expensive bridge, and one which may be more economically maintained.

We are unable to agree with the finding of the court be-

low, and its judgment and decree are, therefore,—*Reversed*.

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

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ROSA SCHULTZ, Appellant, v. F. J. SCHULTZ et al., Appellees.

**DESCENT AND DISTRIBUTION: Wife Not Heir of Husband.**

- 1 widow is not an "heir" of her deceased husband, within the meaning of Sec. 3378, Code, 1897, which provides that property which cannot descend to the son of an intestate because of the prior death of the son, shall descend to the *heirs* of such predeceased son.

**DESCENT AND DISTRIBUTION: Non-Dowable Lands.**

- 2 A widow takes no dowable interest in lands which her husband would have taken had he not predeceased his intestate father. (See Sec. 3366, Code, 1897; Sec. 3379, Code Supp., 1913.)

*Appeal from Polk District Court.*—LAWRENCE DEGRAFF, Judge.

MAY 20, 1918.

ACTION in partition. Opinion states the facts. Judgment dismissing plaintiff's petition. Plaintiff appeals.—*Affirmed*.

*McLaughlin, Shankland & Lappen*, for appellant.

*Lester L. Thompson*, for appellees.

GAYNOR, J.—John Schultz died intestate, in Polk County, November 28, 1916, seized of 360 acres of land. He was a widower at the time of his death. Two sons were born to him, Henry Schultz and the defendant, F. J. Schultz. Henry Schultz, one of the sons, died intestate and without issue on the 10th day of November, 1914, leaving a widow, plaintiff in this suit.

1. DESCENT AND  
DISTRIBUTION:  
wife not heir  
of husband.

Plaintiff brings this action as widow of Henry Schultz,



alleging that, under the laws of this state, she, as the surviving spouse of Henry, is entitled to an undivided one half of the estate of John Schultz, to the amount of \$7,500, and one half of the remainder of said one half, the same as though Henry had outlived his father. She makes also an alternative prayer, and says that, in any event, she is entitled to all the undivided one half of the estate of John Schultz, deceased, to the extent of \$7,500, and one sixth of the remainder as an inheritance. She demands judgment confirming her share as above set out, and prays that the real estate be partitioned.

The defendant is the brother of Henry, and the only surviving child of John Schultz. He appeared, and filed a demurrer to plaintiff's claim. This demurrer was sustained, and judgment entered dismissing plaintiff's petition. From this she appeals.

Thus it appears: John Schultz died on November 28, 1916. He was a widower, at the time of his death. His son Henry died two years before, on the 10th day of November, 1914. Henry was married, at the time of his death, and left surviving him the present plaintiff as his widow. The defendant herein is Henry's brother. The other defendant is his brother's wife. At the time of his death, John Schultz was seized of the property in controversy. The widow of Henry brings this action to partition the real estate left by John, claiming an interest therein by reason of the fact that she is the widow of Henry Schultz, deceased. She claims her interest to be the same as if Henry had survived his father.

The question, therefore, for our determination is this: Is the widow of a deceased son, who died without issue before his father, entitled to any portion of the estate left by the father? She claims as heir. She claims it as her inheritance. Whether she claims as heir of John Schultz or heir of Henry Schultz does not affirmatively appear from

her pleading. She bases her claim on the fact disclosed in her petition, that she is the widow of Henry Schultz, who died two years before his father, John Schultz. After Henry's death, the only relationship she sustained to John was that of a son's widow. She must base her right on the fact either that she was the widow of John's son at the time of John's death, and as such, is entitled, by reason of that relationship, to participate in the division of John's property, or she must base it upon the fact that she is the widow of Henry, and is entitled to participate in it as Henry's property. It is clear that any claim she makes to John's property as John's heir, has no basis to stand on. We must assume, therefore, that her claim is that, upon John's death, an undivided half of the property passed to Henry, and that she, as Henry's widow, is now entitled to a distributive share in the property, the same as if Henry had outlived his father and had come into the possession of the property and had then died.

Section 3378 of the Code of 1897 provides:

"Subject to the rights and charges hereinbefore provided, the remaining estate of which the decedent died seized shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case the *heirs* of such shall inherit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents."

This, evidently, is the section upon which plaintiff plants herself in this controversy. Her contention must be, if she would be sustained at all, that John's property, upon his death, would have passed to the two children, had they both been living, share and share alike; that the share which would have passed to Henry, had he been living, passed to his heirs; and that she is one of Henry's heirs, and, therefore, under this statute, entitled to take whatever Henry would have taken, had he outlived his father.

The controversy, therefore, turns upon the construction to be given this section: to wit, that, in case any of the children are dead, the heirs of such dead child shall inherit his or her portion. If she is one of Henry's heirs, then it follows that, Henry being the child of John, and dead, she, as his heir, is entitled to inherit whatever Henry would have inherited had he lived; but if she is not an heir, in contemplation of this statute, then, of course, she takes nothing under this statute. That plaintiff is not an heir, in such sense as to be entitled to take under the provisions of this statute, we think has been settled by the previous decisions of this court. Under a statute similar in its wording, and the same in its import as the statute here under consideration, it was held that she was not an heir. The first expression of the court touching this question is found in *McMenomy v. McMenomy*, 22 Iowa 148. This decision was followed by this court in *Journell v. Leighton*, 49 Iowa 601, and again in *Will of Overdieck*, 50 Iowa 244, and *Braun v. Mathieson*, 139 Iowa 409. See also *Kuhn v. Kuhn*, 125 Iowa 449; *Phillips v. Carpenter*, 79 Iowa 600.

In *Blackman v. Wadsworth*, 65 Iowa 80, decided in 1884, under Section 2337, Code of 1873, which read as follows: "If a devisee die before the testator, his heirs shall inherit the amount so devised to him, unless, from the terms of the will, a contrary intent is manifest,"—this court held that, if the devisee does not survive the testator, the legacy that would have become a part of his estate, had he lived, and would have been distributed to his widow, does not pass to her as heir, and said:

"If we should hold that the word 'heirs,' as used in Section 2454, includes the widow, we think that we should not only surprise the profession, but invalidate numerous titles which had been supposed to be unquestionable."

See, also, the late case of *McAllister v. McAllister*, 183 Iowa 245.

*Lawley v. Keyes*, 172 Iowa 575, in no way overrules the decisions hereinbefore referred to. That decision was made under the peculiar wording of the statute then under consideration, and that statute provides (Section 3381, Code of 1897), that property coming to the parents from a dead child shall be disposed of in the same manner as if they (the parents) had outlived the child, and died in the possession and ownership of the portion thus falling to their share.

The statute here under consideration provides that, in case of the death of a child before the father, the heirs of such child shall inherit his or her portion. It is plain, from the decisions, that the widow is not the heir of her husband. She takes only, if she takes at all, under the statute that confers on her the right to take. See *Shick v. Howe*, 137 Iowa 249; *Lawley v. Keyes*, 172 Iowa 575.

The plaintiff, not being an heir either of John or Henry, cannot take under the provisions of Section 3378.

Our attention is called to Section 3366 of the Code of 1897, which reads:

2. DESCENT AND DISTRIBUTION: non-dowable lands.	"One third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, * * * shall be set apart as her property in fee simple, if she survive him."
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Code Section 3379 provides:

"If the intestate leaves no issue, one half of the estate shall go to the parents, and the other half to the spouse."

This last section was repealed, and the following enacted in lieu thereof:

"If the intestate leaves no issue, the whole of the estate to the amount of seventy-five hundred dollars, after the payment of the debts and expenses of administration, and one half of all of the estate in excess of said seventy-five hundred dollars shall go to the surviving spouse and

the other one half of said excess shall go to the parents." Section 3379, Code Supplement, 1913.

Section 3366, above set out, and this last named section must be construed together. The estate referred to in Section 3379, Code Supplement, is the estate in which, under Section 3366, the wife is entitled to dower: to wit, "all the legal or equitable estate in real property possessed by the husband at any time during marriage." If there are children, she takes a one-third interest in all legal and equitable estate possessed by the husband at any time during marriage. If there are no children, she takes the whole of the estate to the amount of \$7,500, and one half of the balance, if there be such. But the estate referred to in the above sections is the estate possessed by the husband during marriage. In no other property does she acquire any interest as widow, and in no other property is she entitled to a distributive share. In *O'Connor v. Halpin*, 166 Iowa 101, the word "possessed," as used in this statute, was considered, and it was held that the word "possessed" relates to the estate in the property, and not to the property itself, and that it is equivalent to "seized." There is no heir to the living. Henry, then, at no time during his life became seized or possessed of either a legal or equitable estate in the land, and at his death had no legal or equitable estate in the land, and, therefore, nothing could pass to this plaintiff, under the provisions of Section 3366, above set out, or under Section 3379 of the Supplement. He had no share in his father's lands, either legal or equitable. As Henry had neither a legal nor an equitable estate in these lands at the time of his death, there was no estate to which the right of the wife, under this statute, could attach. The estate referred to in Section 3379, Code Supplement, must be the estate of which he was legally possessed at the time of his death. Since Henry, at the time of his death, had neither a legal nor an equitable estate in his father's property,

there was no estate in Henry to which the wife's dower could attach,—no estate, then, in which she could claim a distributive share. He had nothing. The estate which came from his father upon the father's death, Henry being dead, passed to Henry's heirs, and plaintiff is not one of them. So it is apparent that under neither statute is she entitled to an interest in this land. There was no dowable interest in the land at the time of Henry's death. The title was in the father. Upon the father's death, it passed to the heirs of Henry, and, as said before, passed as the statute directs.

Our attention is called to *Smith v. Zuckmeyer*, 53 Iowa 14, and it is claimed that it is authority for a holding that this widow is the heir of Henry. At that time, the statute provided that one third in value of all the legal or equitable estates in real property possessed by the husband, etc. (the same as the statute now provides), should be set apart for her in fee simple, if she survived him. Another section provided that, "if the intestate leave no issue, the one half of his estate shall go to his parents, and the other half to his wife." In that case it was held that the distributive share of the widow contemplated by these statutes is one third, and that much only is protected from any disposition by the husband, by will or otherwise; and the one sixth share going to make the half in the event there are no children, was not entitled to the same protection that the one third enjoyed, but might be willed by the husband, and was liable for his debts, and subject to the disposal of the husband during his lifetime. Whatever the widow got, even under this construction of the statute, she took under and by virtue of the statute, and not as heir. Of course, the word "heir" is used in connection with the widow in these cases, and reference is made to what is said in *Burns v. Keas*, 21 Iowa 257. But the holding of these cases simply is that, taking under either statute, the wife takes by

virtue of the statute; that the one third given her is protected. The one sixth is not. If no disposition is made by the husband during his lifetime, by will or otherwise, of the one sixth, and there are no debts to which it may be subjected, she takes the half, not as heir, but by virtue of the statute referred to. These cases afford no support to the plaintiff's claim that this widow could take as heir.

*Wilcke v. Wilcke*, 102 Iowa 173, *Hays v. Marsh*, 123 Iowa 81, and *Wild v. Toms*, 123 Iowa 747, though saying in words that she takes as heir, simply held that the one third that she takes under the first statute is all that is protected against the action of the husband, and that the one sixth, going to make the half, does not have such protection. But it is clear that, under either, the third or half, whichever she gets, she takes, not as heir, but by virtue of the statute. She takes a third of the real estate of which her husband was the legal or equitable owner during marriage, absolutely free from any right, on his part, to dispose of or in any way impair that right; while the one sixth, which goes to make up the half, she takes also under statute, but subject to the right of the husband, during his lifetime, to make disposition of it, and subject to debts, charges, etc. We think there was no intention in any of these decisions to hold, as a general proposition, that the widow is, in any sense, the heir of her husband.

Upon the whole record, we think the judgment of the court is right, and the same is—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

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STATE OF IOWA, Appellee, v. P. M. MCGUIRE, Appellant.

**ANIMALS: Police Regulation—Registration of Pedigree.** The legislature has power to require all stallions over two years of age to be registered and a certificate of such registration to be ob-

tained, as a condition to offering such stallions for public service. (Sec. 2341-f, Code Supp., 1913.)

**CONSTITUTIONAL LAW: Classification—Animal Registration.**

- 2 The primary right and duty of the legislature to classify—to say who and what subject-matters shall come under the provisions of an enactment—is not improperly exercised in the Animal Registration Act, which requires pedigree registration, and certificate thereof, of stallions and jacks, and omits such requirements as to bulls and other animals. Such classification is eminently natural, in view of the inherent differences in the species and in the purposes for which they are owned and used. (See Sec. 2341-f, Code Supp., 1913.)

**CONSTITUTIONAL LAW: Prevention of Fraud—Animal Registration.**

- 3 tion. The prevention of fraud in the sale, use, etc., of stallions, is ample justification for the statutory requirement that the pedigree of all such shall be duly registered, and a certificate thereof obtained. (See Sec. 2341-f, Code Supp., 1913.)

*Appeal from Ida District Court.*—E. G. ALBERT and M. E. HUTCHISON, Judges.

MAY 20, 1918.

THE opinion sufficiently states the case.—*Affirmed.*

M. M. White and W. A. Helsell, for appellant.

H. M. Havner, Attorney General, and F. C. Davidson, Assistant Attorney General, for appellee.

WEAVER, J.—The defendant was indicted upon charge of a public offense, set forth in words as follows:

“The grand jury of the county of Ida in the name and by the authority of the state of Iowa, accuses P. McGuire of the crime of offering a stallion for public service without enrollment, committed as follows: The said P. McGuire, on the 29th day of May, in the year of our Lord one thousand nine hundred and fifteen (1915) in the county aforesaid, did offer for public service in this state as registered a stallion over two years old to wit: Belgian Mairret

1. ANIMALS:  
police regulation:  
pedigree.



(47310) without having caused the name, age, color and pedigree of the animal to be enrolled by the secretary of the state board of agriculture and without having procured from him a certificate of such enrollment."

On being called for arraignment, the defendant appeared by counsel and demurred to the indictment, on the ground that the statute with a violation of which he is charged, is unconstitutional and void. The particular statement of these grounds being repeated in a later motion for a directed verdict of acquittal, to which we shall again refer, they are here omitted. The demurrer was overruled, and the trial proceeded. At the close of the evidence, the defendant moved for a directed verdict in his favor, for the following reasons, which we quote from the printed abstract:

"1. Because the law under which this indictment is found is unconstitutional and repugnant to the Constitution of Iowa, in that it violates the provisions of Section 6 of Article 1 of the Constitution of this state, for the reason that the law is not uniform in its operation, and the classification adopted by the legislature is arbitrary and based on no valid and sufficient reason, and the same is class legislation and not uniform and equal in its operation.

"2. The said law deprives the defendant of his property and liberty without due process of law, and the same is repugnant to the provisions of the Constitution of Iowa.

"3. The law under which this indictment is found is in violation of and repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that said law creates a monopoly and prejudices the privileges and immunities of the defendant and denies this defendant the equal protection of the law.

"4. For the reason that the law under which this indictment is brought deprives the defendant of his property without due process of law and compels this defendant to surrender his money to some veterinarian without any op-

portunity for a hearing as to the amount of charges which the veterinarian shall make, and without any method of proving the soundness of the horse in any other manner than the arbitrary provision provided in the law that he must have an affidavit of some veterinarian, and for the reason that the law provides no method in which the soundness of the horse or stallion may be determined except the arbitrary one of referring it to a veterinarian who comes under the terms and provisions of the law. Also for the reason that the law fails to provide an opportunity for the defendant to be heard either as to the actual soundness of his horse in case of an arbitrary refusal of any veterinarian to make the necessary affidavit required by this law, and provides no means by which the defendant may have a hearing and provides for no method or other process by which the defendant may be protected and have a hearing before any court or tribunal upon the merits or as to the fact of the soundness or unsoundness of the horse or stallion.

"5. Because the law under which this indictment is found and this case is prosecuted is unconstitutional and void for the reason it is class legislation, that it grants to certain citizens or persons privileges which under the same terms are not granted to this defendant in that it relieves owners of stallions and jacks two years old and under from the operation of the law, and relieves owners of mares from the provisions of the law when the said male animals and mares are under the same conditions and subject to the same reasons which apply to a stallion or jack over two years old owned by the defendant.

"6. Because the law makes unjust and unequal distinction between owners of male animals of the horse kind and owners of bulls and boars and other male animals that may be offered for service or sale, and the classification is arbitrary and puts burdens upon owners of stallions that are not put upon owners of mares, boars, bulls and other male

animals offered for sale or for service; that the classification rests on no manifest or reasonable ground but is arbitrary and denies this defendant and all others under like condition the same protection of the law that it affords to owners of male animals of other kinds, and for the further reason that as a police regulation it is void because it is unreasonable.

"7. That Section 2341-q of the Supplement to the Code of Iowa being Section 8 of Chapter 100 of the Acts of the 34th General Assembly as amended by Chapter 188 of the Acts of the 35th General Assembly, is invalid and repugnant to the Constitution in that it violates the provisions of Section 19 of Article 1 of the Constitution of the state of Iowa, the effect of such law being imprisonment of the defendant for debt.

"8. The said law under which this indictment is found is unconstitutional in that it violates the provisions of Section 7, Article VII of the Constitution of the State of Iowa."

The motion to direct a verdict having been denied, the cause was submitted to the jury, which found the defendant guilty as charged, and the court entered judgment thereon, imposing upon him a fine of \$25 and costs. The defendant appeals.

The sole question upon which the appeal is presented to this court is the alleged invalidity of the act which defendant stands convicted of violating. The statute referred to, Section 2341-f, Code Supplement, 1913, provides that no person shall offer for public service in this state as registered, any stallion or jack over two years old, until he shall have caused the name, age, color, and pedigree to be enrolled by the secretary of the state board of agriculture, and shall have procured from him a certificate of such enrollment. There are other provisions of the chapter re-

2. CONSTITUTION-  
AL LAW:  
classification:  
animal regis-  
tration.

specting the duties of the owners of such animals, to which provisions counsel have made reference in making their record and arguments; but they are not involved in the charge made against the defendant. The one thing alleged against him is that he offered a certain designated stallion for public service without enrolling him, and without procuring a certificate of such enrollment, as this law requires. It is not argued that defendant is not guilty if the law be valid; and, unless we are to hold the law unconstitutional, there is nothing to do but affirm the judgment appealed from.

Stated in varying forms of expression, the argument advanced by counsel narrows down to the single proposition that the statute violates the constitutional inhibition against class legislation. It is argued and repeated that, to be valid, the law should be made to apply to the owners of all domestic animals; that it is just as important that the public be protected against fraud or imposition with respect to horned cattle as it is with respect to horses; and that to cast such a burden upon the owners of horses and not upon the owners of cattle is an unfair and unreasonable discrimination.

To so hold is to go far beyond any rule or doctrine announced or approved by any of our courts, state or Federal. True, the legislature may not discriminate between persons doing business of the same kind and under the same circumstances, but it may discriminate between different kinds of business, requiring a license in the one instance and not in the other, or impose restrictions and regulations in the one and not in the other. *Iowa M. T. Ins. Assn. v. Gilbertson*, 129 Iowa 658; *Brady v. Mattern*, 125 Iowa 158. Equal protection is not denied if all persons subject to the statute are treated alike under like circumstances. *Sisson v. Board of Supervisors*, 128 Iowa 442. The only limit put upon legislative discrimination is that it shall not be arbitrarily ex-

exercised. There is no such likeness between the keeping, breeding, and rearing of horses, and the keeping, breeding, and rearing of cattle or sheep or swine or other distinct species of domestic animals, that the legislature may not regulate one and leave the others unregulated, or may not provide varying regulations for each. Indeed, it would seem obvious that a classification based upon the ineradicable distinction between the different species of animals and the different purposes for which they are kept, owned, and used, is a natural and proper one. It may be true, as counsel say, that, in the judgment of counsel and many others, a regulation applying to cattle is of equal importance with one applying to horses; but we think that is not the test. In the very nature of things, legislation of a constructive character must proceed step by step. The order in which measures for the advancement of public welfare shall be adopted rests primarily with the law-making branch of the government, and a very large proportion of all our statutes involve, to some greater or less extent, an exercise of the legislative power of classification. This state, as well as many others, has, in recent years, enacted regulations of more or less stringent character with special reference to the manufacture and sale of dairy products. Can it be said, that these acts are unconstitutional because there are other lines of food production, which we think of equal or greater importance to the public, left unregulated? The statute here challenged is, in express terms, made applicable to all persons of a definitely described class. That class consists of all persons who offer to the public the service of stallions which are described or held out to the public as registered animals. It is a matter of common knowledge that the word "registered," as applied to a domestic animal, means that its purity of blood, breeding, and pedigree has been evidenced by its admission to registration or

3. CONSTITUTIONAL LAW: prevention of fraud: animal registration.

enrollment in the records kept by some recognized authority upon such matters. To offer the service of a stallion described as "registered" is, therefore, a representation of kind and quality which, if false, tends directly to the promotion of fraud; and the evident purpose of the statute is to prevent such imposition. That this is a legitimate subject of legislation can scarcely be questioned; and, as it is made to apply to every member of the described class, there is no unconstitutional discrimination. Classification for the purposes of legislation need not "depend upon scientific or marked differences in things or persons in their relations. It suffices if it is practical, and it is not reviewable unless palpably arbitrary." *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562.

It is unnecessary to go into any extended discussion of the very many authorities which sustain these views. They are practically without conflict on that subject, and none to which our attention has been called by appellant can be considered as lending support, even by inference, to the proposition that the statute here under consideration is void as class legislation, or as denying to the defendant that equal protection of the law to which he is entitled under the state and Federal Constitutions.

The judgment of the district court is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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STRAIGHT BROS. COMPANY, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

**LANDLORD AND TENANT: Action by Landlord for Damage to**

- 1 **His Share of Rent.** A landlord who leases on shares may maintain an action against third parties for damages to his share of the crops; especially is this true when the action is begun after the expiration of the lease, and after the landlord has received an assignment of the tenant's claim for damages.

**DAMAGES: Avoidable Damages—Non-Necessity to Commit Trespass.** The rule that one may not recover for avoidable consequences does not require that the injured party commit a trespass.

**DAMAGES: Flooding of Lands and Injury to Soil.** "The difference between the value of a farm as an entirety, immediately before and immediately after an unlawful flooding," which causes injury to the soil, is, or may be, a better measure of damages than such difference confined solely to the lands receiving the physical injury.

**DAMAGES: Flooding of Lands and Injury to Crops.** Injury to growing crops, and injury by reason of inability to plant or raise crops, caused by the unlawful flooding of lands, may very properly be worked out by determining the difference between the rental value of the land for the term in question, immediately before and after the flooding.

**DAMAGES: Flexibility of Measures.** Principle recognized that it matters little just what rule is adopted for measuring damages, provided the jury can and does thereunder work out substantially just compensation.

**DAMAGES: Double Recovery.** Allowing damages to land which has, in a sense, been permanently injured by reason of an unlawful flooding, and allowing damages to growing crops and damages by reason of inability to raise crops on the same land, and by reason of the same flooding, do not constitute or authorize a double recovery.

**WORDS AND PHRASES: "Value of Use"—"Rental Value."** "Value of use" of lands, and "rental value" of lands, are synonymous terms.

**DAMAGES: Injury to Leasehold Interest.** On the issue as to the damages to a leasehold interest in farm lands by reason of the unlawful flooding of the land, evidence is admissible of the usual crop yield and the value thereof in the neighborhood in question.

*Appeal from Pocahontas District Court.*—D. F. COYLE,  
Judge.

MAY 20, 1918.

ACTION to recover damages for overflow. Trial to a

jury. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

*T. F. Lynch and Hughes, Sutherland & Taylor*, for appellant.

*Kenyon, Kelleher, Price & Hanson*, for appellee.

PRESTON, C. J.—The petition was filed in September, 1914, and is to recover damages for flooding plaintiff's land, and injury done to the crop thereon in the year 1913. Re-

ferring only to the issues which seem to be

1. LANDLORD AND TENANT: controlling, it is alleged, substantially, that, prior to the year 1912, a drainage district was established, and tile crossing plaintiff's land crossed defendant's right of way; that

the tile at that point was 22 inches in diameter; that plaintiff, in rebuilding a bridge at said point, obstructed said ditch and drain by driving through said tile line four large piling, each 14 inches in diameter, thereby obstructing the same and reducing its efficiency and capacity to carry off water from surrounding land, including plaintiff's; that the water was dammed up on plaintiff's land, drowning out the crops during the season of 1913; that, in addition thereto, the flooding caused an accumulation of foul weeds, caused the land to become sour, and resulted in permanent injury to the land; that for said season plaintiff had rented the land to one Johnson for a share of the crop, two fifths of such crop to go to plaintiff and three fifths to the tenant, Johnson. The lease provided, among other things, that the tenant was to pay and deliver to plaintiff, as rent, the two-fifths part of all the crops; that the small grain was to be threshed before November 1st, and the tenant had no right to remove any of the share of the crops belonging to plaintiff from the premises until the division was made. The first count of the petition asks damages for injury to plaintiff's land and its share of the crop. The second count



makes similar allegations as to the flooding of the land, and alleges further, and the proof shows, an assignment to plaintiff by Johnson of his claim for damages against the company for the tenant's three-fifths share,—that the tenant was in possession of the lands for the year 1913. Plaintiff asked \$3,000 damages on both counts of the petition. The jury allowed \$1,750.

By an amendment to the petition, the plaintiff says, as to the first count, that 50 acres of corn ground were unplanted because of the wrongful acts of the defendant, and that about 55 acres which were planted were seriously damaged, resulting in loss to plaintiff on this account of \$1,200; that plaintiff's oats crop was damaged \$148; and as to the second count, it is alleged that the loss and injury to corn crop were \$1,350, and loss and damage to the oats crop, \$222.

The answer is in denial, and it says, further, as to each count of the petition, that plaintiff knew the situation, and knew of the break in the tile at the time it occurred; and that, by the expenditure of a nominal amount, it could have prevented the injury, and for that reason it is not entitled to recover; and further, that, if plaintiff's premises were flooded at all, it was not due to the breaking of any tile, but to the insufficient drainage system, as constructed by the drainage district.

It is stated by appellant in argument that the principal errors relied upon for a reversal have reference to the admission of testimony, and instructions to the jury. A considerable part of the argument by counsel for both sides is in regard to the question as to whether plaintiff can recover on the first count, as the owner of the land, for injury to its two-fifths share of the crop. At the close of all the testimony, defendant moved the court to withdraw from the consideration of the jury any right of the plaintiff to recover under the first count for alleged loss to crops or

damage to crops, because, under the issues and evidence, it is shown that such were not the property of the plaintiff, but, if the property of anyone, the property of the tenant, Johnson. The question was not otherwise raised in the trial court. The facts in connection with the different propositions will be stated briefly.

1. As to whether plaintiff can recover for its two-fifths share. Appellant concedes, in its reply argument, that this question may involve only a technical rule of pleading, but that they are entitled to have the rule observed. It is conceded by appellant that, under the statute, an action must be maintained by the real party in interest; but it contends that the owner of the land was not the real party in interest, as regards the crops that were growing upon the premises, and that the tenant was the only person entitled to sue on account of their injury or destruction. Appellee concedes, as we understand it, that this is the rule in some cases, but insists that, where the crop is to be raised by the tenant on shares, the rule does not apply, and that this is especially so since the suit was not brought until after the tenant's lease had expired, and the tenant has assigned to the landowner the damages to his share of the crop; and they say that, under such circumstances, the tenant could have no interest in the two-fifths share that would go to the landowner. It may be possible that it could be worked out by the tenant's suing as trustee for the owner of the land as to the landlord's share; but it seems to us that this would be an awkward way to go at it, and that such circumlocution is wholly unnecessary, as applied to the facts in this case. Appellant cites, on this point, *Drake v. Chicago, R. I. & P. R. Co.*, 70 Iowa 59; *Townsend & Knapp v. Isenberger*, 45 Iowa 670; *Rees v. Baker*, 4 G. Greene 461; *Blake v. Coats*, 3 G. Greene 548; *Alwood v. Ruckman*, 21 Ill. 200; *Baltimore & O. S. W. R. Co. v. Stewart*, 128 Ill. App. 271, 274.

Appellee cites at this point, in support of its contention that plaintiff is the real party in interest and entitled to prosecute the action under a share rent lease, *Riddle v. Dow*, 98 Iowa 7; *Blunck v. Chicago & N. W. R. Co.*, 142 Iowa 146; *Niagara Oil Co. v. Ogle*, 177 Ind. 292 (98 N. E. 60); *Gulf, C. & S. F. R. Co. v. Caldwell*, (Tex. Civ. App.) 102 S. W. 461; *Fuhrman v. Interior Warehouse Co.*, 64 Wash. 139 (116 Pac. 666); *Doke v. Trinity & B. V. R. Co.*, 60 Tex. Civ. App. 106 (126 S. W. 1195); 24 Cyc. 1468.

We shall not attempt a review of all these cases, but content ourselves by referring to some of them, and our conclusion that appellee's cases, under the facts of the instant case, are controlling.

It is true, as contended by appellant, that, in the *Drake* case, supra, it was said that a landlord has no such interest in the growing crops of his tenant as to enable him to maintain an action against a person who injures the crop, and in the *Townsend v. Isenberger* case, supra, it was said that the share of the crops reserved by the lease to the landowner is to be regarded as rent. But these cases are distinguished in some of our later cases. It should be borne in mind, we think, that, in the instant case, there is no question of the right of possession of the crops grown on the leased premises, such as might arise in a controversy between the landlord and tenant. Under such a lease, there is no liability on the tenant's part to the landlord for the share which the landlord would have received had the defendant not flooded the land; the tenant has not agreed to pay the rent in money, nor is he obligated or bound to deliver any grain or other crops which he was prevented from growing by the alleged wrong of the defendant. The cases are referred to in *Riddle v. Dow*, supra, where it is said:

"It is undoubtedly true that the authorities generally hold that, where a tenant on shares has exclusive possession of the leased premises, the legal title to the entire crop

grown thereon and the right to possess it are vested in him until the share which is to be delivered as rent is separated from the remainder of the crop; and some authorities hold that such ownership is exclusive. It will be found, however, that, in most cases of that character, the landlord, or person claiming through him, was endeavoring to assert a right of possession as against the tenant before a division of crops had been made, or that there had been a conveyance of the land before a maturity of the crops, and a claim made that the landlord's share did not pass by the conveyance. But the rules which control in such cases are not applicable to this case."

The *Riddle* case was a garnishment case, where it was held that a mortgage by a lessor upon his share-rent interest in the crop was paramount to a garnishment of the tenant. In that case, in speaking of the *Townsend v. Isenberger* case, the court said that what was said in regard to the ownership of the tenant was designed to show that the rent had not accrued, and was not payable until after the purchaser at the sheriff's sale had acquired title to the land; hence that the case was controlled by the rules that rent reserved by lease, not accrued, passes by a conveyance of the land, and that a purchaser under execution sale is entitled to the rent accrued or falling due after the execution of the sheriff's deed. And, in referring to *Drake v. Chicago, R. I. & P. R. Co.*, supra, it was said:

"But the nature of the landlord's claim to the crops in that case is not shown. The point was decided without discussion by the court, apparently on the authority of *Townsend v. Isenberger*. The case cannot, therefore, be regarded as in conflict with the views we now express."

It was further said, in the *Riddle* case, after reviewing the authorities:

"But it was not said that the interest of the landlord in the crops raised, was no more than it would have been

had the rent been payable in money. In no case which has been called to our attention has a share of the crop to be delivered as rent been treated, in all respects, as though it were money rent. That it should not be, is clear, on principle. When rent is to be paid in money, the obligation of the tenant is discharged by the payment of the specified amount of money, from whatever source obtained; and, if a share of the crop to be grown, or its equivalent, is to be paid as rent, the requirements of the lease will be satisfied by the delivery of the share itself, or by delivering an equivalent—as crops of a kind and quality equal to the share designated. But when the rent is to be paid by delivery of a share of the crop raised on the leased premises, and no option is given to deliver an equivalent, the obligation of the tenant can be satisfied only by a delivery of the specified share of the crops grown on the leased premises. Nor can he be compelled to pay anything but the stipulated share, unless he fails to deliver it according to the terms of his contract. \* \* \* It was intimated, however, in *Parker v. Garrison*, 61 Ill. 250, that the delivery of a share of grain reserved as rent might be enforced as the execution of a trust. In that case, the tenant had agreed to deliver as rent, one half of the crops which he should raise on the leased premises; but it was to be paid in corn. He refused to deliver the stipulated share, and did not separate it from the remainder of the crop, but intended to sell all of it. He was enjoined from selling or otherwise disposing of the grain at the suit of the landlord. The court said that the landlord had an interest in the corn; that 'it justly and equitably belongs to him;' that 'the defendant, Garrison, had received from him the entire consideration of it, \* \* \* and it was his plain duty to deliver the corn to the complainant.' That case is an authority for the theory that the landlord has an interest in the crop which he is to have a share of as rent, before a di-

vision is made, which is more than a mere right to a landlord's lien, and which the courts will protect. It should be remembered, in this connection, that the rule that the legal title to crops, a share of which is to be delivered as rent, and the right to their exclusive possession, are in the tenant until a separation and delivery of the rent share, is fully recognized by the Supreme Court of Illinois [citing cases]."

In the case of *Niagara Oil Co. v. Ogle*, supra, the Supreme Court of Indiana held that:

"While growing, both landlord and tenant had an interest in the crops, and both would be entitled to damages for their injury or destruction, \* \* \* whether, at the time this suit was commenced, the landlord and tenant owned the crops as tenants in common, or whether they were in possession of the tenant under contract for the delivery of one half thereof, in the bushel or by weight, to the landowner for rent, when harvested, or whether they had been, when the action was commenced, divided in equal shares between landlord and tenant, would not affect the landlord's right to an action for damages for injury by a third person to the same. No right of possession of crops is here involved. The relief prayed is for damages for injury to a specific property, and such relief will not be denied simply because a third party may be in the rightful temporary possession thereof. No question is raised here concerning a defect of parties plaintiff; and certainly, in the absence of such objection, the landlord, though the owner of the undivided half only of the crops, may, alone, maintain an action for such damages as he may have sustained by the injury [citing cases]."

The other cases cited sustain the proposition. The case of *Doke v. Trinity R. Co.*, supra, was a case to recover damages for injury to crops from an overflow of the land. We shall not further discuss them. In this case the lease had

expired; the tenant had assigned his interest or share to plaintiff; he might not be disposed to employ counsel and incur expense to sue for his landlord.

In *Minneapolis Iron Store Co. v. Branum*, (N. D.) 162 N. W. 543, at 552, it was held, citing numerous cases, that, under a lease similar to that in the instant case, the owner of the land and the tenant are tenants in common of the crops. See, also, *Doke v. Trinity R. Co.*, supra, where it was said that this is in accord with the great weight of authority.

We are of opinion that the court did not err in overruling the defendant's motion to direct a verdict as to this first count.

2. As to the questions of fact whether the piling driven by defendant obstructed the flow of water, and the condition of the crop and land when the injury occurred, these and other questions were questions for the jury, and have sufficient support in the testimony. We shall not set out the evidence.

3. As to defendant's claim that plaintiff could have, by the expenditure of a nominal amount, prevented injury, it is to be said that the court withdrew that issue from the jury upon its own motion, and

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avoidable dam-  
ages: non-nec-  
essity to com-  
mit trespass.

stated as reasons therefor:

"That the burden of proof is upon defendant, and there is no evidence to show that the plaintiff had any right to remove the posts [piling] which constituted the obstruction, or any right to change the course of the drain across which the posts or piling were placed, the drain being a large drain and under the control of public authorities; and for the further reason that there is no evidence to show that the obstruction was discovered in time to avoid all the damage, but on the contrary, the evidence shows that the water had accumulated

and a part of the damage had occurred before the obstruction was discovered."

We think the court was right about this. Appellant seems to rely on 4 Sutherland on Damages (3d Ed.), 3079, to the effect that, if plaintiff has access to the nuisance, or the means or opportunity of avoiding or mitigating the injury it causes, it is his duty to abate it, or to take proper steps to lessen the damage; but the same authority holds that the fact that plaintiff might have abated the nuisance caused by obstructing the ditch, but did not, it being necessary to go upon defendant's land for that purpose, will not affect his right of action or the damages.

As to the other defense, that the drainage system was insufficient, this seems not to be seriously relied upon by appellant in argument. At any rate, the jury was told that there could be no recovery unless there was a finding that defendant had obstructed the flow of water, and the jury was limited, in the allowance of damages, to such as were occasioned by the acts of the defendant.

4. The next point argued is in regard to the instructions as to measure of damages, and the admission of evidence in reference thereto. Under the evidence, the jury could have found that the obstruction was placed in the tiling early in April, 1913. The

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floodings of lands  
and injury to  
soil.

tenant sowed his oats, about 25 acres, about April 8th. At that time, the water drained off the land, and there was no standing water. The heavy rainfall was about May 12th. Prior thereto, the tenant had plowed about 60 acres of land, and about 25 acres had been plowed the previous autumn. The ground, prior to the rain, was dry enough for plowing. Sixty acres had been planted to corn: if there had been no obstruction and no flooding, 50 acres more of land could and would have been plowed and planted to corn. The 60 acres which were planted in corn were finished June 10, 1913. But for the obstruction, it



could and would have been planted considerably earlier than that. Because of the late planting, the corn did not mature, and half of the 60 acres was so wet that it was rendered unfit for crops. There were 165 acres in the farm, less the amount taken out on account of a public road. There was evidence as to the yield of corn and oats on similar land, and the value thereof. Evidence was introduced as to the reasonable value for the use of the farm before and after the flooding. The jury could have found, also, from the evidence, that the permanent effect of the flooding on the land was that the ground was made sour, foul weeds grew, and that alkali was brought out on the low lands as a result of the flooding. The instructions as to the measure of damages are criticised. The damages claimed in the first count of the petition involve different elements: that is, damage to the land itself, and the damage to plaintiff's share of the crop. Appellant contends, first, that Instruction No. 5, relating to the first count, is erroneous, in that it allowed damages on the basis of the whole farm, when it should have confined plaintiff to its recovery for the area actually flooded; and cites *Thompson v. Illinois Cent. R. Co.*, (Iowa) 153 N. W. 174 (not officially reported). But a rehearing was granted in that case, and the second opinion is found in 177 Iowa 328, where, at page 332, the rule is given which conforms to the fifth instruction, the first part of which, relating to the permanent damage, reads substantially thus: That, if the jury should find plaintiff entitled to damage because the water made the land sour, etc., they should allow as damages therefor the difference between the value of the land immediately before the water accumulated on the land and its value immediately afterwards, excluding any consideration of the crops as an element of value.

The remainder of Instruction 5, as to the other elements of damage, reads substantially this way: That, if the jury should find for plaintiff, and that the act of de-

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and injury to  
crops.

fendant prevented the tenant from planting corn on some of the land, or damaged any corn or oats planted, the jury should allow, as damages therefor, the difference between the value of the leasehold interest of the tenant—in other words, the difference between the value of the use of the premises for the term of the lease—immediately before the damage occurred, and the value of the same immediately after it occurred, taking into consideration the right of the tenant to grow and mature the crop, and the right of plaintiff to have two fifths of the crop as rent, and allowing plaintiff only two fifths of the said difference, not allowing more for any part or element of the damage than is claimed therefor. Appellant's complaint of this is that the damages for injury to premises before the crops are planted must be recovered on the basis of injury to the land itself,—that is, the difference in the value of the land before and after the injury, where permanent injury is claimed; and in support of this, it cites *Drake v. Chicago, R. I. & P. R. Co.*, 63 Iowa 302; *Jefferis v. Chicago & N. W. R. Co.*, 147 Iowa 124; *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa 659; *Harvey v. Mason City & Ft. D. R. Co.*, 129 Iowa 465; and some authorities from other jurisdictions. It is perhaps true that the damage in the instant case could have been worked out in that way; but we have said that the rule for the measure of damages in a given case is often one of difficulty, and that it frequently happens that one of two or three rules would be effective, the purpose of the law being to give compensation. We have seen that the court gave the correct rule as to the permanent damage to the land, and it has been held that the measure of damages to a leasehold is the difference in its value before and after the overflow. *Blunck v. Chicago & N. W. R. Co.*, 142 Iowa 146. In that case it was said that, obviously enough, the rule of rental value must gov-

5. DAMAGES :  
flexibility of  
measures.

ern in cases presenting no more than an injury and damage to growing crops. If the thing destroyed, although it is a part of the realty, had a value which could be accurately measured and ascertained without reference to the soil on which it stands, or out of which it grows, the recovery may be the value of the thing thus destroyed. This was the rule given in the instruction. It is true that a part of the land was not put in at all, and we think it is not a case where it was necessary to show the cost of planting, working, and harvesting the crop. The rule given by the instruction authorized the recovery for the difference between the value of the leasehold interest immediately before the damage occurred and the value of the same immediately after it occurred. It is thought by appellant that the

6. DAMAGES:  
double recovery.  
instruction allowed a double recovery: first, to recover for damage to the land itself, and second, a recovery for the use of the land. But we think the instruction is not susceptible of such a construction. As to the permanent damage, the instruction limited the recovery to the damage to the land itself, exclusive of the crop. As said, there were several different elements of damage in the first count, and we think the instruction given permitted the jury to work out justice to the parties, and without prejudice to the defendant.

Another complaint is made of the wording of the instruction, in that it uses the words, "the value of the use of the premises." Cases are cited from other jurisdictions; but there is little, if any, difference in the expression, "value of the use" and "rental value." We have so held. *Alexander v. Bishop*, 59 Iowa 572, 579; *Leick v. Tritz*, 94 Iowa 322.

Evidence of the usual crop yield and its value is proper and admissible, even though the rule for determination of measure of damages is confined, as it was here, to the value

of the leasehold. *Jefferis v. Chicago & N. W. R. Co.*, 147 Iowa 124; *Nelson v. Omaha & C. B. St. R. Co.*, 158 Iowa 81; *Black v. Minneapolis & St. L. R. Co.*, 122 Iowa 32.

8. DAMAGES:  
injury to lease-  
hold interest.

5. The seventh instruction, as to the measure of damages, has reference to the second count. It is conceded that the same rule was adopted by the court as was applied to one of the elements of damage in the first count. So that what we have said as to that disposes of the seventh instruction.

6. Finally, it is thought by appellant that the damages allowed are excessive. Defendant introduced no evidence to rebut appellee's evidence at this point. The argument is that the court will take judicial notice of the fact that farm land in Iowa, such as that flooded, would not rent, under favorable conditions, for \$10 an acre,—that is, that the rental value or value of the use would not exceed that amount,—and that the verdict is more than that for the entire farm. But, under the evidence and instructions, something could have been allowed for injury which was more or less permanent, in addition to the rental value. The estimates of some of the witnesses were that the damages were more than the amount of the verdict. We are not prepared to say that the verdict has not sufficient support in the testimony.

Our conclusion is that no prejudicial error appears, and the judgment is, therefore,—*Affirmed*.

WEAVER, EVANS, and GAYNOR, JJ., concur.

B. AGNES WHALEN, Appellee, v. HARRY V. SMITH et al., Appellants.

**ADVERSE POSSESSION: Hostile Character of Possession—Vacant**

- 1 **Lots.** Adverse possession results from the act of one who, in good faith, and under a deed supposedly carrying title to certain vacant lands, goes upon said land at reasonable intervals, marks its limits with visible monuments, clears it of debris to such limits, and, as occasion may require, asserts his full ownership within said marked limits.

**DEEDS: Construction—Deed to Lot Impliedly Conveying Vacated**

- 2 **Alley.** Owners of lots who consent to the vacation of an appurtenant and separating alley, on the express condition that such vacation will carry to each lot owner title to a proportionate part of said alley, are bound thereby. It follows that a subsequent deed by one of such owners for his particular lot will be construed as carrying title to the grantor's portion of the alley, even though the lot is described by its lot number only.

*Appeal from Polk District Court.*—THOMAS J. GUTHRIE, Judge.

MAY 20, 1918.

SUIT in equity to enjoin defendants from interfering with plaintiff's possession of certain real estate. There was a decree for plaintiff, as prayed, and defendants appeal. The material facts are stated in the opinion.—*Affirmed.*

*Tomlinson & Gilmore*, for appellants.

*Nourse & Nourse*, for appellee.

WEAVER, J.—In the year 1893, one Burleigh, being the owner of a tract of land in the city of Des Moines, platted it into two ranges or tiers of lots, separated by an alley 14 feet in width. Among these lots, one described as No. 9, being 50 feet in width, and extending east and west, was bounded on the west end by the alley above mentioned. On

the opposite side of the alley, and bounding thereon, was Lot No. 16, of the same width. The plat was duly executed, acknowledged, and recorded, and given the name "Sherman Place." As thus platted, the entire property was conveyed by Burleigh to a corporation, which, later, conveyed it to Hoyt Sherman. In 1896, Sherman, who still owned most of the lots, including 9 and 16, united with all the other owners of lots in Sherman Place in a petition to the city council "to declare vacated, and all rights of the city of Des Moines annulled in and to, all of said alley lying between Lots 1, 2, 3, 4, 7, 8, and 9 upon the east, and Lots 24, 23, 22, 21, 18, 17, and 16 upon the west, and the title of the same merged into that of said abutting lots." Thereafter, the city council, by ordinance duly enacted, ordered the vacation of the alley as prayed. Hoyt Sherman died in 1904; and, in the course of the settlement of his affairs, the court ordered the executors of his will to sell said lots. On February 16, 1906, the executors, by their agent, one McCutchen, entered into a contract with plaintiff to sell and convey to her Lot No. 9, Sherman Place, and to make conveyance as soon as the deal was approved by the court. This agreement was evidenced by a writing, stating the terms of sale, and including a stipulation that "the purchaser is to be given possession of the full lot." Pursuant to this agreement, the executors, on May 9, 1906, executed and delivered their deed for Lot 9 to the plaintiff, who still holds the title so conveyed. It is the plaintiff's claim that the property so purchased by her, though described in the deed as Lot 9, included, and was intended to include, not only the area of Lot 9, as originally platted, but also on half the width of the vacated alley abutting thereon. In pursuance of such purchase and understanding, and under claim of right so founded, she alleges that, immediately upon acquiring said property, she took actual possession thereof, including the east one half of the vacated alley

abutting on Lot 9, and for more than 10 years maintained such possession openly, exclusively, and adversely to the claims of all other persons. In August, 1916, the defendants, claiming title in themselves, sought to exclude the plaintiff from the east half of said alley, and thereupon she brought this action, alleging her superior and exclusive title and right thereto, and asking that the defendants be enjoined from disturbing her in her enjoyment of the rights so acquired. The defendants deny the petition, and assert their own exclusive right to the vacated alley to its entire width, and ask that the title be quieted in them against the plaintiff. The trial court, having heard the evidence offered by the respective parties, found for the plaintiff, and the defendants appeal.

The original platting of the property and the subsequent vacation of that part of the alley, at the time and in the manner alleged, are not made a matter of dispute. It is the position of the appellants, however, that the effect of the vacation of the alley was not to vest the title in equal proportions in the owners of the abutting lots, under the provisions of Code Section 919, but to take away the easement in the alley which had been made appurtenant to such lots by the original dedication, and to restore the entire unincumbered title to such alley to Hoyt Sherman, from the trustees of whose estate defendants allege they have acquired title by quitclaim deed. Defendants claim first to have acquired title to Lot 16, with other lots on the west side of the vacated alley, in the summer of 1916. Their deeds to these lots are not shown in the record, but it seems to be assumed in argument that they were from the trustees of the Sherman estate, and we will so consider it. Evidently, this conveyance, like that made the plaintiff, contained no express mention of the alley, but simply described the lots by number. Defendants then sought to procure a deed expressly conveying the alley. One Oleson had acted

as agent for the trustees in selling the lots, and with him appellants say they made a deal by which, for the consideration of one dollar, to be paid to the trustees, who alone could have any shadow of title to the alley (if such title had not already vested in the lot owners), they would quitclaim to the defendant; and at the same time, and as a further consideration to Oleson, who had neither title nor color of title, defendants undertook to convey to him another undescribed lot, on which they placed a value of \$150. The quitclaim deed by the trustees was finally consummated in August, 1915; but the evidence on part of plaintiff tends to show that no effort was made by the defendants to exclude plaintiff from the east half of the alley until August, 1916.

The principal questions discussed by counsel in this court are as follows: (1) The legal effect of the vacation of the alley upon the title to the land included therein; and (2) whether the plaintiff's claim of title may properly be upheld, because of adverse possession by her for the period of 10 years.

I. As the last inquiry, if answered in the affirmative, will be decisive of the appeal, we give it first attention. An examination of the testimony, as shown by the record, satisfies us that the decree below may well be sustained on this ground alone. The testimony fairly tends to show that, promptly upon making the purchase, plaintiff went upon the property, including the seven-foot strip constituting one half the vacated alley, cut the weeds and grass, set posts at the corners of the lot as thus enlarged, had it surveyed and staked, and later graded the level of the seven-foot strip down to the level of the lot generally. She did not build upon the property or occupy it as a home until about two years after she obtained the conveyance, but, during the interim, she was apparently caring for it and preparing it for the building improvement which she ulti-

1. ADVERSE POSSESSION: hostile character of possession: vacant lots.



mately made. Appellants argue, and their defense of this branch of the plaintiff's claim is based upon the proposition, that, until the building of the house on Lot 9, at which time it is shown she caused earth to be taken from the alley and hauled or moved upon the lot, plaintiff did no act and exercised no control over the seven-foot strip now claimed by her which "can possibly be construed as taking or holding adverse possession of any portion of the alley." The point thus made is not supported by the record. To constitute adverse possession, or to set in operation the statute of limitations, does not necessarily require the claimant to live upon the land, or to enclose it with fences, or to stand guard at all times upon its borders, to oppose the entry of trespassers or hostile claimants. It is enough if the person pleading the statute takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general, in holding, managing, and caring for property of like nature and condition. It is manifest that the acts of ownership and dominion necessary to indicate adverse possession of a vacant lot need not and cannot be the same as those which a court or jury might think essential with respect to a lot covered with valuable improvements, or upon which there is a place of residence. If one asserting ownership of a vacant lot goes upon it at reasonable intervals, marks its limits or corners with visible monuments, clears it of brush, grass, and weeds to the limits so indicated, and points it out to his neighbors and friends as his property, it constitutes adverse possession, within the meaning of the law; and, when it is continued without interruption for a period of 10 years, his title becomes unassailable. Measured by this rule, there is little room to doubt that plaintiff is entitled to the relief given her by the court below. That plaintiff's claim of right and of title was asserted and relied upon by her in good faith from the outset, is well substantiated. When she purchased

the lot from the agent representing the Sherman estate, he represented that the purchase carried with it, or assured to her, the half of the alley. The preliminary contract to sell provided that the purchaser was to be given possession of the "full lot." This expression does not clearly indicate any reference to the alley, and no explanation of it is offered by the defendant; but, in view of all the circumstances, the plaintiff's interpretation of the phrase "full lot" as being intended to include the added strip from the alley, is not unnatural. That plaintiff, as well as her grantors, understood that the conveyance to her of Lot 9 gave her title to the lot, not only as originally platted, but also as being enlarged to include half of the alley, is quite clear. She and they may have been mistaken as to the strict legal effect of the conveyance; but, if they believed that by this deed plaintiff acquired the title to the vacated strip, and she, in good faith and under such claim, took and maintained possession for the required period, such possession was adverse, and her claim of right was sufficient to bar the assertion of title by the defendant.

II. The conclusion announced in the preceding paragraph renders unnecessary any disposition of the other question presented. It may, nevertheless, be said that, ad-

2. DEEDS :  
construction :  
deed to lot  
impliedly con-  
veying vacated  
alley.

mitting, for the purposes of the argument only, appellant's contention that, generally speaking, the mere vacation of the alley without vacating the abutting plat of lots

will not change or affect the size or proportion of such lots, and that, in such case, the vacated alley will remain a distinct and separate tract of land, yet there is no statute or rule or principle of law which prohibits the owners of the abutting lots to which the alley is appurtenant from consenting to its vacation, upon condition that, when so vacated, the title to the land included within the alley shall accrue in equal proportions to the several owners of such

lots. In this case, the petition upon which the vacation was ordered states, in express terms, not only the desire and purpose of the petitioners to have the alley vacated, but also that "the title to same be duly merged into that of said abutting lots." Now, while it may be said that the language here employed was inaptly chosen, and that the title to one tract of land cannot, in a legal sense, be "merged" into the title of another tract, the intent and purpose of the petitioners that, upon the vacation of the alley, the ownership of each lot, as originally platted, should draw to it the ownership of a proportionate part of the land relieved from the public easement, thus, in practical effect, extending each lot to the middle line of the alley, are clearly evident. Whether, as a technical proposition, the description in the deeds of the lots so affected by the numbers given them in the original plat, and nothing more, is or is not sufficient to give it effect as a conveyance of the enlarged lot, it cannot be doubted that it will be held to have such effect if it fairly appear that such was the intent of the parties to the instrument. That such was the intent in this instance is not open to reasonable question. It is true, there is no direct evidence of the understanding or intent of plaintiff's grantors. It is shown, however, that their agent assured the plaintiff that she was, by her purchase of Lot 9, getting the one half of the vacated alley abutting thereon. It appears also that, when the trustees deeded Lot 16, on the opposite side of the alley, to the defendants, they described it by number only. So far as shown, they never, at any time thereafter, claimed to have retained to themselves or to the Sherman estate any part of the intervening space formerly occupied by the alley. Sherman himself was a party to petition for vacation of the alley, and must be held to have consented to the condition on which it was ordered. The quitclaim of the trustees for the nominal consideration of one dollar constituted no claim or assertion of title on their

part, and indicates little more than the easy good nature of the average man, who sees no harm in quitclaiming, without money and without price, to a soliciting speculator in doubtful titles, a tract of land in which he neither claims nor has any property right whatever. It is scarcely credible that the trustees understood or believed that, in selling the lots occupied by plaintiff on one side and defendants on the other, they were retaining to themselves or to the Sherman estate the narrow strip between. Had they not quitclaimed, and, at this late day, had sought to occupy that strip to the exclusion of their grantees of these lots, the court would have no hesitation in holding that such assertion of title was inconsistent with both the expressed and implied conditions upon which the vacation of the alley was sought and obtained, and inconsistent with the practical interpretation which both parties placed upon the contract. The defendants, as grantees in the quitclaim deed, occupy no stronger or better position, and their prayer for affirmative relief was properly denied.

The decree below is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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LOUIS WOKOUN, Appellant, v. G. H. JAMESON et al.,  
Appellees.

**VENDOR AND PURCHASER: False Representations as to Value.**

- 1 Representations as to value, made as statements of fact and to be relied on and to induce a contract, furnish ample basis for a rescission of the contract, if such representations prove to be false.

**VENDOR AND PURCHASER: Waiver by Laches. Rescission for**

- 2 fraud must be made within a reasonable time after full discovery of the fraud, or the right will be irrevocably lost. So held where, after such full knowledge, the party held the contract and acted thereunder for more than two years, and then, after an abortive assignment of the contract, attempted to rescind.

*Appeal from Black Hawk District Court.*—H. B. BOIES,  
Judge.

MAY 20, 1918.

THIS is an action in equity, by which plaintiff seeks to rescind a contract and to set aside and cancel 140 promissory notes, aggregating the sum of \$14,000, of which, 128 notes were given by plaintiff to defendant G. H. Jameson, and 12 notes were given to E. J. Hanna, as part payment in the purchase of 35 vacant town lots in the city of Waterloo; and to recover the sum of \$10,000, advanced payments made in said purchase, and interest and taxes since paid by plaintiff. Plaintiff claims that the contract under which said notes were given and payments made was procured by defendants W. R. Jameson and W. P. Soash, as agents for G. H. Jameson, and that they conspired together for the purpose of cheating plaintiff. After a trial upon the merits, the trial court dismissed the plaintiff's petition, and plaintiff appeals.—*Affirmed.*

*Reed, Tuthill & Reed* and *Treichler & Treichler*, for appellant.

*J. W. Arbuckle*, for appellees.

PRESTON, C. J.—Plaintiff resides at Cedar Rapids, and is cashier of a bank there. Prior to the transaction in question, defendant Soash was indebted to plaintiff upon a note in the sum of \$8,000 and interest. It is alleged that, about March 13, 1914, defendant Soash requested plaintiff to go to Waterloo, stating that he had a deal on with W. R. Jameson by which the Soash indebtedness to plaintiff could be paid as part consideration in the purchase of town lots in Waterloo; that thereafter, on March 18th, plaintiff went to Waterloo and met Soash and W. R. Jameson, and a schedule was produced, giving the prices of 35 lots in Rose Hill Addition to Waterloo, amounting to \$24,125; that they represented

to plaintiff that the prices given in the schedule were the fair market values of said lots; that plaintiff was unacquainted in Waterloo, and had no knowledge or information as to the value of the lots, and relied upon said statements as being true. On that date, the parties entered into what is called a preliminary contract for the purchase of the 35 lots at the price stated, and thereafter, about March 25th, there were substituted separate and distinct contracts for each of the 35 lots. Plaintiff alleges that the consideration for said contracts was the cancellation of the Soash \$8,000 note and interest, a deed to 7 lots in Texas, valued at \$300, cash paid W. R. Jameson, \$200, and the execution of the 140 promissory notes; that plaintiff afterwards paid W. R. Jameson, as interest and taxes, the sum of \$772.90, making a total cash payment to W. R. of \$972.90; that plaintiff had confidence in the integrity of W. R. Jameson, with whom he had an acquaintance; that, prior to November 20, 1914, W. R. Jameson assured plaintiff that the lots had advanced in value, and advised plaintiff not to offer the same for sale; that, on November 20, 1914, plaintiff assigned said contracts, through the defendant Soash, to Farmers Land & Cattle Company, of St. Paul, as part consideration for the purchase of land in Wisconsin; and that plaintiff did not discover that defendant's representations as to the value of the lots were false until March 11, 1916, when the Cattle Company refused to carry out their contract and release plaintiff from the payment of said notes, stating that, upon investigation, they found that the lots were not worth the amount of the notes.

The execution of the contracts is admitted, and it is admitted that Soash and W. R. Jameson were the agents for G. H. Jameson. The consideration for the notes is shown to be as claimed. Defendants aver that defendant Soash was discharged in bankruptcy, and the plaintiff's claim against him was of no value. It appears that such is the fact, and that plaintiff had notice of the bankruptcy pro-

ceedings, and filed his \$8,000 claim therein. Plaintiff says, as to this, that Soash afterwards admitted the debt. For further answer, defendants aver that, for more than two years after the making of the contracts and the execution of the notes referred to in the petition, the plaintiff, with full knowledge of every fact and circumstance relied upon by him, or which he may rely upon as a basis for his cause of action, and with full knowledge of the value of the property which he alleges to have been misrepresented to him, continued to hold said contracts and to negotiate for a sale and assignment thereof, and for a sale of the property covered thereby; that, with such knowledge, he paid, or caused to be paid, the interest on said notes and the taxes on the real estate, and continued to exercise full ownership of and control over said property, and to have, during all said period, the privilege and opportunity incident to such exercise of ownership and control for the sale or other profitable disposition thereof, and actually sold and assigned said contracts, in exchange for other property; and that, by reason thereof, he has waived any right which he might or could have had to rescind said contracts, or for the cancellation of said notes. It appears that, after Mr. Soash went into bankruptcy, he undertook to and did settle many of his discharged obligations by negotiating the sale of real estate to his creditors at retail prices, which he was able to procure at wholesale prices, the difference between these prices being applied toward the liquidation of his claim, the creditors assuming the payment of that portion of the purchase price going to the original vendor. Plaintiff was one of the parties to whom Soash submitted this kind of a proposition.

Some other circumstances will be referred to later and in more detail, bearing upon the question of waiver.

1. Elaborate arguments have been made by both sides on the point as to whether an expression of opinion as to the value of property will sustain an action for fraud, plaintiff

1. VENDOR AND  
PURCHASER:  
false represent-  
ation as to  
value.

contending that the rule does not apply, where the representation is intended to be taken as a fact and as an inducement to the trade, and where, as here, plaintiff was a resident of another city and not acquainted with the values of property in Waterloo, and did not have an equal opportunity to know the truth. They contend that, in such cases, the false representations as to value constitute a fraud, and are actionable. They say, too, that the fact that the purchaser does not procure the information which ordinary prudence would dictate will not defeat his recovery when the seller has superior knowledge, and the purchaser relies upon the seller's misrepresentations. They cite, on the first proposition, *Van Vliet Fletcher Automobile Co. v. Crowell*, 171 Iowa 64; *Ross v. Bolte*, 165 Iowa 499; *Mattauch v. Walsh Bros.*, 136 Iowa 225; *Hetland v. Bilstad*, 140 Iowa 411; and other cases. See also the recent case of *Rembe v. Ferguson*, 183 Iowa 29. On the second proposition, they cite *Holmes v. Rivers*, 145 Iowa 702, 709; and the *Hetland* case, *supra*. *Ross v. Bolte*, *supra*, is cited to the point that, where defendants conspired for the purpose of defrauding plaintiff, and did defraud him, each defendant will be liable for the loss sustained.

Upon the trial, four witnesses testified for plaintiff as to the value of the lots, and their estimates range from about \$4,200 to nearly \$8,000. A larger number of witnesses testified for defendants, and their estimates range from about \$14,000 to \$24,000. Defendants contend that the average of all the witnesses, for plaintiff and for defendants, is about \$15,000. Plaintiff contends that there are circumstances which lessen the value of the estimates by defendants' witnesses. We are inclined to the view that, under the circumstances shown by the record, the representations were made substantially as alleged by plaintiff, and that, under our cases, they are actionable. We shall not, however, go into



this question further, for the reason that we are of opinion that the case turns on the question of waiver.

2. Under the record, we are satisfied that plaintiff has waived his right to rescind, because he did not do so promptly after discovering the fraud, or after the means of knowledge were at hand. It appears that, within a few days after these contracts and notes were executed, there were further negotiations between these parties for the purchase by plaintiff of other lots in the same addition and of about the same quality and value, to be paid for, in part, by taking into account an obligation of Soash for \$1,000 on a note given to one Johnson. Pending these negotiations, plaintiff made an entirely independent investigation of the Rose Hill lots and their value, free from any interference by defendants; and, appellees contend that such investigation was unknown to them, and that it was only developed at the trial upon cross-examination of plaintiff himself. We shall not set out all the evidence bearing on this, but plaintiff himself testified on this matter:

"After the deal was made, and prior to April 18, 1914, I was making an investigation of an additional bunch of lots offered me on the Texas deal. They were practically the same lots as those I had already bought. They lay in the same addition, and some, perhaps, adjacent to those that I had already bought; and I was making an investigation with reference to those lots under the proposed Texas deal, or in the Johnson deal, and I concluded, as a result of my investigation, that they would be all right at \$100 per lot less than they were being offered for. I wrote here to different parties. I don't recall who, without looking at my files. I think I wrote to real estate men here in Waterloo about these lots on Rose Hill and about the value of them. I must have got replies expressing their opinions as to the value of the lots. I don't recall how many such letters I wrote and

how many such answers I received. It is just possible I made a trip here, too. The fact is that I inquired of some of the banks, and they said, well, it was a new addition. They were not in a position to say just what those lots would sell for, but they thought that those prices were high. I had a price list for the whole addition, and submitted it to them. I think it was the same price list as the one I had seen and used in connection with my deal with Mr. Jameson, and that I afterwards sent to the Farmers Land & Cattle Company. In making inquiry about those lots, I think I visited the Leavitt & Johnson Trust Company and the Security Savings Bank. I asked them about the values of these lots. They said they did not know; that it was a new addition; that it was hard to place a value on it, but they did not have occasion to make any loans there. I think it was there at that bank where the party with whom I discussed the matter expressed the opinion that the prices were high. I had submitted to the banker this price list. This same opinion was expressed by people at the Leavitt & Johnson Trust Company. I think I inquired of another real estate man, but he was not posted,—the Gardner Land Company. I went out and looked at the lots again, when I was there, and looked the addition over, and it was after I had made that trip and after I had received these letters from real estate men in Waterloo that I expressed the opinion that the price was too high, after deducting \$100. I should imagine I wrote to two or three different people. I don't think I got answers to all of my letters. I think I got two answers. In these letters that I received in reply, they expressed the thought at that time that the prices were high; so that, in less than a month after I made this deal with Mr. G. H. Jameson for the purchase of these 35 lots, I had all the information I could find out by writing letters to real estate men here, and by inquiring of bankers with reference to

these Rose Hill lots,—enough information to turn down the proposition that they made at the time.”

From this it appears, as stated, that plaintiff made the investigation, and that it was his own opinion, at that time, nearly two years before any attempted rescission, that the prices of the lots were too high, by \$100 a lot; and he says that, a month after he made this deal with defendants for the 35 lots in controversy, he had all the information he could find out by writing letters to real estate men and bankers; and that he again visited the property, and refused to take the additional lots. On April 18, 1914, plaintiff wrote Soash on the subject, and, among other things, says that:

“According to information which I have been able to obtain, the lots would be quite high even if \$100 was cut off on each lot.”

This has reference, as we understand it, to the proposed purchase of additional lots. Plaintiff again wrote Soash, on April 22, 1914, to substantially the same effect. After such investigation, he made no complaint, although he had the opportunity when he wrote these letters, and he commenced no suit, but continued to hold the contracts and to exercise such ownership and control of the lots as the contracts gave him.

About November 1, 1914, plaintiff entered into negotiations with the Farmers Land & Cattle Company, which resulted in a contract in that month between them, under which plaintiff turned in his equity in these lots at \$14,000, on a trade for 12,000 acres of Wisconsin land, and plaintiff made the necessary assignment of the contracts in question. Plaintiff took the Wisconsin land at \$12 per acre in this trade; and, up to the time of the trial, he had sold 1,000 acres for \$15,000, on a cash basis. There is but little evidence in the record as to the value of the remaining 11,000 acres; but plaintiff testified, and his counsel claims it is the

only evidence in the record on that question, that the balance of the Wisconsin land was worth \$2 an acre more than he paid. Counsel for appellant argue that it should be taken into account that plaintiff may lose on the remaining land; but we do not understand that there is any evidence of that. In taking from plaintiff the assignment of the contracts in suit, the Cattle Company did not assume their payment, and, after an investigation by them, they did not desire to pay off the notes and take the lots, and so notified plaintiff. The Cattle Company then assigned the contracts back to plaintiff for \$25; but, under the record as we understand it, the plaintiff still has the Wisconsin land. It is true, as claimed by appellant, that Soash received a commission from the Cattle Company in the trade of the Wisconsin land to plaintiff. It is also said by appellant that this trade was negotiated by Soash, who is a defendant; but we are unable to see that it makes any difference whether it was negotiated by Soash or by somebody else.

It is not claimed by appellant in argument that Soash is solvent, or that the \$8,000 note is collectable. Plaintiff is asking to recover a money judgment for this Soash note and the other payments made by him. Appellees contend that plaintiff has been able to recoup his Soash loss and make a nice profit besides, and that he then proposed that defendants take back the lots and give plaintiff back his notes.

After plaintiff made the trade with the Cattle Company, he paid taxes on the lots and interest on the notes given by him, in accordance with his contract with the Cattle Company, and the Cattle Company continued, for nearly a year and a half, in entire control of the lot contracts; and during this time, it was beyond the power of plaintiff to restore to defendants the property acquired of them, had he wished to do so; and this was after plaintiff had made his investigation in April, 1914, as testified to by him, and as before set

out. It should be said that plaintiff claims that he did not know that the value of the lots purchased by him had been misrepresented until after the Cattle Company had refused to pay out on the lots. This suit was brought on May 5, 1916.

There may be other circumstances; but, after reading the record, we are satisfied that, under the law, plaintiff had waived his right to rescind. It is said in *State Bank of Iowa Falls v. Brown*, 142 Iowa 190:

"It is an universal rule that, where one is induced to purchase property by fraud and deceit, he must, within a reasonable time after discovering the fraud, rescind the contract and place the other party *in statu quo*. In other words, he has an election, after discovering the fraud, or after the means of knowledge are at hand, to treat the contract as valid or to rescind, and if he fails to act promptly and to rescind, he will be held to have waived his right to do so." See, also, *Barnes v. Century Sav. Bank*, 165 Iowa 141, 174; *Tidgwell v. Bouma*, 176 Iowa 47, 59; *German Sav. Bank v. Des Moines National Bank*, 122 Iowa 737; and *Moore v. Howe*, 115 Iowa 62. In the last-named case, it was held, as a matter of law, that the retention of a retail stock of goods, and sale therefrom in the ordinary course of business, and appropriating the proceeds thereof for four months after acquiring knowledge of the alleged fraud, preclude a subsequent rescission of the contract, and in that case it was said:

"Such treatment of the property is an unequivocal election to accept the goods and carry out the contract. Taking any benefit or changing the condition of the property bought, after learning of the fraud, has been adjudged a waiver of the right to rescind."

In 9 Cyc. 436, it is said:

"The party defrauded will generally lose his right to rescind if he takes any benefit under the contract or does

any other act which implies an intention to abide by it or an affirmation of it, after he has become aware of the fraud."

In 10 R. C. L. 395, the text reads:

"It is a familiar doctrine that, apart from any question of statutory limitation, courts of equity will discourage laches and delay in the enforcement of rights. The general principle is that nothing can call forth the court of chancery into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. \* \* \* Its object is, in general, to exact of the complainant fair dealing with his adversary; and the rule was adopted largely because, after great lapse of time, from death of parties, loss of papers, death of witnesses, change of title, intervention of equities, or other causes, there is danger of doing injustice, and there can be no longer a safe determination of the controversy."

3. It is thought by appellant that, even though Soash had been discharged in bankruptcy, he thereafter, in writing, by letter, admitted the debt to plaintiff on the \$8,000 note. Cases are cited by both parties pro and con on this proposition. But, in view of our holding on the question of waiver, it is not necessary to determine this point.

On the entire record, we are of opinion that the decree of the trial court is right, and it is, therefore,—*Affirmed*.

WEAVER, GAYNOR, and STEVENS, JJ., concur.

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GUY BARKER, Appellant, v. NATIONAL LIFE ASSOCIATION,  
Appellee.

**CORPORATIONS: Officers and Agents—Tenure—Unlawful Removal.**

- 1 al. A duly elected corporate officer, whose tenure of office is definitely fixed by the articles of incorporation, may not, prior to the expiration of said fixed time, be legally discharged, without cause, by the board of directors.

**CORPORATIONS: Election—Power to Postpone.** Articles of incorporation which distinctly provide that the directors shall, on a specified day, elect the officers of the corporation, are not mandatory, in such sense that the directors may not, on said specified day, postpone such election to a subsequent day.

**CORPORATIONS: Election—Tenure—Holding Over.** An officer of a corporation, by holding over, without re-election, after the expiration of his duly elected term of office, because of the failure of the directors to elect his successor, does not, *ipso facto*, succeed to a full new term, under articles of incorporation which provide "that the term of office of said officer shall be two years, and until his successor is elected and qualified."

**CORPORATIONS: Election—Formalities Necessary.** No particular formality is required, in electing the officers of a corporation, especially when no contest attends the election. On the issue whether the ambiguous proceedings of a board of directors constituted an election, a construction which would lead to invalidity because in excess of legal power in the directors will not be adopted, when another construction is available which is concededly within the powers of the directors.

*Appeal from Polk District Court.*—LAWRENCE DE GRAFF,  
Judge.

MARCH 5, 1918.

REHEARING DENIED JUNE 24, 1918.

ACTION to recover alleged balance of salary due to the plaintiff from the defendant for the unexpired portion of his term as secretary of the plaintiff. There was a trial to a jury. At the close of the evidence, the trial court directed a verdict for the defendant, and the plaintiff appeals.—*Reversed.*

*Dale & Harvison*, for appellant.

*Sidney J. Dillon*, for appellee.

EVANS, J.—The defendant is a life insurance company. In February, 1912, the plaintiff became its secretary, by election in due form. Under the articles of incorporation, his

- term was fixed at two years, and "until his successor is elected and qualified." The
1. CORPORATIONS : officers and agents: tenure: unlawful removal
- articles of incorporation of the defendant company included the following:

"Article VI. *Management.* The board of directors shall have power to adopt all rules, regulations and by-laws necessary for the management of the affairs of the association, in accordance with law and the articles of incorporation, and to amend the same. Three members of the board of directors shall constitute a quorum for the transaction of business, except that it shall require a majority of the members to adopt by-laws and elect officers of the association.

"Article XIX. *Officers.* The officers of this association shall be a president, vice-president, secretary, treasurer, superintendent of agents and medical director, all of whom shall be chosen by the board of directors at meetings to be held on the first Tuesday in February of every second year. The term of office of all of said officers shall be for two years *and until their successors are elected and qualified.* The board of directors may provide for such other officers and agents as it shall deem proper, and shall also fix the compensation of all officers and agents of the association."

The by-laws also included the following:

"Article X. *Officers, Terms and Their Duties.* Section 1. On the first Tuesday in February, 1910, and on the same date every second year thereafter, the board of directors shall elect a president, one first vice-president, one or more vice-presidents, one or more second vice-presidents, a secretary, one assistant secretary, a treasurer, and auditor, a legal director, a medical director, an assistant medical director, a field manager and a superintendent of agents.

\* \* \*

"Article XII. *Board of Directors.* Section 1. Regular meetings of the board of directors for the transaction of



business shall be held at the office of the company in Des Moines, Iowa, on the second Saturday of each month, and the regular time for the election of other officers of the association shall be the first Tuesday in February of every second year. Special meetings may be called at any time by the president or secretary. Three directors shall constitute a quorum for the transaction of business, but the affirmative vote of a majority of the members of the board shall be required in order to elect or carry any proposition presented for consideration at any board meeting."

The regular meeting for the election of officers occurred on February 10, 1914. Some of the officers were elected at that time. On motion, the election of secretary was postponed until the regular April meeting. On April 7, 1914, a meeting was held whereat the following proceeding was had:

"Upon motion, it was ordered that the salary of Guy Barker be fixed at two hundred dollars a month and that his employment be continued at said rate subject to the will of the board of directors."

The regular date for the regular April meeting was April 11th. But the appellees insist that the meeting of April 7th, though a special meeting, was held pursuant to the adjournment of February 10th, and that its proceedings were regular, as such. For the purpose of our discussion, we shall so treat it. Prior to this meeting of April 7th, the plaintiff had been receiving a salary, as secretary, of \$300 per month. Under the articles of incorporation, the power was conferred upon the board of directors to fix the salaries of officers. The plaintiff recognized this power, and accepted the offered salary. Plaintiff continued thereafter as secretary, and received the monthly salary of \$200 until the 15th day of May, 1915. On this latter date, the board of directors declared the office vacant, and proceeded to elect a successor to the plaintiff to fill such alleged vacancy. They also took possession of the office, and excluded the plaintiff therefrom.

It is the contention of the plaintiff that, by the mutual conduct of all parties, he was the secretary *de facto* and *de jure*, and that his term of office, as such, was fixed by the articles of incorporation, for a period of two years from February, 1914. On behalf of the defendant, it is contended that, under the articles of incorporation, the plaintiff was entitled to hold the office after the expiration of the two-year term "until his successor is elected and qualified;" that the plaintiff so continued to hold the office until May 15, 1915; that the directors had the power at all times to elect a successor, and thereby to terminate the incumbency of the plaintiff, and that they did do so on such date; that the action of the directors at the meeting of April 7, 1914, which is above quoted, gave notice to the plaintiff that he was deemed to be holding his office temporarily and at the option of the directors; and that the plaintiff acquiesced therein and is bound thereby.

Plaintiff's contention in argument is that, upon a failure to elect a successor at the February meeting, the plaintiff thereby became a hold-over officer, and that he necessarily

became such for the two-year term provided by the articles of incorporation. We are not disposed to sustain this argument, but are more disposed at this point to the views of the appellee, that the provision as to the date of election is not mandatory, in the sense that the directors might not postpone action and thereby perform their duties of election upon the later date. *Beardsley v. Johnson*, 121 N. Y. 224 (24 N. E. 380). Nor do we think that the mere holding over by

the official under such circumstances would entitle him to a two-year tenure. It was clearly the contemplation of the articles of incorporation that the practical operation

of the company might require a temporary holding over of an officer after the expiration of the two-year term, and be-

2. CORPORATIONS:  
election: power  
to postpone.

3. CORPORATIONS:  
election:  
tenure: hold-  
ing over.

fore the election and qualification of his successor. In this case, the directors, at the February, 1914, meeting, did postpone the election of secretary until the April meeting. We

think they had power to do so. Coming forward, then, to the April meeting, they had power then and there to elect a secretary.

4. CORPORATIONS:  
election:  
formalities  
necessary.

They doubtless had the same power of further postponing action to a future date. What did they do? It is the contention of the appellee that, at such meeting, the directors, in effect, postponed again the election of secretary to some future date, and that they reduced the tenure of the plaintiff as secretary to the will of the board of directors. The determination of this question involves both the power of the board of directors under the articles of incorporation and the fair construction of the terms of the resolution actually adopted by them. The question of the election of secretary was not postponed to a future date, unless such is the effect of the motion which we have above quoted. The subject of the election of secretary does not seem to have ever received the consideration of the board of directors at any future meeting until that of May, 1915. The articles of incorporation conferred the power upon the board of directors to fix the salaries of all officers. They were within their power, therefore, in fixing the salary of the secretary at \$200 in lieu of \$300. The same articles of incorporation fixed the tenure of office at two years. Nowhere did they confer power upon the board of directors to control the tenure of the officers which they might elect. This fixing of the tenure of the office was made a part of the fundamental policy of the corporation. The situation confronting the directors, therefore, at their April, 1914, meeting, was that they had power to elect the secretary, but they had no power to limit the tenure, by holding it subject to their will. This fact has its importance, as bearing upon the proper construction to be put upon the language

of the motion adopted. The last clause is, "subject to the will of the board of directors." Does that mean that the tenure of the office was to be subject to the will of the board of directors, or that the *rate* of compensation should be subject to the will of the board of directors? The latter would be within their appropriate power; the former would exceed their authority. In our judgment, the motion of April 7th should be construed as fixing the salary of the secretary at \$200, subject to still further change in the future.

In no view can it be said, therefore, that this motion had the effect of reducing the tenure of office of the secretary. What was the effect of this motion upon the question of electing a secretary? This was the postponed meeting at which the election was to be had. In the absence of contending candidates, perfection of formality was not essential to a valid election. This motion carries in it a recognition of the plaintiff as secretary. It, in effect, tenders him a reduced salary of \$200 per month. He accepted the same, and the subject of electing his successor was thereby dropped. He qualified by giving a new bond at the expiration of his existing bond. To be more accurate, the company qualified him by obtaining such new bond. It did this in pursuance of its custom of bonding its own officers at its own expense. It so bonded the plaintiff as its secretary, following this meeting of April 7th. At its April, 1915, meeting, the board of directors appointed a committee to confer with the plaintiff and to request his resignation. This action was consistent with the view that they had made him their secretary at their April, 1914, meeting. In the light, therefore, of the articles of incorporation, and in the light of the conduct of the directors and the plaintiff following the meeting of April 7, 1914, we are constrained to the view that the action of the directors at the April 7th meeting, though very informal and indefinite, was a sufficient election of the plaintiff as secretary, especially in the absence of any contest of candi-

dates. If we are correct in this view, it follows that his tenure necessarily extended to the end of the two-year period fixed by the articles of incorporation.

In the absence, therefore, of proper grounds of removal for cause, the directors were not justified in declaring a vacancy, or in excluding the plaintiff from his office. No grounds of removal for cause are contended for in this record. The trial court erred, therefore, in directing a verdict for the defendant, and its judgment is—*Reversed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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SARAH J. CASADAY, Appellant, v. CHARLOTTE J. BICKFORD  
et al., Appellees.

**DEEDS: Nominal Consideration and Marked Mental Impairment.**

Want of consideration is not, of itself, sufficient ground for setting aside a completed conveyance, but such want of consideration plus the marked mental impairment of the grantor—*of which grantee had full knowledge*—may demand such cancellation.

*Appeal from Washington District Court.*—HENRY SILWOLD,  
Judge.

JUNE 24, 1918.

SUIT in equity to set aside a deed, it being averred in the petition that such deed was obtained from the plaintiff by defendants by fraud and undue influence and without consideration, and while the plaintiff was in a weakened mental condition. The defense was a general denial, and an averment of adequate consideration received by the plaintiff. There was a decree dismissing the petition, and the plaintiff has appealed.—*Reversed and remanded*.

*Spence & Beard* and *W. M. Keeley*, for appellants.

*Chas. A. Dewey*, *W. H. Butterfield*, *H. M. Eicher*, and *C. C. Wilson*, for appellees.

EVANS, J.—The deed in question was executed on October 4, 1915. This suit was begun by the plaintiff as grantor therein on October 24, 1915. Later, there was a substitution of her guardian as plaintiff, and still later, a substitution of her executor. The plaintiff, Sarah J. Casaday, was an unmarried woman. At the time of the execution of the deed, she was 76 years of age. The property conveyed by the deed was her home, which consisted of a house and a half lot situated in the town of Washington, Iowa, and worth from \$1,200 to \$1,600. She had purchased this home 15 years before, and had lived therein ever since, up to the time of such conveyance. She lived alone. During her active life, her occupation had been that of a housekeeper for a prominent family in Denver, Colorado. Her immediate family consisted of a brother, residing in Ringgold County; two sisters residing in Brighton, Iowa; and one sister residing in Texas. Her means of livelihood consisted of the property in question and \$3,700 for which she held the note of her brother. The grantee in the deed complained of was Charlotte J. Bickford. She is the wife of her codefendant, Elmer Bickford. Mrs. Bickford was engaged, to some extent, in the business of renting her rooms to roomers. She lived neighbor to the plaintiff for five years next preceding the date of her conveyance. She was a kind neighbor, and had shown thoughtful consideration for the plaintiff in times of more or less need. In times of sickness, she had carried meals to her. This had occurred on two or three occasions in the last three or four years. These kindnesses were fully appreciated by the recipient. In 1915, the plaintiff had reached a considerable degree of senility. Arterial hardening was marked, and she was afflicted with heart, kidney,

and bladder trouble. In May, 1915, she had an illness which confined her for two or three weeks or more, and which left its impress upon her thereafter. There is practical unanimity in the evidence that there was a noticeable change in her appearance and conduct after that time. Previous thereto, she had been a considerable reader of papers. She had also been interested in church work, and had been a regular attendant upon church services. After her illness, she ceased the reading of the papers, and ceased attendance upon church services. These circumstances of themselves are not greatly significant, but they bear quite importantly upon what followed. On October 1, 1915, while she was away from home and in the business part of the town, she collapsed, and fell unconscious to the sidewalk. She was taken up and revived, but was unable to speak for a half hour or more. She recovered sufficiently to walk to her home, by a little aid from others. On the day following, she recited to her friends her experiences of the evening before. She had become lost in her own home, and was unable to find her own bed. She said she was "turned around," and that she slept on the floor. The next forenoon, she was out in her flower garden, picking flowers for a sick neighbor. She had had no breakfast, and this was supplied by one of the neighbors. On the afternoon of this day, Mrs. Bickford took her to her home, to care for her. This was on Saturday. On Monday, October 4th, the deed in question was executed. A notary came, at the request of Mrs. Bickford, and drew the deed and supervised its execution. The deed recited a "consideration of the sum of five dollars and other valuable considerations, including services rendered in hand paid by Charlotte J. Bickford."

The contention of the plaintiff appellant, generally stated, is that the grantor was in a weakened mental condition, and unable to fully comprehend the nature of her act, and that the grantee knew it; that the conveyance carried

only a nominal consideration; and that the grantee took advantage of the weakened condition of the grantor and her dependence upon the grantee, for the time being, to obtain from her the conveyance, which was essentially improvident.

The contention of appellee concentrates upon two general propositions: (1) That want of consideration is not a ground for setting aside a completed conveyance; (2) that there was a good and sufficient consideration in an undertaking by Mrs. Bickford to care for Miss Casaday for the rest of her life, she having then an expectancy of about five years.

It must be found, upon this record, that there was serious impairment of the mental condition of the original plaintiff, at the time of the execution of such conveyance. Whether the impairment was such as to render her wholly incapable to transact any business at that particular time would be a somewhat different question, which we do not find it necessary to determine. Contracts of persons of impaired mental condition are often sustained, where they are entered into innocently by the other party, and where a fair consideration is found. It is true, as contended by appellees, that want of consideration is not, of itself, a ground for setting aside a completed conveyance. If it were, then even a completed gift would become always subject to revocation. The fact remains that, where marked impairment of mental condition is shown, the question of fair consideration becomes a very important and often controlling circumstance, as bearing on the question of fraud, either actual or constructive. The argument of appellee that an undertaking to care for the grantor for the rest of her life was a good and fair consideration, presents the most plausible ground upon which this conveyance could be sustained. But we are unable to find in the record a word of evidence to sustain it. It does not appear that Mrs. Bickford ever bound herself, either orally or otherwise, to such an undertaking. On the



contrary, it affirmatively appears from the record that her attitude has been a guarded one in that regard, and that she has always refrained from committing herself to such an undertaking. It does not affirmatively appear that there were any negotiations concerning the conveyance in advance thereof. It does not appear that Mrs. Bickford, either before the making of the deed or afterwards, agreed to care for the grantor during life. On the contrary, her attitude at various times quite contradicted such an inference. As noted, the deed recites a completed consideration received. To inquiries made by the relatives of the grantor, at about the time of her departure from the Bickford home, Mrs. Bickford stated that she had paid for the property. In her answer, filed herein during the lifetime of the original plaintiff, she recited the alleged consideration as follows:

"At the time of the execution of said deed and before, and a long time thereafter, the defendants furnished and continued to furnish and provide said Sarah Casaday with care, maintenance, and support, and thereby paid the full consideration for the property; and they have at all times been ready, willing, and able to perform all their obligations in reference thereto, and so informed said Sarah Casaday, and she well knew the same. The contract and arrangement with said Sarah Casaday in reference to matters involved in this suit were her desire and for her best interest, and the plaintiff and those joining with him, and the intervenors and those joining with them in this suit, forcibly, wilfully, and against her will and the will of these defendants, deprived said Sarah Casaday of some of her rights therein. These defendants have made and placed improvements on the property conveyed by said deed, and made the property much more valuable thereby."

If there was, in fact, an existing agreement for the care of the grantor for the period of her life, then the foregoing answer would have to be construed as an intentional evasion

by the defendant from committing herself thereto. Shortly after the grantor left the home of Mrs. Bickford, the latter caused a letter to be written and to be served by the sheriff upon the grantor, which was as follows:

"I desire to carry out my arrangements with you and perform every obligation just as we agreed. Can you not come back and live with me, according to our arrangements? It is not possible for me to come to see you, but I send this to let you know that I have not forgotten you, and am anxious to do what I can for you. (Signed) Mrs. E. A. Bickford."

This was served upon Sarah J. Casaday on November 2, 1915. The foregoing letter implies the existence of an obligation to carry out arrangements, but the defendant did not therein commit herself to any statement of her understanding as to what the arrangement was.

It is to be recognized that, as a witness, Mrs. Bickford would have been under the inhibition of the statute from testifying to personal transactions with a grantor since deceased. She was under no such disability, however, in the framing of her pleading and her letter. Moreover, she testified freely as a witness, in disregard of the statute, without offering any testimony in support of this alleged consideration. The only reference thereto is contained in the last question and answer of her redirect examination, which were as follows:

"Q. Have you, at all times since, been able to comply with your agreement to care for and keep Sarah Casaday?  
A. Yes, sir, and have at all times since then during her lifetime been willing to do so, if she had come to my house."

As against her, an inference might properly be drawn from the foregoing that she had entered into such an undertaking, but she is not entitled to build her proof of consideration upon evidence quite so scant and vague. It further appears, without dispute, that, after receiving the deed, Mrs.

Bickford took possession of practically all the contents of the house, including the grantor's personal assets. These were the note of the brother and a certificate of deposit. She kept these until after this suit was begun. This conduct indicated that she herself regarded her grantor as not capable, for some reason, to care for the same. It appears, also, that the notary who prepared the deed advised that, in view of the circumstances, witnesses to the same had better be procured. Two witnesses were later procured.

A paving tax had been levied upon the property. Two hundred dollars of this tax was unpaid at the time the deed was executed. This amount was paid by or on behalf of the grantor herself, about the fifteenth of October, while she was at the home of Mrs. Bickford.

We reach the conclusion that it cannot be said, under the pleadings and the evidence, that there was anything more than a nominal consideration for this deed; that, in view of the impaired mental condition of the grantor, and the circumstances under which the deed was obtained, it cannot be sustained as a gift; that the deed was, therefore, clearly an improvident one, and that it was received by the grantee with full knowledge of the impaired mental condition of the grantor. The grantee expended something in repairs and, later, in taxes. She also testified that her care of the grantor for three weeks was worth \$10 a week. All this is tendered to her by the plaintiff, and she will be allowed to take the same under the tender. The decree dismissing the petition must be reversed.

In view of the decree below in favor of the defendant, she has doubtless continued in possession. The evidence in the record is sufficient for an accounting, both for rentals received and expenses incurred up to the time of the trial below. The cause will be remanded to the district court for an accounting from such date to the present. The defendant will account for rents received, and she will be entitled to

deduct therefrom appropriate expenditures incurred for taxes and betterments.—*Reversed and remanded.*

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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M. N. CLARK & COMPANY, Appellee, v. M. E. MONSON,  
Appellant.

**BROKERS: Compensation—When Earned—Evidence.** Evidence re-  
1 viewed, and giving it the most favorable construction which,  
in reason, could be given to it, held sufficient to present a jury  
question on the issue whether the broker was the procuring  
cause of a sale.

**WITNESSES: Contradictory Statements Out of Court.** A witness  
2 who, on cross-examination, denies having made certain mate-  
rial statements out of court contradictory of his material state-  
ments in court, may, as a matter of right, be required to state  
what he did state out of court.

**PLEADING: Answering Over.** Error in overruling motion to strike  
3 and to divide petition into counts is waived by answering over.

*Appeal from Hardin District Court.*—R. M. WRIGHT, Judge.

MARCH 7, 1918.

REHEARING DENIED JUNE 24, 1918.

THE plaintiffs and appellees had verdict for a commis-  
sion which they claimed was due for aiding in a sale of land  
made by the defendant, and defendant appeals.—*Reversed  
and remanded.*

*Williams & Huff*, for appellant.

*E. H. Lundy*, *Dean W. Peisen*, and *W. H. Soper*, for  
appellee.

SALINGER, J.—I. Reduced to its lowest terms, one  
claim of the plaintiffs' is an agreement that defendant was  
to pay them \$2.00 an acre "upon all lands that the defen-

dant might be able to sell to any person or persons either upon contract or by deed, if such person were brought to the said Monson by the plaintiffs or were what is commonly known as the customers of plaintiffs or buyers produced by plaintiffs." It is alleged that, pursuant to said contract, the plaintiffs did find one Hundebly as a buyer or purchaser of land, who purchased a certain quarter section of land from defendant. The ultimate claim of the appellees is, there was an agreement whereby plaintiffs were to receive \$2.00 an acre commission upon all lands which defendant might be able to sell to persons "brought to him" by the plaintiffs.

On the complaint that the plaintiffs had no case to go to the jury, the plaintiffs are entitled to the most favorable construction that may in reason be drawn in their favor from all the testimony. Can it be said there is no evidence that plaintiffs did any bringing to the defendant which was in any way instrumental in bringing about the sale which defendant made to Hundebly? True, the plaintiffs did not take Hundebly to Elmore, where the defendant lived and was doing his selling. Hundebly went there to meet one Olson, for the purpose of looking at some land which Olson owned, near Elmore. Hundebly was delayed in reaching Elmore; and, when he finally found Olson in the defendant's office, Olson informed Hundebly that he, Olson, didn't have much time, that he would like to make his train home, and if he did so, they had only about an hour; whereupon Hundebly suggested that they get an auto and go out to see Olson's land. Olson found the plaintiffs and induced them to furnish their car to take the parties out to look at the Olson land. The plaintiffs occupied the front seat of the car. Neither on the way out or back did the plaintiffs say anything to Hundebly about a purchase of any land. Up to this point, plaintiffs make no case. The question is as to

what occurred after they returned to Elmore. There is a dispute as to what happened then, but the jury settled it in favor of the contention of the plaintiffs. The testimony for them is that, after the parties reached Elmore, one of the plaintiffs asked Hundebly whether he would be interested in a raw quarter of land which was, at the time, being offered for sale by defendant; and Hundebly said he would be interested. The plaintiff then told Hundebly the plaintiff was working with defendant, and would go down to his office. On the way to the office, they met defendant, talking with some men. One of the plaintiffs called Monson aside, and introduced him to Hundebly. The defendant sold this quarter to Hundebly.

In a letter which closed the correspondence which is relied upon to be the contract between the parties, it is stated that the commission is to be paid on lands sold, which are included in a list sent in this letter. But it is to be added the same letter states that the list is only a partial one of those the defendant had to offer, and it may fairly be said, upon the whole record, that plaintiffs should not be defeated merely because the land on whose sale they claim commission was not included in any list that the defendant sent to them.

The jury could have found that defendant made his sale without any help from the plaintiffs. But we are not prepared to say that its finding to the contrary can be interfered with.

II. One Winterfield, a witness for plaintiff, denied having made statement out of court to the effect that he had mistakenly testified, on a former trial, that the person introduced by plaintiff to defendant was Hundebly; and that, in truth, he did not know who the person was that was introduced. He was thereupon asked to state what it was he had said out of court. He was not allowed to answer,

2. WITNESSES:  
contradictory  
statements  
out of  
court.

on the objection that it was not cross-examination. The rights of the plaintiffs rest practically upon whether they did introduce the man to defendant who bought of defendant. The witness had given testimony on this trial that plaintiffs did introduce this man to defendant. For aught we can know, this testimony turned the verdict. It was certainly cross-examination to show the witness had stated he did not know who the person was that was introduced. So it all narrows down to whether the right to cross-examine was at an end, the moment the witness declared categorically that he had made no such statement. We think it was cross-examination to have the witness tell the jury, not only his construction of what he had said, but, as well, to have him state, if he would and could, what he *had* said. Had he told the jury what he actually had said, they might have found therefrom an admission he did not know who it was that the plaintiffs introduced to defendant. It was legitimate cross-examination to have the witness narrate what he had said, in order that the jury might determine, from the statement of it, whether or not, notwithstanding the opinion of the witness to the contrary, it proved the witness did not have that knowledge on a material point that he was professing to have.

III. There are a number of assignments complaining of rulings, denying motions to strike, and to divide and number, and the like. They are not tenable, because the defendant answered. *Coakley v. McCarty*, 34 Iowa 105; *Kline v. K. C., St. J. & C. B. R. Co.*, 50 Iowa 656; *Heiman v. Felder*, 178 Iowa 740.

IV. Many other errors are complained of, which complaints are either untenable or are errors not likely to be committed upon a retrial; and we give them no further consideration.

3. PLEADING :  
answering  
over.

For this error in limiting the cross-examination, as was done, the cause must be—*Reversed and remanded*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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DES MOINES BREWING COMPANY, Appellant, v. POLK  
COUNTY, Appellee.

**INTOXICATING LIQUORS: Mulet Tax—Wholesale Dealers.** A

1 wholesale dealer in intoxicating liquors is liable for the payment of the so-called "Mulet Tax" equally with a retailer. In other words, the term "penalty," as employed in Sec. 2456, Code, 1897, does not embrace the "mulet tax." (See Secs. 2382, 2432, 2447, 2460, Code, 1897.)

**TAXATION: Recovery of Tax Paid—Mulet Tax.** The so-called

2 "mulet tax," provided by the Intoxicating Liquor Act (Chap. 6, Title XII, Code, 1897), is not a "tax," within the terms of Sec. 1417 of said Code, which provides for the repayment of illegally exacted "taxes."

**INTOXICATING LIQUORS: Mulet Tax—Avoidance.** The proce-

3 dure provided by Sec. 2441 *et seq.*, Code, 1897, for contesting the imposition of the so-called "mulet" tax, is exclusive of all other procedure and remedies.

*Appeal from Polk District Court.*—LAWRENCE DE GRAFF,  
Judge.

JUNE 24, 1918.

ACTION by the plaintiff to recover from the defendant county the amount of certain mulet taxes heretofore paid by it, on the ground that such taxes were illegally exacted. There was a demurrer to the petition, and the plaintiff has appealed.—*Affirmed*.

Oscar Strauss, for appellant.

Ward C. Henry, Arthur T. Wallace, A. G. Rippey, and  
Louis Cohen, for appellee.



EVANS, J.—I. The plaintiff was formerly a manufacturer of spirituous, malt, and vinous liquors, and operated its manufacturing plant in Polk County. It seeks to recover the amount of the mulct taxes so paid, covering the years 1908 to 1915, inclusive. The action is predicated upon the theory that no mulct tax was properly collectible from a manufacturer of intoxicating liquors, unless such manufacturer sold liquors at retail. This contention is predicated upon our statutory provisions pertaining to the mulct tax and to the manufacturing of intoxicating liquor. Reliance is had upon Section 2456 of the Code, which contains the following:

1. INTOXICATING LIQUORS:  
mulct tax:  
wholesale  
dealers.

“Any person, partnership or corporation \* \* \* manufacturing or selling any spirituous, malt or vinous liquors at wholesale and to dealers only \* \* \* shall be exempt from any and all *penalties* now provided by law for manufacturing, selling or transporting spirituous, malt or vinous liquors.”

Code Section 2460 provides:

“Any person, partnership or corporation operating any brewery, distillery or place where wine is manufactured, permitting any drinking of such products or selling the same at retail upon the premises of any such manufacturing establishment, shall forfeit the exemption hereby contemplated to be granted.”

The argument is that the statute distinguishes between the manufacturer who sells at wholesale and the dealer who sells at retail, and that the mulct tax was intended to be applied to the retailer only. Attention is directed to that provision of Section 2456 whereby the manufacturer is held “exempt from any and all *penalties* now provided by law for manufacturing, selling,” etc. It is argued that the mulct tax is a *penalty*, and that, by the foregoing provision of the statute, the manufacturer is necessarily exempted therefrom.

The real question which is sifted out of the argument is whether the word "penalty," as used in Section 2456, is intended to include the mulct tax.

It is true, in one sense, that the mulct tax is a burden or *penalty* upon the liquor business. In another sense, it is the very reverse of that, in that it operates to bar "penalties" to which the dealer would otherwise be subject. If the word "penalty," in Section 2456, is used therein in the latter sense, then the argument of appellant falls. The basic section of our prohibition statute is Code Section 2382, as follows:

"No one, by himself, clerk, servant, employee or agent shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, *manufacture*, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employee or agent engaged or aiding in any violation of this chapter shall be charged and convicted as principal."

Other provisions of the statutes provide *penalties* for the violation of the foregoing. The rigor of the foregoing statute has been somewhat mollified by the so-called mulct tax provisions. The basic section pertaining to this tax is Section 2432, Code, 1897, and is as follows:

"Every person, partnership or corporation, except persons holding permits, carrying on the business of *selling or keeping for sale intoxicating liquors*, or maintaining a place where intoxicating liquors are sold or kept with intent to

sell, shall pay an annual tax, to be called a 'mulet tax,' of six hundred dollars, in quarterly installments as hereinafter provided, which tax shall be a lien upon the real property wherein or whereon the business is carried on, or where the place for selling or keeping for sale is maintained, from the time each installment of tax as hereinafter provided shall become due and payable. In case the person carrying on the business of maintaining the place is a different person from the owner of the real property wherein or whereon the business is carried on or the place maintained, then the tax shall be payable by the person conducting such business or maintaining such place. But such owner may pay such tax at any time after the same becomes due and payable for the purpose of releasing his property therefrom. Any permit holder selling intoxicating liquors as a beverage shall pay the tax provided for in this section."

It will be seen that the foregoing section, by its terms, applies to *every person*, etc., carrying on the business of selling or keeping for sale, etc. Sections 2456 to 2460, inclusive, impose additional limitations upon the manufacturer. He is permitted to manufacture and to *sell* at wholesale. He is not permitted, under any circumstances, to *sell at retail upon the manufacturing premises*. He cannot acquire this right even by paying the mulet tax. He cannot escape the mulet tax by relinquishing such right. It does not follow that he may conduct the manufacturing and wholesale business without paying the mulet tax. On the contrary, every provision of the statute pertaining to such tax applies in terms to the manufacturing seller, in the same manner as it does to any other seller.

Code Section 2447 is as follows:

"Nothing contained in this chapter so far as it relates to the mulet tax shall be in any way construed to mean that the business of the sale of intoxicating liquors is in any way legalized, nor as a license, nor shall the as-

assessment or payment of any tax for the sale of liquors as aforesaid protect the wrongdoer from any *penalty* now provided by law, except as provided in the next section."

The next section, 2448, specifies the conditions which must be complied with, in order to render the mulct tax a bar to prosecution. Sections 2447 and 2448, taken together, provide that the payment of the mulct tax under the statutory conditions shall operate to protect the seller of intoxicating liquors from any *penalty* now provided by law. Clearly, the word "penalty," in this connection, does not include the mulct tax itself. We think it clear that the word "penalty," as used in Section 2456, is used in precisely the same sense as it is used in Section 2447. The appellant brings to our attention the discussion of the opinion in *Guedert v. Emmet County*, 116 Iowa 40, wherein the mulct tax is referred to as a "price or penalty" set upon the saloon keeper's business. We see little aid for the appellant in this citation. The language thus used was entirely appropriate to the question there under discussion. The mulct tax is an anomaly in the law. It is difficult to give to it a logical classification. It is both a tax and not a tax; a penalty and not a penalty; a bar to prosecution, but not a justification. It usually involves, therefore, some struggle of speech to deal with it. Appellant cites, also, *Orke v. McManus*, 142 Iowa 654, and *Sowles v. Martens*, 160 Iowa 580, as recognizing a distinction between wholesale and retail selling of liquor. There is a distinction recognized in the statute, but it furnishes no aid to the position of the appellant. We have examined the opinions in the cited cases, and find nothing in either opinion that aids the contention of the appellant. Moreover, we have heretofore held directly that the storage warehouse of a manufacturing company was subject to mulct tax. *In re Taration Des Moines Union R. Co.*, 137 Iowa 730. This holding was not based upon any assumption that the manufacturing company was selling at retail.

This holding was clearly foreshadowed, also, in *Bell v. Hamm*, 127 Iowa 343, and *State v. Miller*, 114 Iowa 396.

While it is true, therefore, that the statute recognizes a distinction between sale at wholesale and sale at retail, in that the manufacturer may sell at wholesale, but may not, under any circumstances, sell at retail, yet the fact remains that the manufacturer may not sell even at wholesale, without compliance with the provisions of the mulct statute, and that he comes within the sweeping provisions of the prohibitory statutes, which prohibit every person from selling or keeping for sale intoxicating liquors to be used as a beverage. This prohibition has its qualification in the mulct statute. Without the mulct statute, the manufacturer could neither sell nor even manufacture. By compliance with the conditions of the mulct statute, he may do both. The basic condition of the mulct statute is the payment of the mulct tax.

II. There is a further conclusive reason why the plaintiff could not recover in this case, even though the mulct tax be deemed a penalty, within the meaning of Section 2456.

Treating the tax as a penalty, the plaintiff paid it for many years, knowing it to be such. True, it avers that it paid the same under protest. But, in the absence of statute, the plaintiff could not thereby create and keep alive successive causes of action against Polk County. The tax was levied by the state. Its collection and distribution were obligatory upon the county officials. The statute relied upon by the plaintiff as authorizing the maintenance of this suit is Code Section 1417. This section provides for a "refund to the taxpayer" of any tax found to be erroneously or illegally exacted or paid. Was the plaintiff a taxpayer, and was the mulct tax a tax, within the meaning of Section 1417? This section is a part of the chapter on the collection of taxes. The taxes thus dealt with in such chapter are property taxes,

2. TAXATION: recovery of tax paid: mulct tax.

which are levied pursuant to assessment of property. That the mulct tax was not included within the contemplation of that chapter was held in the *Des Moines Union Railway* case, *supra*. It was there held that, where the assessment of the mulct tax had been omitted, it was not within the power of the county treasurer to assess the same, under the provisions of Section 1374.

It necessarily follows that Section 1417 does not authorize a suit by the plaintiff to recover mulct taxes paid.

If a right of action were permitted in such a case, either by legislation or by judicial construction, it would necessarily be subversive of the entire legislation pertaining to

the sale of intoxicating liquors. When a mulct tax is assessed against a place, it implies a charge by the state that intoxicating liquors are there kept for sale to be used as a beverage. If the person carrying on such business may pay the tax, even under protest, and then, after many years, bring suit to recover the same, on the ground that he did not, in fact, have in his possession intoxicating liquors for sale to be used as a beverage, or that he had not engaged in any sale and was not intending to do so, then the public authorities are put under the necessity of preserving indefinitely the proofs upon which they have acted in making the assessment. Such proofs would necessarily involve the testimony of witnesses who, though available then, might not be available years thereafter. The facts which would properly subject a person to an assessment of the mulct tax involve the guilt of his violation of the prohibitory law. If the trial of such an issue could be postponed for many years, by a present payment of the tax, and the issue be raised thereafter at any time at the will of the dealer in intoxicating liquors, the enforcement of the prohibitory law would become a farce. The statute provides the method of contesting the imposition of the mulct tax. It is adequate to the pro-

3. INTOXICATING  
LIQUORS:  
mulct tax:  
avoidance.

tection of the innocent. We are clear that it is not open to a person who pays the same to raise the issue later, in the manner presented herein. The demurrer to the petition was properly sustained, and the order is—*Affirmed.*

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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MARCO FERINAC, Appellant, v. ITALIAN IMPORTING COMPANY et al., Appellees.

**PRINCIPAL AND AGENT: Negligence.** One may not be held  
 1 liable for the results attending the negligent act of another when, at the time of such acts, such negligent person was acting solely for a third party, even though, at times prior thereto, such negligent person had acted for the one sought to be held liable.

**NEGLIGENCE: Unhitched Horse.** Evidence reviewed, and held  
 2 sufficient to present a jury question on the issue of negligence in leaving a horse unhitched in a private yard adjacent to a public street.

*Appeal from Polk District Court.*—WILLIAM MCHENRY, Judge.

JUNE 24, 1918.

ACTION for personal injuries sustained by a minor. At the close of plaintiff's evidence, there was a directed verdict for the defendant, and the plaintiff appeals.—*Affirmed in part and reversed in part.*

*Jas. A. Merritt*, for appellant.

*Miller & Wallingford and Parker, Parrish & Miller*, for appellees.

EVANS, J.—The plaintiff, a child three years of age, was injured in a collision with a horse and wagon which were not in charge of a driver. The petition alleged that the horse and

1. PRINCIPAL  
AND AGENT:  
negligence.

wagon were the joint property of the defendants and that the injury to the plaintiff resulted from the negligence of a servant of the defendants. The particular negligence specified was that one Santo, the alleged servant, had gone to the home of the plaintiff, upon business of both of the defendants'; that the residence of plaintiff's parents was situated within a fenced enclosure, or yard; that Santo passed through the gate, and failed to close the same; that he left his horse standing near the gate without hitching the same; that the plaintiff child passed through the open gate into the street; and that the unhitched horse started on a trot down the street, running over the child in its course. The motion for a directed verdict was sustained, on the ground that there was no evidence that Santo left the gate open; that there was no evidence that he left his horse unhitched; nor any evidence that it would have been negligent to leave the horse unhitched; and that, as to the defendant the Italian Importing Company, there was no evidence that Santo was the servant of such defendant. The injury happened in the early afternoon. There was a wedding party at the house at the time. Some of the guests were present and others were arriving. There were "kids outside." Whether the "kids" were guests or whether they were there for ulterior purposes does not appear. Some refreshments in the form of beer and whisky had been purchased by the groom for use at the wedding dinner. The errand of Santo was to collect the bill for the refreshments. The Italian Importing Company was engaged in the grocery business. The defendant Dapolonia was the president of that company. He was engaged on his own account in the liquor business. He sold the refreshments to the groom. The evidence is undisputed that the horse and wagon belonged to him and that Santo was his servant. It appears, also, that Santo made deliveries, at the direction of his em-



ployer, at various times for the Italian Importing Company. His business at the home of the plaintiff, however, was exclusively that of his employer Dapolonia. So far, therefore, as the defendant Italian Importing Company is concerned, the verdict was properly directed, on the ground that Santo was not its servant, and was not engaged upon its business at the time of the alleged negligence.

It remains to consider whether there was any evidence from which a jury could find negligence on the part of Santo. There was no direct evidence that he left the gate open.

2. NEGLIGENCE :      All that appears from the evidence at this  
                                 unhitched  
                                 horse.      point is that Santo necessarily came through  
                                 the gate, and that it was open thereafter,  
                                 and that the child passed through it to the  
street. Under the evidence, the jury would not be justified in finding that he was the only one that passed through the gate, or that he was the only one that could have left it open. Guests were arriving about the same time that he arrived. The "kids" were present in close proximity thereto. If, therefore, it were vital to the plaintiff's case to show that Santo left the gate open, we should have to hold that he had failed. But we do not think it was vital to his case. It may well be doubted whether a leaving of the gate open could be deemed as negligence unless it were made to appear that Santo knew of the presence of the child, or knew that he increased its peril thereby. The real pivot of plaintiff's case turns upon the question of whether the horse was left by Santo unhitched; and whether, under all the circumstances, it was negligent in him so to do. The evidence shows that, in a very few moments after Santo came into the house, the horse went trotting down the street. The witnesses who stopped him discovered no evidence of his having been hitched. There did not appear to be any hitching strap, broken or otherwise. We think the facts thus shown were sufficient to justify a finding of fact by the jury that the

horse was left unhitched. If such fact were found, it would then be a fair question for the jury whether, considering all the surrounding circumstances, as well as the character of the horse, it was negligence to leave him unhitched. A horse drawing a vehicle upon the street without control carries some presumption of fact against his absent driver. We think that the question whether Santo did leave the horse unhitched, and whether it was negligence to so leave him, under all the circumstances, were proper questions for the jury. *Migliaccio v. Smith Fuel Co.*, 151 Iowa 705; *Ash v. Century Lbr. Co.*, 153 Iowa 523.

As to the Italian Importing Company, the order of the trial court will be affirmed. As to the defendant Dapolonia, it will be reversed.—*Affirmed in part and reversed in part.*

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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ANNA L. GEORGE, Appellant, v. IOWA & SOUTHWESTERN RAILWAY COMPANY, Appellee.

**APPEAL AND ERROR: Directed Verdicts.** A directed verdict may

- 1 not, on appeal, be aided by giving consideration to the fact that the trial court had the advantage of seeing and observing the witnesses.

**NEGLIGENCE: Negating Causes.** Testimony as to the proximate

- 2 cause of an injury is not in equipoise on two opposing theories when one theory has such support in the evidence as would fairly justify an impartial jury in finding that such cause was established, while the other cause has no support in the evidence, and is wholly theorized as a possibility.

**PRINCIPLE APPLIED:** A railway track was very rough and uneven, and by reason thereof the engine swayed and jerked in passing over the track, and created a condition which rendered it possible for one to be thrown from the engine. A post had been negligently placed very near the track. Deceased was in the performance of his duties as fireman on the engine. A very short time thereafter, at a point along the rough track, he was found close to the track, and with wounds and bruises on

his dead body. The jury might have found that his body hit the post. There was no evidence that he was sick or diseased. *Held*, the possibility that deceased fell from sickness or disease, and not from the lurch of the engine, was not sufficient to place the testimony in equipoise on the two conflicting theories.

**NEGLIGENCE: No Eyewitness Rule.** Principle recognized that a 3 presumption of due care arises, in the absence of eyewitnesses.

**MASTER AND SERVANT: Rough Railway Track, Etc.** An employee upon a railway engine may not be held to have assumed the risk attending the operation of an engine over a rough and uneven track, with a post negligently left in close proximity thereto, from the mere fact that he *knew* of such condition, unless the danger is so imminent that a reasonably prudent person would not have continued in the work—a question which is rarely one of law.

*Appeal from Page District Court.*—E. B. WOODRUFF, Judge.

JUNE 24, 1918.

IN this, a suit to recover damages for the alleged negligence of defendant claimed to have resulted in the death of one John J. George, a motion to direct verdict for the defendant was sustained at the close of the testimony for the plaintiff, and she appeals.—*Reversed and remanded.*

*Earl R. Ferguson and C. R. Barnes*, for appellant.

*Orr & Turner and Tinley, Mitchell & Pryor*, for appellee.

**SALINGER, J.**—I. The appellee insists the trial court was justified in directing verdict against the appellant, on the authority of *Meyer & Bros. v. Houck*, 85 Iowa 319, which, in effect, abrogates the scintilla of evidence rule theretofore prevailing in this jurisdiction, and empowers the court to direct a verdict against the party having the burden of proof, if the testimony is in such condition that, should the verdict be returned for that party, the court would unhesitatingly set the same aside. Appellee urges that, in applying

1. APPEAL AND  
ERROR: di-  
rected verdicts.

the *Meyer* case rule, this court should take into consideration that the trial court saw and heard the witnesses. The *Meyer* case did not intend to substitute the judge for the jury; and, in passing upon whether a verdict was rightly directed, we are not at liberty to aid the ruling by considering the advantage the trial judge had because the living witnesses were before him. Notwithstanding this valuable advantage, we must determine from the record before us whether there was such an absence of evidence for the plaintiff as to justify a direction of verdict for the defendant.

II. So proceeding, it seems to us to be beyond dispute that, on the vital premise of one phase of this appeal, there is no serious controversy. Whatever the effect of it may be, it is beyond question that the jury could

2. NEGLIGENCE:  
negating  
causes.

find the following things from the evidence: (1) That the roadbed was unballasted, rough, and uneven; (2) that a train going at 8 or 10 miles an hour at the point where decedent was injured would be caused thereby to sway, jerk, jump, to take up slack roughly, and that conditions generally made it possible that one upon the train would be thrown from it; (3) this tendency to lurch and sway would be increased when, as was the fact here, the supply of coal in the tender was low, thus making the train lighter. Speaking to the very part of the roadbed upon which the train was being operated when decedent was injured, one witness says that, at that point, "it is just up and down and just wobbly and any other way, just low places and high places, not even at all." Another says that, at this particular place, the track was not very even, and was pretty rough, and there was no ballast at this point; that, at the point in question, there is a hump, and the effect of this upon the tender in going over was that one could feel the shock when the engine swings onto it, and on dropping back after the engine got across it; that the engine would seem to run down there, and

take the slack of the train with a jerk when the engine once more dipped upward; that the rough track will make the engine bounce around. One witness says it was "awful rough" just before this point was reached, and, in going upon a bridge in that immediate neighborhood, the track was "awful rough;" and that, when they got on the bridge, they would "just jump off again." It is also testified there was a lot of slack, and, as the engine would roll over the bridge, it would jerk that slack around; that this would cause a jerking and jumping and rocking, "just rocking back and forth, and it would jerk every way."

Assume there may be debate over what deduction might rightly be drawn by a jury from this evidence; yet the evidence does exist. This record is not one wherein there is no evidence to support a claim that there was this roughness and swaying, and the question is, whether their existence made it for the jury whether these conditions caused decedent to fall from the train.

2-a

We are justified in saying that, on the whole case, appellee does not so much question that, under the testimony, it might be true that decedent came to his death as the plaintiff claims, but takes the position that this is no more probable or possible than that decedent might have been stricken by an attack of heart trouble, vertigo, and the like, and thus have come to fall from the train. Again, appellee does not so much urge it was impossible for the death to have resulted from contact with the post, but insists, rather, that that is no more possible than that the man was already dead when he fell from the train, because of something not due to the negligence of defendant. In other words, the main defense of the judgment below is that the testimony was in equipoise, as matter of law.

The law on the point is well settled: Undoubtedly, it is not enough there is a mere possibility that the injury is

chargeable to the negligence of defendant, and a recovery may not rest wholly on conjecture. *Lunde v. Cudahy Packing Co.*, 139 Iowa 688, at 697. There is no case for a jury where the evidence leaves the happening of the accident a mere matter of conjecture, and as consistent with the theory of absence of negligence as with its existence. *Tibbitts v. Mason City & Ft. D. R. Co.*, 138 Iowa 178. Undoubtedly, the plaintiff fails if, as matter of law, the testimony is in equipoise. *Neal v. Chicago, R. I. & P. R. Co.*, 129 Iowa 5; *Asbach v. Chicago, B. & Q. R. Co.*, 74 Iowa 248, 251; *Rhines v. Chicago & N. W. R. Co.*, 75 Iowa 597. Undoubtedly, it does not suffice where a conclusion which is consistent with the theory of the plaintiff is, as matter of law, equally consistent with some other theory. *Wheelan v. Chicago, M. & St. P. R. Co.*, 85 Iowa 167. But, as said in *Lunde v. Cudahy Packing Co.*, 139 Iowa 688, at 697, this does not require plaintiff to prove either negligence or proximate cause, beyond a reasonable doubt; and, where the proven circumstances are such that different minds may reasonably draw different conclusions, or where all the known facts point to the negligence of the defendant as the cause, then, though the evidence be wholly circumstantial, proximate cause is for a jury. It suffices that inferences which plaintiff demands may fairly be drawn. *Kansas City So. R. Co. v. Leslie*, 112 Ark. 305 (167 S. W. 83, 89), approving *St. Louis, I. M. & S. R. Co. v. Hempfling*, 107 Ark. 476 (156 S. W. 171).

The true test is well stated in *Schoepper v. Hancock Chemical Co.*, 113 Mich. 582 (71 N. W. 1081), wherein it is said that the rule where the case rests wholly in conjecture does not apply, if there is room for balancing the probabilities and for drawing reasonable inferences better supported on one side than the other, even though the evidence for the theory of plaintiff is rebutted, but without disclosing any other probable cause.

It is said in *Lunde v. Cudahy*, 139 Iowa 688, at 701, if

any testimony bears on the question at issue, and there is afforded room for fair-minded men to conclude therefrom that one theory of the case is better supported than the other, the question cannot properly be withdrawn from the jury; that plaintiff is not bound to exclude the possibility that the accident might have happened in some way other than claimed by plaintiff, because to require this would be to require plaintiff to make his case beyond a reasonable doubt. When a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, then, in the absence of a showing of other cause, it is a warrantable presumption that the cause indicated in the testimony was the operative agency in bringing about the result. *Brownfield v. Chicago, R. I. & P. R. Co.*, 107 Iowa 254, at 258; *Lunde v. Cudahy*, 139 Iowa 688, 701, 702; *Settle v. St. Louis & S. F. R. Co.*, 127 Mo. 336 (30 S. W. 125). In establishing that injury is due to negligence either by direct or circumstantial evidence, the plaintiff need not negative every other conceivable hypothesis which might account for the injury. It is only where opposing theories of the accident are equally in accord with the proven facts that the evidence of the plaintiff fails, as matter of law. *Gordon v. Chicago, R. I. & P. R. Co.*, 146 Iowa 588. An efficient and adequate cause of an injury may be termed the real or proximate cause thereof, unless another cause, not incidental to such cause but independent of it, has intervened and caused the injury. *Davis v. Mercer Lumber Co.*, 164 Ind. 413 (73 N. E. 899). If several proximate causes contribute to an accident, and each or all may be an effective cause, the result may be attributed to any or all of these causes. *Burk v. Creamery Pkg. Mfg. Co.*, 126 Iowa 730.

The facts in *Kansas City So. R. Co. v. Leslie*, 112 Ark. 305 (167 S. W. 83, at 90), and in *Rickerd v. Chicago, St. P., M. & O. R. Co.*, 141 Fed. 905, are, in many respects, like those

at bar; and in these it was held that there was a case for a jury.

2-b

Plain as all this seems to be, the parties conflict sharply on how it bears upon their case. The appellant contends that, if the jury can reasonably find from the evidence that the negligence of defendant furnished cause adequate to produce the injury suffered, there is a case for the jury. The appellee construes our decisions that the plaintiff must fail where the testimony on liability is in equipoise, to mean that, if the trial court or this court are of opinion the testimony is in equipoise, and reach such conclusion because the injury is possible upon some theory other than the one advanced by plaintiff, and such other possible cause is not excluded, then there is a case for a directed verdict. If this be so, then, though the jury may reasonably find that a shot fired by the defendant caused death, a verdict must be directed for the defendant, if, in the opinion of the court, it is possible that someone other than defendant fired the shot. We do not believe the rule is as appellee contends. When a verdict has been directed, the appellate court, in reviewing that action, and in passing upon what the evidence showed, or what might legitimately be inferred from it, does not deal with what the trial court or the Supreme Court might infer, but inquires whether the jury, as reasonable and intelligent men, might legitimately conclude, from the proofs offered, that the accident occurred in the manner alleged by the plaintiff. *Lunde v. Cudahy*, 139 Iowa 688, at 702. The paramount question is whether the jury could legitimately infer, honestly using such abilities as they had, that the circumstances indicated that the condition of the track threw the decedent from the engine. We think that question was for the jury. We sum the cases we have analyzed not to hold that the plaintiff must submit to a direction against him, unless he shows, first, that something done or omitted



by the defendant is adequate to produce the injury suffered, and, second, excludes all possibility that the injury was caused by something other than such act of the defendant. To bring the case to a more concrete point: if the plaintiff shows that some act or omission of the defendant might adequately cause what resulted, and the jury may reasonably find that something other than the act of the defendant could also have produced the injury, testimony is in equipoise. But if the plaintiff shows that what the defendant did might accomplish what plaintiff suffered, it does not take the case from the jury merely because it is *possible* that the act of the defendant may not have been the cause—that it is possible that something else caused the injury. If, in the case before us, there were any evidence from which a jury could find the existence of some disease which might have caused decedent to stagger and fall off the train, there would be evidence of two equally adequate causes, and the testimony might be in equipoise, as matter of law. In the case supposed, one theory would, as matter of law, be as strong as the other. But it is only when the opposing theories have equal support as matter at law that it becomes the duty of the court to direct a verdict against the plaintiff. The case before us makes the line of demarcation clear. The plaintiff showed that something existed which could throw a man off the train; that one who had been on the train was lying on the ground dead, with wounds and contusions upon him; and these and other things disclosed circumstances indicating that decedent came in contact with a post placed close to the track. The jury could, in reason, find that the condition of the track, the act of the defendant, could and did initiate the injury suffered; and placing the post where it was, completed the injury. The defendant merely responds that all this might as well have happened if some adequate illness had caused decedent to stagger, and so to fall off the train. The difficulty is, there is no evidence

from which the jury could find that any disease existed—that plaintiff shows an efficient cause for the injury suffered; while the defendant theorizes upon what would be the state of the case if it, too, had shown a differing adequate cause, involving no negligence on its part. With nothing to meet the showing by plaintiff that negligence on part of defendant was adequate to cause the injury sustained, except a claim that the same injury might have resulted from an imagined cause which, if existing, would be adequate, it was for the jury to say whether the theory advanced by plaintiff was sustained by the evidence. Therefore, it was error to direct a verdict for defendant.

We shall not stop to set out all the circumstances that lead us to this conclusion. They are numerous. No one or more of them, nor many taken together, might be at all conclusive; but with no proof whereon to base the theory advanced by defendant, all taken together, though not conclusive, made it a question for the jury whether or not decedent had come to his death as the petition charges—that is, that the defective roadbed so swayed the engine upon which the decedent was, in the performance of his duty, as that he was thrown off and killed, by coming in violent contact with a post placed by defendant.

III. We incline to the opinion the verdict was directed on the sole ground that a recovery for the plaintiff would rest on a mere guess, and that the court sustained the motion on the expressed and sole ground that

3. NEGLIGENCE:  
no eyewitness  
rule.

there was no evidence of what caused the death of the decedent. But the briefs contest all along the line. The appellant presents an exhaustive brief for the proposition that freedom from contributory negligence was established by presumption, because there were no eyewitnesses. Of course, that is the general rule; and the point would need no further consideration, were it not for the claim of appellee that *Stark*

*v. Tabor & Northern R. Co.*, 161 Iowa 393, at 403, holds that the rule is not applicable, under the facts present in this case. It is said in the *Stark* case that, "At best, there was such a short period of time not covered by the testimony that no presumption can fairly arise that, during this short period, something occurred which would indicate that he used the degree of care required of him." The final reason is stated to be that there is no room for presumption relieving the deceased, "in view of direct testimony relating to his conduct at and just before he received his injuries." It seems to us that this states the rule, and not an exception to it. It but reiterates that the presumption arising from the love of life is not available where there is direct evidence relating to the conduct of the deceased at and just before he received his injury, and further, that such conduct was observed in the *Stark* case, except for so short a period of time as would be negligible.

We think freedom from contributory negligence was for the jury.

IV. We have exhaustive briefs on what does and what does not constitute an assumption of risk. The rules on this head are well settled, too. We incline to think, too,

that the judge ruled expressly that assumption of risk was not a controlling factor in his decision. He said expressly he thought the motion was somewhat premature, because

4. MASTER AND  
SERVANT:  
rough railway  
track, etc.

assumption of risk was a matter for defense. *Melody v. Des Moines Union R. Co.*, 161 Iowa 695, so holds, and points out that, by statute, the defense of assumption of risk can only be made available by pleading and proof that the danger was so apparent that a reasonably prudent man would not have continued in the service. Notwithstanding that, it is possible that, though such defense be not pleaded, that, if the testimony for the plaintiff showed there was assumption of risk, this would defeat recovery. But, as will be noticed,

both said statute and the case law do not defeat recovery merely because it was known that a roadbed was rough, and a post was too close to the rail, but only where the danger is so apparent that a reasonably prudent man would not continue in the service. Mere knowledge that the roadbed was in that condition, and the post in that place, is not enough.

Assumption of risk was held to be for a jury where the injury came from an overhead structure. See *Coles v. Union Terminal R. Co.*, 124 Iowa 48; *Bryce v. Chicago, M. & St. P. R. Co.*, 103 Iowa 665. For it is not knowledge that something exists which might cause injury that takes assumption of risk from a jury: that is for the jury, unless, in addition to knowing that the instrumentality was present, a reasonably prudent man should, as matter of law, have known and appreciated the danger. The matter is for the court only when the danger is so obvious and glaring that an ordinarily prudent man would not undertake the work in the face of such danger. *Hosheit v. Lusk*, (Springfield Court of Appeals) 190 Mo. App. 431 (177 S. W. 712). It is for the jury if there is a question whether the employees understood and appreciated, or ought to have understood and appreciated, not the presence of the instrumentality, but the peril to which it exposed him, and, with such knowledge and appreciation, continued in the service. *Gordon v. Chicago, R. I. & P. R. Co.*, 146 Iowa 588. We think that *Kirchoff v. Creamery Supply Co.*, 148 Iowa 508, tends strongly to sustain the right of appellant to have assumption go to the jury; and that some support for that position is given by *Lunde v. Cudahy*, 139 Iowa 688, at 697. *Johnson v. St. Paul, M. & M. R. Co.*, 43 Minn. 53 (44 N. W. 884), *Tibbitts v. Railway*, 138 Iowa 178, and *Rickerd v. Chicago, St. P., M. & O. R. Co.*, 141 Fed. 905, come as near to having the same facts as one may expect to find; and in all of them, assumption of risk was held to be for the jury.

Placing the post in dangerous proximity to the track constituted negligence. *Galveston, H. & S. A. R. Co. v. Brown*, 33 Tex. Civ. App. 589 (77 S. W. 832); *Kearns v. Chicago, M. & St. P. R. Co.*, 66 Iowa 599; *Murphy v. Wabash R. Co.*, 115 Mo. 111 (21 S. W. 862); *Hall v. Union Pac. R. Co.*, 16 Fed. 744. It constituted negligence to permit the track to remain in an uneven, rough, and unballasted condition, thus causing cars to roll back and forth, and to create a tendency to have them jump the track. *Gordon v. Chicago, R. I. & P. R. Co.*, 146 Iowa 588. This being so, it follows, as matter of elementary law, that, at worst, assumption of risk was for the jury, because the employee does not assume the risks created by the negligence of the master. Assumption of risk was, at worst, for the jury, because a fireman was not bound to keep a lookout to ascertain whether the company had performed its duty to provide a safe place to work. It has been so held as to ascertaining the dangerous proximity of a post. See *Galveston, H. & S. A. R. Co. v. Brown*, 33 Tex. Civ. App. 589 (77 S. W. 832); *Gulf, C. & S. F. R. Co. v. Moore*, 28 Tex. Civ. App. 603 (68 S. W. 559, at 561); and *Galveston, H. & S. A. R. Co. v. Mortson*, 31 Tex. Civ. App. 142 (71 S. W. 770). We see nothing in *Texas M. R. R. Co. v. Taylor*, (Tex.) 53 S. W. 362, that aids appellant, and find no applicability to anything at issue here in *Louisville & N. R. Co. v. Parker's Admr.*, 165 Ky. 658 (177 S. W. 465). We are of opinion that the circumstances held to sustain submission to a jury that were found present in *Thornton v. Seaboard Air Line R. Co.*, 98 S. C. 348 (82 S. E. 433), *Gordon v. Chicago, R. I. & P. R. Co.*, 146 Iowa 588, and *Choctaw, O. & G. R. Co. v. McDade*, 24 Sup. Ct. Rep. 24, are not stronger than those found in this record.

Can it be said decedent assumed the risk of being thrown against the post which defendant had placed too near the track? If so, then, though it were conceded that some wrong of the defendant had thrown decedent from the

train, there could be no recovery if being thrown brought his head in violent contact with the land on which the right of way lay. For if knowing the post was where it was would bar a recovery, so would knowledge that ground was lying there against which the head of one thrown from a train might be driven. Appellee bases its claim that all risks involved were assumed on no more than the argument that, if decedent was thrown from the train because of the rough condition of the roadbed, and if, upon being thus thrown, he came to his death by striking a post placed by the defendant in too close proximity to the track, this constitutes an assumption of these risks which defeats recovery, because decedent knew the roadbed was rough and uneven, and knew, as well as defendant, that a post was placed in such proximity, if one was placed there. We do not have to decide whether this claim must go to a jury, but do decide that it was not for the court to rule that assumption of risk defeats recovery, here.

We are of opinion the cause must be remanded for trial by jury.—*Reversed and remanded.*

PRESTON, C. J., LADD and EVANS, JJ., concur.

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ELINOR F. GIBSON, Appellant, v. SIOUX COUNTY et al.,  
Appellees.

**COUNTIES: Highways—Negligently Obstructing—Liability.** The non-liability of a county for damages resulting from the act of its board of supervisors in negligently obstructing a highway, as distinguished from a bridge, extends to the supervisors who order the obstruction, and to a mere employee, who does only that which the supervisors direct him to do.

*Appeal from Osceola District Court.*—WILLIAM HUTCHINSON, Judge.

JUNE 24, 1918.

ACTION for personal injuries sustained upon a highway, by reason of obstructions negligently placed and permitted and left unguarded by the defendants, as alleged. There was a demurrer to the petition, which was sustained. Judgment being entered thereon, the plaintiff has appealed.—*Affirmed.*

G. A. Gibson and T. M. Zink, for appellant.

O. H. Montzheimer, W. H. Downing, Anthony Te Paske, Van Oosterhout & Kolyn and T. E. Diamond, for appellees.

EVANS, J.—I. The highway upon which the accident occurred was located upon the county line between Sioux County and O'Brien County. These two counties are defendants. Joined with them are the members of the respective boards of supervisors and their employee, Gardner. The obstructions complained of consisted of sand and gravel, which had been hauled upon the highway for the purpose of building a cement bridge or culvert.

The question presented is that of the liability of a county for damages by reason of such alleged negligence. The argument is that the highway was a county highway, and in charge of the county supervisors of the respective counties, and that the counties were, therefore, liable for damages for negligence. The question is not an open one in this state. But appellant challenges the correctness of the prior holdings of the court on the question. The argument is essentially the same as that presented to us in *Snethen v. Harrison County*, 172 Iowa 81, 85. The question was quite fully gone into in that case, and our previous cases were reviewed therein. No useful purpose can be subserved by repeating the discussion. Sufficient to say that we adhere to the former precedents. *Soper v. Henry County*, 26 Iowa 264; *Kincaid v. Hardin County*, 53 Iowa 430; *Green v. Harrison County*, 61 Iowa 311; *Nutt v. Mills County*, 61 Iowa 754; *Lindley v. Polk County*, 84 Iowa 308; *Dashner v. Mills Coun-*

ty, 88 Iowa 401; *Packard v. Voltz*, 94 Iowa 277; *Miller v. Boone County*, 95 Iowa 5; *Wenck v. Carroll County*, 140 Iowa 558.

If the rule of law which has been established by the precedents above cited and which has been followed for so many years ought to be changed, the appeal should be to the law-making body. The rule of non-liability of counties in actions of this nature has abundant authority in other jurisdictions even though it be true that the authorities are not unanimous in that regard.

II. It is argued by appellant that, even though the counties be not liable, yet the members of the respective boards of supervisors and their employee, Gardner, are liable, in that their duties were ministerial, and were negligently performed. We have held to the contrary. In *Snethen v. Harrison County*, supra, we said:

"Agents who perform the governmental functions are no more responsible than an artificial body,—the corporation for which they acted. We see no reason for departing from any of these established rules. The trial court was right in sustaining the demurrer, and this judgment is—*Affirmed*."

In *Wood v. Boone County*, 153 Iowa 92, we said:

"It must certainly be an anomalous doctrine that would exempt a corporation itself from liability for the doing of a lawful act in a negligent manner upon the ground of its compulsory agency in behalf of the public welfare, and at the same time affix liability upon the agent for precisely the same act done under express authority. We think an instance of such liability is not to be found."

To the same effect is *Schneider v. Cahill*, (Ky.) 127 S. W. 143.

Whether the employee, Gardner, could be found liable, notwithstanding that the county officials were not, is a question not argued. The petition avers that Gardner, as employee, deposited the sand and gravel upon the highway. It



also avers, in substance, that the supervisors directed it to be so done. The employee was presumably subject to the orders of his employer, and, if he deposited the sand and gravel where directed by the supervisors, he did not thereby become guilty of negligence. The real negligence, if any, charged in the petition, was not the obstructing of the highway. The supervisors had a right to do that, for proper purposes. The wrong, if any, was in the failure to erect proper barriers, or to give proper warning to the traveling public.

Whether Gardner could be held to liability upon an averment that he was under direction and duty to give warning and to erect barriers, we are not called upon to determine, upon this record. The order below will be—*Affirmed.*

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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GREAT WESTERN ACCIDENT INSURANCE COMPANY, Appellee, v.  
P. H. MARTIN et al., Appellants.

**TAXATION: Corporate Stock—Millage Basis.** The shares of stock  
1 of a domestic accident and health insurance company should  
be taxed at the five-mill rate provided by Sec. 1310, Code Supp.,  
1913, and not on the basis of the tax rate on 25% of value,  
provided by Sec. 1305, Code Supp., 1913.

**STATUTES: General Principles.** The following principles of statu-  
2 tory construction are recognized:

1. Specific statutes control general statutes on the same subject.
2. Statutes *in pari materia* must be construed as one statute.
3. All provisions of a statute must be given effect, if possible.
4. "Hereinafter," employed in a statute, cannot refer to a preceding statute.
5. The plea of unreasonableness can have no weight in the construction of a valid, unambiguous statute.

**APPEAL AND ERROR: Waiver of Rules.** The power of the ap-  
3 pellate court to waive its rules for proper assignments, brief  
points, and arguments, will not be exercised in order to give  
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consideration to a question of constitutional law upon which the court may surmise that appellant relies.

*Appeal from Polk District Court.*—W. S. AYRES, Judge.

MARCH 24, 1918.

REHEARING DENIED JUNE 24, 1918.

THIS was a suit in equity to compel the correction of a tax levy. The relief prayed by the appellee was granted, and the defendants appeal.—*Affirmed.*

*Ward C. Henry*, County Attorney, for appellants.

*Carr, Carr & Evans*, for appellee.

SALINGER, J.—I. The trial court changed the assessment to one fixed by Section 1310, Code Supplement, 1913. The sole question is whether it should not, instead, have adopted the tax rate fixed by Section 1305, Code Supplement, 1913.

1. TAXATION:  
corporate  
stock : millage  
basis.

Section 1310 provides, so far as its provisions have any applicability here, that "corporation shares or stocks \* \* \* shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation," and that this millage tax shall be in lieu of all other taxes upon moneys and credits. The court adopted this rate. If Section 1310 stopped at what we have quoted, the action of the court is right, beyond debate. But the statute adds, "except as otherwise provided." The point for our decision is, therefore, narrowed to whether there is elsewhere a provision that such shares as are involved shall be taxed at some rate other than "five mills on the dollar of actual valuation." No statute has been called to our attention, and we find none, which, in terms, purports to make any change in the taxation of such shares as are before us. The effect of the argument for appellant is that Section 1305 makes the change, by implication. It provides that all property sub-

ject to taxation shall be assessed at 25 per cent of its actual value. It seems to us that Section 1310 is a limitation of the general provision of 1305, and that, therefore, Section 1305 is not an enlargement of 1310. The specific controls the general. The two statutes must be read as if they were one, and provided that all property, except specified shares, should be taxed at 25 per cent of actual value, and that said shares should be taxed at five mills on the dollar. Any other construction violates the rule that nothing enacted shall, if it may be avoided, be made ineffective or useless. On the theory of appellants, Section 1310 need not have been enacted, and has nothing to operate on. If 1305 fixes the tax rate for "all property," and 1310 is no modification, it is impossible to understand why 1310 was passed. If 1305 controls, then 25 per cent of actual value is the rate for *all* property, and it was idle to say in other statutes that *some* property should be taxed at a rate differing from the one fixed in 1305. The only way in which elementary canons of construction can be made effective is by holding, as did the trial court, that, as to the property specified in 1310, that statute controls.

This conclusion is reinforced by the fact that Section 1310 fixes its own exceptions as to shares; wherefore, the legislature did not intend that other statutes should be looked to for exceptions. Moreover, Section 1310 not only makes its own exceptions, as, for instance, shares of loan and trust companies, but requires that those who desire a definition of the excepted classes shall ascertain, by investigating, how such classes are "hereinafter" defined. Certainly, Section 1310 did not intend that Section 1305 should be looked to. For that statute is not "hereinafter." Certainly, "hereinafter" does not refer to a preceding section.

There is nothing in *Layman v. Iowa Tel. Co.*, 123 Iowa 591, nor in *Morril v. Bentley*, 150 Iowa 677, which has any

2. STATUTES:  
general prin-  
ciples.

bearing upon the claim that Section 1310 does not fix the assessment of such shares as the one in consideration.

II. It may be true that the statute exhibits unfairness. If there were any substantial doubt concerning the legislative intent, fairness and unfairness would enter into determining what construction the statute should have. But if it were ever so clear that Section 1310 works unfairness, it is just as clear that the legislature intended that unfairness, and that no legitimate construction can reach any other result than that these shares shall be assessed at five mills, and no more. This being clear, it becomes immaterial, *on the case presented by appellants*, whether fairness demanded of the legislature that it should not thus fix the taxation of such shares. We cannot substitute for a plain legislative enactment what we would deem a fairer law.

We say so much as this in connection with a reference to what is presented on this appeal, because in the *Layman* case, *supra*, there is found a decision declaring a taxation statute unconstitutional, and, for aught we know, it may have been cited as reinforcing the claim of unfairness. In other words, it may have been in the mind of counsel that the statute is unfairly discriminating to such an extent as to render it unconstitutional. But no such claim is made in assignment, brief point, or argument, unless it be found in the fact that the *Layman* case is cited.

While we have power to waive the rules of presentation, that power is never exercised where the record does not make it clear, in some informal manner, that a certain point not formally presented is being urged against the judgment. Certainly, we should not enlarge upon this for the purpose of considering the constitutionality of a statute. Judicial interference with the legislative arm is avoided whenever it may be done, rather than strained for.

3. APPEAL AND  
ERROR:  
waiver of rules.

Reduced to its lowest terms, the record shows that an

assessment of these shares was made at a higher rate than the one which Section 1310 fixes in unmistakable terms, and that the trial court changed the assessment to the one fixed in Section 1310. If we are to reverse its action, we must do so because the court obeyed the statute.

In our opinion, the decree below should be, and it is, therefore,—*Affirmed*.

PRESTON, C. J., LADD, GAYNOR, and STEVENS, JJ., concur.

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IN RE ESTATE OF JAMES DALTON, Deceased.

**EXECUTORS AND ADMINISTRATORS: Paying Taxes from Per-**

- 1 **sonalty.** An administratrix may not legally apply the personal property of an estate to the payment of taxes on the real estate left by deceased, when she was not, as administratrix, in possession of such real estate, and when said taxes were not even payable when the intestate died. But where such taxes were paid from rents accruing subsequent to the intestate's death, the error may be corrected by charging the administratrix with one third and the shares of the heirs with two thirds of the payment.

**EXECUTORS AND ADMINISTRATORS: Paying Interest on Mort-**

- 2 **gage Indebtedness.** An administratrix may validly pay, from the personal funds of the estate, duly filed claims for interest due on the intestate's real estate mortgages.

**EXECUTORS AND ADMINISTRATORS: Repairs on Homestead.**

- 3 Repairs or betterments on the homestead during the "occupancy" period may not be made at the expense of the estate.

**EXECUTORS AND ADMINISTRATORS: Rents—When Treated as**

- 4 **Realty.** Rent notes falling due *after* the death of the owner of the real estate will be treated as real estate, with consequent right on the part of the surviving widow, who was administratrix, to refuse to account, *as administratrix*, for one third of such rents.

**EXECUTORS AND ADMINISTRATORS: Attorney Fees—Necessity**

- 5 **and Reasonableness.** An administrator must defend his employment of an attorney on behalf of the estate, and the amount paid the attorney, by *affirmative* evidence showing the *necessity* for

the services and the *reasonableness* of the amount paid. Evidence of the amount that the administrator *agreed* to pay is wholly immaterial. Even a judgment against the administrator for the amount of the fee will be ignored, in the absence of a showing that it was rendered on an issue as to its *reasonableness*.

**EXECUTORS AND ADMINISTRATORS:** Administrator Employing 6 Attorney to Defeat Will. An administrator has no authority, *as such*, to employ an attorney to contest the probate of a will and to charge the estate with the resulting fees.

*Appeal from Plymouth District Court.*—WILLIAM D. BOIES,  
Judge.

JUNE 24, 1918.

APPEAL by the heirs from an order overruling certain objections to a final report of Margaret Dalton, as administratrix of the estate of James Dalton, deceased.—*Reversed and remanded.*

*Molyneux & Maher*, for appellant.

*Shull, Gill, Sammis & Stilwell*, for appellee.

LADD, J.—James Dalton died intestate, October 27, 1914, leaving him surviving a widow and nine children. At the time of his death, he was seized of 384 acres of land in Cherokee County, a house and lot where he lived in Le Mars, household furniture, \$585.66 on deposit in a bank, \$150 in cash, and notes given for rent. The widow's share of his life insurance was \$583, and she was allowed \$600 for support. She was appointed administratrix of the estate; and shortly thereafter, suit for the establishment of a lost will was brought by some of the heirs, making her a party defendant, both individually and as administratrix, but was subsequently dismissed without trial. Her final report was filed April 26, 1916; whereupon, the children of decedent, other than Helen, interposed objections, several of which

were sustained, and others overruled. With the latter only are we concerned.

I. The administratrix appears to have paid the taxes on the land, as well as the house and lot, levied in 1914 and 1915. These were not liens, and had not become payable

at the time of decedent's death. They did

1. EXECUTORS  
AND ADMINIS-  
TRATORS: pay-  
ing taxes from  
personalty.

not then constitute personal obligations of the decedent, and might not be paid by the administratrix out of the proceeds of the

personal property of the estate, even on the reasoning of *Findley v. Taylor*, 97 Iowa 420; but see *Plymouth County v. Moore*, 114 Iowa 700; *Crawford County v. Laub*, 110 Iowa 355. There is no showing that administratrix took possession of the land; and, therefore, she was not concerned, as such administratrix, therewith, or with the taxes not payable thereon. Exceptions to the payment from the proceeds of the personalty should have been sustained. They were paid from rents to accrue after Dalton's death; and, as this worked no prejudice to the heirs, save in charging same against the heirs' two-thirds interest in the rents, this will be corrected by charging one third of these taxes against the administratrix and two thirds thereof only against the shares of the heirs.

II. There was a mortgage on the land, and, as we understand it, one on the house and lot. The administratrix paid interest on each of these. Exception was taken to this,

for that, as is said, the interest should be taken from the future rents of the estate.

2. EXECUTORS  
AND ADMINIS-  
TRATORS: pay-  
ing interest on  
mortgage in-  
debtedness.

But the widow's distributive share was not subject to the payment of the husband's debts, even though secured by these mort-

gages, until the shares of the heirs therein had been exhausted. *Mock v. Watson*, 41 Iowa 241; *Kendall v. Kendall*, 42 Iowa 464. That the mortgages might be enforced against the realty did not impair the obligations as those of decedent;

no interest even paid in mortgage or debt

and claims for the indebtedness secured might have been filed against the administratrix, and payment enforced from the personal estate. *Sharpless v. Gregg*, 45 Iowa 649; *Boyd v. Collins*, 70 Iowa 296; *James v. Weisman*, 161 Iowa 488. That the widow's distributive share may not be subjected to the payment of a particular indebtedness does not relieve the personalty from being charged with its satisfaction. Real estate may not be resorted to for the payment of debts until personal property is exhausted or shown to be inadequate for that purpose, and the widow may share in the personal property only after the debts of the estate have been satisfied therefrom. This appears from Section 3362 of the Code:

"The personal property of the deceased not necessary for the payment of debts of decedent therefrom; and of this distributed to the same persons and in the same proportions as though it were real estate."

The personal estate is distributed only after provision for the payment of debts of decedent therefrom; and of this remainder, one third goes to the widow and two thirds to the heirs. As observed in *Herriott v. Potter*, 115 Iowa 648:

"While the right to the distributive share of personal property vests in the heirs at the time of the decedent's death, title to specific property and the amount to be received is not determined until distribution through the probate court is effected. This merely ascertains and segregates the particular portion to which each heir is entitled, and his title immediately attaches, and relates back to that of decedent, of whom he takes. Sections 3362, 3364, Code; *Moore v. Gordon*, 24 Iowa 158; *Weaver's Estate v. State*, 110 Iowa 328. See *Foss v. Cobler*, 105 Iowa 728. But at decedent's death, it passes to the possession and control of the executor or administrator, subject to his disposal; and only after the payment of the debts and costs of administration is it to be distributed. On the other hand, the title to real estate descends to the heirs *eo instanti* upon the



death of the ancestor, with the quantity of each definitely ascertained. From that instant, subject to the right of the administrator to resort thereto for the payment of the debts of the deceased, they may dispose of the particular property as the owners, by sale, devise, or gift, and are entitled to possession and the rents and profits."

See *Ritchie v. Barnes*, 114 Iowa 67; *Christe v. Chicago, R. I. & P. R. Co.*, 104 Iowa 707.

We are of opinion that the mortgage indebtedness might have been established as a claim against the estate. Whether claim therefor or for the interest accruing was filed, does not appear; but, inasmuch as the matter of filing or proving of such a claim is not mentioned in argument, we may well assume that it was duly filed and established. No error in overruling this exception appears.

III. The administratrix credited herself with \$20.45 paid Thomas Rinehart in December, 1914. She testified that this "was for repairs on the pump in the basement and on the furnace. Some of it was done before Mr. Dalton's death and some of it after, but it was all done on the homestead. Some of the bill was for connecting the sewer."

3. EXECUTORS  
AND ADMINIS-  
TRATORS: re-  
pairs on home-  
stead.

The bills or vouchers disclose that but \$1.35 of the amount was for services or material furnished decedent, and that amount should have been allowed. The other items were dated long after his death, and while she was occupying the premises without rental charge. She had the right to the occupancy of the homestead until otherwise disposed of (Section 2985, Code); but this did not authorize her to keep it in repair at the expense of the estate, nor did it impose upon her, as administratrix, any duty to do anything in the way of keeping the same in repair; since her possession was that of widow, and she did not pretend to have taken possession as administratrix. As such, she had no concern with

the realty, and the court erred in the allowance of more than \$1.35 on this claim.

IV. The decedent had leased the farm, taking notes for rents payable for its use. Of the rent for 1914, one note for \$201.50 became due November 1, 1914, and \$1,200, February 1, 1915; and the rental for 1915 was

4. EXECUTORS  
AND ADMINIS-  
TRATORS:  
rents: when  
treated as  
realty.

evidenced by one note for \$910.90, due November 1, 1915, and another for \$1,200, due February 1, 1916. These notes were inventoried as personal property. The administratrix, however, retained one third thereof, on the theory that the moneys received were for rent to accrue, and should be treated as realty. The general rule is that rents accruing after the owner's death belong to the heirs or devisees, as an incident to the ownership of the land which descends to them. *Swift v. Flynn*, 145 Iowa 630; *In re Pennock's Estate*, 122 Iowa 622; *Dexter v. Hayes*, 88 Iowa 493; *Crane v. Guthrie*, 47 Iowa 542; *Laverty v. Woodward*, 16 Iowa 1. In the absence of a stipulation to the contrary, rent does not accrue until the tenant has enjoyed the use of the land during the period for which it is payable: that is, at the expiration of the term, unless shorter periods are designated in specifying the rent reserved. *Dixon v. Niccolls*, 39 Ill. 372 (89 Am. Dec. 312); *Castleman v. De Val*, 89 Md. 657 (43 Atl. 821); *Wood v. Partridge*, 11 Mass. 487; *Kistler v. McBride*, 65 N. J. L. 553 (48 Atl. 558). By agreement it may come due at an earlier date; and in this cause, the first rent note was payable November 1st following Dalton's death. When the crops may have matured was of no significance; for the rent was payable in money at a time in no manner dependent on the maturity or marketing thereof. Had the rental been a share of the crop, payable at maturity, then, of course, the rent would accrue at that time. Rents to accrue are chattels real, and, as said, pass upon the death of the owner to those who succeed to such ownership, i. e., the

widow and heirs of said owner. 1 Woerner's American Law of Administration, Section 300; 24 Cyc. 1170, and cases collected in note.

No point is made as to whether the administratrix, as widow, had previously elected to take her distributive share in lieu of homestead; and we decide only that the rent had not accrued at the time of decedent's death, and that the right thereto passed as an incident to the realty, and not to the administratrix. The court, then, cannot be said to have erred in allowing the administratrix, as widow, to retain one third of the rents to accrue. The other two thirds were properly subjected to the payment of the debts of decedent. to satisfy which the personal property was inadequate. *Dexter v. Hayes*, 88 Iowa 493.

V. The administratrix credited herself with the payment of \$350 to P. Farrell and \$50 to Nelson Miller for services rendered in the settlement of the estate, and \$300 paid

Farrell and \$100 paid Miller for services rendered in defending against the establishment of the alleged lost will. Itemized accounts of such services did not accompany the report, nor was there any evidence intro-

5. EXECUTORS  
AND ADMINIS-  
TRATORS: at-  
torney fees:  
necessity and  
reasonableness.

duced tending to show for what the services were rendered, or the reasonable value thereof. Only the reasonable value of the services rendered by attorney in the settlement of estates will be allowed, regardless of what was paid or agreed to be paid. *In re Estate of Carmody*, 163 Iowa 463; *In re Estate of Smith*, 165 Iowa 614. And upon objection's being made to the employment or the amount paid for such services, the burden of proof was upon the administrator to show the necessity of such employment and reasonable value of services, precisely as where objection is interposed to other disbursements. *Munden v. Bailey*, 70 Ala. 63; *Taylor v. Burk*, 91 Ind. 252; *Miller v. Simpson*, (Ky.) 2 S. W. 171; *In re Archer's Estate*, 23 N. Y. Supp. 1041; 2 Woerner's

American Law of Administration, Section 529; 11 Am. & Eng. Encyc. of Law (2d Ed.), 1241; 18 Cyc. 1180. Of course, the exceptions may be of such affirmative character as that the objector assumes the burden of establishing them. *Estate of Vance*, 141 Cal. 624 (75 Pac. 323); *Succession of Conery*, 106 La. 50 (30 So. 294).

After Farrell was paid \$125, he brought suit against the administratrix, and recovered judgment for the balance of \$525. All this adjudicated was that she owed him that amount; but whether this was the reasonable value of his services or on their agreement does not appear, and, therefore, the judgment was not prima-facie evidence of the value of the services rendered, as between the objecting heirs and administratrix. The only other evidence was that little more than \$4,000 passed through her hands without suit. Of course, the amount involved is important in ascertaining the reasonableness of a charge, but this furnishes little aid when the court was not advised of what had been done. What Miller did does not appear, save that he acted as the attorney of the administratrix during Farrell's illness. The necessity of evidence to establish an expense in such a case is the same as in any other, and the same rules obtain with reference to its introduction. And, as the expenses of administration were to be paid from the heirs' two-thirds interest, the court should scrutinize the account closely. The evidence was insufficient to show that the expenses for attorneys' fees were reasonable; and on this ground, the order allowing them is reversed.

VI. As seen, the administratrix was allowed \$400 for attorneys' fees paid Farrell and Miller in defending against the establishment of the alleged lost will. Aside from the

6. EXECUTORS  
AND ADMINIS-  
TRATORS: ad-  
ministrator  
employing at-  
torney to de-  
feat will.

objections heretofore mentioned, it is to be said that the administratrix, as such, had no interest in the estate such as would justify her in attempting to defeat the admission of the will to probate. It cannot be said to

have been of concern to the estate whether she, as administratrix, or an executor, to be appointed, administered on its assets; and whether the admission of a will to probate will be for the benefit of or detriment to the estate may well be left to those interested therein, rather than to one interested in its administration only. As said in *Edwards v. Ela*, 5 Allen (Mass.) 87:

"The administrator, as to much that occurred in the progress of the settlement of the estate, might properly be considered as the representative of the heirs and creditors, and, while acting in good faith in prosecuting or defending claims for their benefit, should be fully indemnified for all reasonable expenditures occasioned thereby. But he was not called upon, in the discharge of his official duty as administrator, to employ counsel to oppose the probate of a will of the deceased. That question goes out of his sphere of action, and may affect interest that he does not represent; and money expended by him in opposing the probate of the will is or may be expended adversely to the interest of those who are to enjoy the estate as devisees. Such opposition may be safely left to the heirs at law personally to protect their interest, if endangered by setting up an instrument purporting to be a will. With the liberal rule generally adopted by this court, as to the refusal to award costs against the party opposing the probate of a will disinheriting the heirs at law, we see no reason in this case for going further, and charging upon the estate of the testator the expenses incurred in opposing the probate of the will; and more especially so in a case like the present, where the administrator was personally deeply interested, as her late husband, and entitled, under the statute of distribution of intestate estates, to her personal estate, if no will was established."

In *Dalrymple v. Gamble*, 68 Md. 156, the administrator employed counsel to resist the admission of a will to probate in California; and, in the course of the opinion reject-

ing the expense, the court, after saying the duty of defending did not rest on the administrator, proceeded:

"If a person not named as executor had taken out letters *pendente lite*, would it have become his duty, as such administrator *pendente lite*, to interfere and resist the probate of the will. If, in that case, or in the case under review, it was his duty, then neglect to discharge that duty would have rendered him answerable on his bond as administrator. Duty and liability in such case are correlative. Would a suit on the appellant's bond have been maintainable against him, had he neglected to do what he did in respect to contesting the will? We think it very clear it could not have been; for there is no language in the bond specifying such duty, and we find nothing in the statute binding him to any such course; nor do we know of any obtaining practice from which it could be inferred as his duty. The action taken was purely *personal* in its nature, and not *fiduciary* in character. It was personal in *name*, and was conducted with others jointly interested, who had agreed to share proportionally the expenses of the proceedings. If successful, *it could only bring benefit to the plaintiffs therein*; and it brought nothing, and secured nothing to the estate, as such. The Orphans' Court could not, on anybody's petition, have ordered the administrator to take such proceedings, because the interest of the estate, as such, was not involved. If the court could not order it to be done, how could he voluntarily engage in it at the charge of the estate?"

See, also, *Lester v. Mathews*, 56 Ga. 655.

Expenses incurred in the defense of the suit to establish the lost will should not have been allowed the administratrix. Some claim is made that the widow was allowed one third of the personal property before the payment of the indebtedness of decedent therefrom. If so, this should be corrected. Possibly the division of the rents only is meant. For the correction of the final report on such further hear-

ing as may be deemed appropriate, the order is challenged, and, in so far as held erroneous, is reversed, and the cause remanded.—*Reversed and remanded.*

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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MARGARET TOUHEY, Appellee, v. MARIE COONEY, Appellant.

IN RE ESTATE OF THOMAS TOUHEY.

**WILLS: Non-Heir Devisee Contesting Subsequent Will.** A devisee

1 who, without the will in his favor, would, under the laws of inheritance, take no part of testator's estate, may not contest a later will by testator, on the ground of mental incompetency of testator, without necessarily and unavoidably admitting that testator was fully competent to execute the will in his—contestant's—favor. It follows that such contestant will be limited to evidence of incompetency subsequent to the execution of the will in his favor.

**WILLS: Presumption and Burden of Proof.** Proponent's burden of

2 proof to prove testamentary capacity is met, in the first instance, by a showing, or concession, that testator had executed another will two months prior to the will in question, and was then possessed of testamentary capacity.

*Appeal from Buchanan District Court.*—GEORGE W. DUNHAM, Judge.

MARCH 12, 1918.

REHEARING DENIED JUNE 24, 1918.

THE alleged will of Thomas Touhey was proposed by the appellant. The will was set aside on the ground of alleged want of mental capacity, and proponent appeals.—*Reversed and remanded.*

*R. J. O'Brien and Hasner & Hasner, for appellant.*

*John J. Ney and M. W. Harmon, for appellee.*

SALINGER, J.—I. The decedent was a bachelor, some 43 years old. On the 25th of April, 1912, he made a will in favor of the contestant, his niece. On June 28, 1912, he made the will in review, and in favor of propo-

1. WILLS: non-heir devisee contesting subsequent will.

nent, his cousin. The contestant has no right to maintain this contest, unless the will of April 25th, in her favor, is a valid will. It follows she must concede that, up to April 25th of the year in which the attacked will was made, decedent was capable of making a will. This disposes of many things which the appellee urges in support of her verdict. Concede her claim that decedent never was strong mentally. Admit he became so ill that the last sacrament of his church was administered. All this was his condition before he made that will which contestant must concede he was capable to make. In other words, this contestant is in no position to take advantage of anything urged against the capacity of the decedent because of anything that existed before and at the time he made the will in favor of contestant. Of necessity, then, the question is whether there was any evidence as to things that happened between the making of the two wills from which a jury might, in reason, find that, though the testator was competent when he made the first, he was incapable when he made the last. It is true

2. WILLS: presumption and burden of proof.

that, in this proceeding, appellant had the initial burden of proving testamentary capacity. But, it being conceded that there was such capacity on the 25th day of April, 1912, this burden is, in the first instance, discharged by the presumption of continuity. And ultimately, it must be determined whether the appellee has adduced anything which makes mental capacity subsequent to April 25th, and between then and up to June 28, 1912, fairly a jury question. Taking the claims of the appellee for it, and the most there is, is that decedent left the home of the contestant's parents and went



to that of the proponent, when the weather and his physical condition were such as that making the journey and the change itself were injurious to the health of decedent, and in violation of the directions of his physician, which enjoined quiet upon him; that the heart trouble from which decedent had suffered for years grew steadily worse between the time he made the first alleged will and the one at which he made the proposed one; that he had a fixed intention to devise his estate to the contestant; that he erred in claiming he left the home of contestant's parents because not well used there; that proponent has not proved any good reason why a once fixed intention to give his property to contestant should have been abandoned in favor of proponent; and that death came in ten or twelve days after the contested will was made. As said, it was for the contestant to have some evidence that the will in favor of proponent was so utterly unreasonable as that that fact alone is some evidence of mental incapacity, or evidence of a condition of mind, body, or both, from which such incapacity might be deduced by reasonable men, though other reasonable men would not reach the same conclusion therefrom. It certainly does not meet this requirement to point out that proponent did not show why the will was, under all the circumstances, a reasonable one. Ultimately, it became the duty of the appellee to make a jury question of incapacity. This burden cannot be discharged by showing that a man sick with a heart trouble became more sick, and ultimately died, and died not long after making the will. It is not enough that his last will involves a radical change from an earlier one. It is not enough that, no matter what he may have thought about it, there was no justification in fact for his making such change. Nor is it enough that, added to all this, the *proponent* has not shown affirmatively why the change was made, and that witnesses said they had never heard of his "favoring Marie Cooney in any way." Undue

influence is out of the case. All we have pointed out,—and it is the essence of the appellee's evidence,—is no substantial proof of a claim that, between April 25, 1912, and the 28th of June following, the decedent changed from being a man capable of making a will to one who was not. See *Hanrahan v. O'Toole*, 139 Iowa 229. Then, too, there is the clearest of affirmative testimony that there was capacity at the very time when the will proposed was made. True, appellee argues that "the explanation is clear he was a dying and a helpless man, always foolish and clownish and simple, but in his condition at the time of making the copy and of making his signature, a mere automaton."

If he was always foolish, clownish, and simple, to an extent that made him incapable to make a will, then the will for contestant deprives her of standing to attack the proposed will. And, while a "mere automaton" cannot make a will, there is no evidence that decedent was such automaton.

We are of opinion that the motion for new trial of the appellant should have been sustained, on the ground that the verdict is not supported by the evidence. This makes it unnecessary to consider the many other complaints made, and the cause must be—*Reversed and remanded*.

PRESTON, C. J., LADD and EVANS, JJ., concur.

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G. H. LADE et al., Appellees, v. BOARD OF SUPERVISORS OF  
HANCOCK COUNTY et al., Appellants.

**DRAINS:** "Deepening and Widening" Under Guise of "Cleaning  
1 and Repairing." An assessment made under a proceeding "to  
clean and repair" a public drain, without notice to the property  
owner, is wholly illegal, when the work actually done constitutes,  
in general substance, a "widening and deepening" of the ditch,  
even though, in the process of "widening and deepening," clean-  
ing and repairing was done. (See Secs. 1989-a11, 1989-a21, Code  
Supp., 1913.)

**DRAINS: Illegality—Estoppel.** Landowners are not estopped to object to an illegal assessment by the naked fact that they knew that work was being done on the drain. So held where the work done was under proceeding *to clean and repair*, but in truth constituted a *widening and deepening*.

**PAYMENT: Voluntary Payments—Drainage Assessments.** The payment of a drainage assessment to the county treasurer, under the distinct understanding that such payment was to be held subject to the outcome of pending litigation relative to the legality of such assessment, is not such a voluntary payment as will estop the one paying from demanding the return of the money after the assessment has been declared illegal; and especially so when such payment remains unexpended in the hands of the treasurer.

*Appeal from Hancock District Court.*—C. H. KELLEY, Judge.

MARCH 7, 1918.

REHEARING DENIED JUNE 24, 1918.

SUIT in equity, to cancel an assessment with which it is sought to charge the appellees upon the claim that a drainage ditch has been cleaned and repaired. The claim is that what was done was not cleaning and repairing, but an unauthorized widening and deepening of such drainage ditch. The trial court cancelled the assessment.—*Affirmed*.

*Wichman & Hastings* and *Ramsay & Blackstone*, for appellants.

*Senneff, Bliss & Witwer*, for appellees.

SALINGER, J.—I. This record has 124 pages of abstract, a 75-page amendment on part of appellee, and a second amendment on his part. The original arguments have 70 pages, and there is a supplemental argument by appellee and

- an objection to its being considered, which includes a reply thereto. A most laborious investigation of all these has satisfied us that the real controversy is very narrow, and
1. DRAINS:  
"deepening  
and widening"  
under guise  
of "cleaning  
and repairing."

it is to be regretted this could not be known until the exhaustive investigation of this record was finished.

The defendant board of supervisors authorized the cleaning and repairing of an existing drainage ditch, and made contract to have this done. The contractor performed work under this authorization and contract. An assessment has been levied, charging the lands of the plaintiffs. They instituted suit to have this assessment cancelled, on the ground that, no matter what was authorized by the board and contracted for, the work actually done was not cleaning and repairing, but widening and deepening said drainage ditch. The relief asked by them was granted by the trial court.

While it is true the board of supervisors has authority to have an existing ditch widened and deepened and to make assessment for the costs thereof, this may be done only if notice be given; and none was given. See Code Supplement, 1907, Section 1989-a11, as amended by Section 10, Chapter 118, Acts of the Thirty-third General Assembly, and Section 4, Chapter 87, Acts of the Thirty-fourth General Assembly, which was the law at the time involved in this controversy. So it does not matter that the work actually done might have been authorized, or that it was of benefit to these plaintiffs; and the sole question at this point is whether that for which it is sought to charge these plaintiffs was, in fact, no more than repairing and cleaning. If it was not repairing and cleaning, but widening and deepening, the cancellation of the assessment in review was justified. The trial judge declares:

"It is clear to me that all parties concerned in the work in question were acting under a misapprehension of the facts. What was actually done was far in excess of removing a fill, and far in excess of repairing. It was enlarging, deepening and widening and lengthening."

His conclusion upon this is that the assessing com-

plained of is not authorized by law. While, on this, a review *de novo*, this statement or finding on part of the trial court does not conclude us, it does have some weight. Giving it that, we find from the record that this pronouncement by the trial judge is fully sustained by the evidence. Because of the conclusion reached by us, much said on both sides needs no consideration. The chancellor could not reform the assessment. It was an entirety, based upon the assumption that the work done was cleaning and repairing. This being so, the assessment as a whole must fall, even if it were practicable and permitted to determine whether or not some cleaning and repairing was included in the work done. That is to say, an assessment having been made wholly on the ground that cleaning and repairing was to be paid by it, such assessment must be cancelled if, in general substance, the work done was not cleaning and repairing, and was of a character for which notice not given was by law required.

II. The naked fact that the landowners who now complain were advised that work was being done in the old ditch, does not create an estoppel against them. There is no evidence that they knew that what was being done was not a cleaning and repairing of the ditch, but was, instead, a substantial lowering of its level, or a substantial widening. The board of supervisors itself did not apprehend that the latter was to be done, nor know it was being done. The board certainly was as much under obligation to prevent unauthorized work as the landowner was to assume that such duty had not been performed. If it was the duty of the county authorities to see to it that the ditch should not be deepened and widened, it was not for these landowners to assume that the board would permit unauthorized work, and that the landowner must take steps to prevent it. The plaintiffs knew that widening and deepening could not lawfully

2. DRAINS: illegality: estoppel.

be engaged in at their cost unless they had been served with notice, and knew they had not been so served. Instead of assuming and anticipating and determining that the doing of the work which they saw was being done because the board of supervisors contemplated the levy of an illegal assessment against them, it was their right to assume that the work being done was such as the law permitted. We think the question is fairly ruled in principle by *Wingert v. City of Tipton*, 134 Iowa 97.

III. Some of the landowners, after this suit began, deposited their part of this assessment with the county treasurer, with the express understanding that same was to be held subject to the litigation and its termination and determination. The money has not been disbursed, and no one has been put to a change of position by reason of the deposit. We think such payment was not a voluntary payment, even on part of those of the plaintiffs who made it, in such sense as now to estop them. Of course, this is so as to those plaintiffs who made no such payment. In principle, this position is sustained by *Winzer v. City of Burlington*, 68 Iowa 279.

3. PAYMENTS:  
voluntary pay-  
ments: drain-  
age assess-  
ments.

The decree below must be—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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PETER McKELLAR et al., Appellants, v. MARY McKELLAR  
HARKINS et al., Appellees.

**BASTARDS: Proceedings in Bastardy as Evidence.** Bastardy rec-  
1 ords, including the verdict of guilty and judgment thereon, con-  
stitute competent evidence of the paternity of the child in ques-  
tion, and that such proof was made during the lifetime of the  
putative father, even though the judgment entry does not for-  
mally declare the paternity, and even though said judgment has

been set aside, in the sense that all payments for support are terminated. (Sec. 3385, Code, 1897.)

**JUDGMENT: Vacation—Operation and Effect.** The formal vacation of a judgment, in the sense that all future financial obligation thereunder is terminated, does not destroy the evidential value of such judgment, or of the proceedings leading up to and culminating therein. So held as to a judgment in bastardy proceedings.

**BASTARDS: Written Recognition—Articles of Adoption.** Recitals in articles of adoption that the signer is the father of the child which is given in adoption, that such paternity has been declared by a certain judgment of court, and that said signer "consents" to said adoption, constitute a *written* recognition of the paternity of said child, within the provisions of Section 3385, Code, 1897, even though, in the execution of such articles, the signer was acting under compulsion, in the sense that he was complying with an order of court as a condition to escaping further liability on a bastardy judgment against him, covering the support of said child.

**DESCENT AND DISTRIBUTION: Heirs of Bastard—Putative Grandfather.** The children of a deceased bastard mother inherit the share which their mother would have inherited from her father, even though it be conceded that the father, in case he outlives such children, may not inherit from them. (Sec. 3385, Code, 1897.)

**DESCENT AND DISTRIBUTION: Adoption of Bastard—Effect on Inheritance from Natural Parent.** The adoption of an illegitimate child in no wise lessens its right to inherit from its natural parents. (Sec. 3384, Code, 1897.)

*Appeal from Clayton District Court.*—A. N. HOBSON, Judge.

APRIL 1, 1918.

REHEARING DENIED JUNE 24, 1918.

**SUIT** in partition of lands. The real contest, however, is one of ownership. All parties claim as heirs of Hugh McKellar, also known in the record as Hugh McKellar, Jr. McKellar died intestate and unmarried, seized of the lands involved herein. The parties are divided into two contesting groups. The first group, including the plaintiffs and the

first-named five defendants, comprises the surviving brothers and sisters, and the children of one brother deceased. This group claims the full title by collateral inheritance.

The second group comprises the last five-named defendants. They are the children of Clara Johnson Adams, deceased, the alleged illegitimate child of Hugh McKellar. This group claims the full title by direct inheritance through their mother. There was a decree for the second group. The other parties have all appealed.—*Affirmed*.

*Eugene H. Garnett, D. D. Murphy & Son, and Clinton L. Nourse, for appellants.*

*R. E. & V. T. Price, and W. W. Davidson, for appellees.*

EVANS, J.—The five defendants referred to in the briefs as the "Adams" defendants are the legitimate children of Clara Johnson Adams. They aver that Clara Johnson Adams was the illegitimate child of Hugh McKellar, and that the paternity was proved in the lifetime of McKellar; and they aver, also, that the paternity was recognized by McKellar in writing. In support of the allegation of paternity and the proof thereof in the lifetime of McKellar, reliance is had upon certain bastardy proceedings had in the circuit court of Clayton County against McKellar, on complaint of Elsa Johnson, wherein trial was had and verdict of guilty rendered, and judgment entered on September 26, 1876. By this judgment, McKellar was adjudged to pay certain installments for the support of the child. Clara Johnson Adams was such bastard child of Elsa Johnson.

In support of the allegation that the paternity was recognized by McKellar in writing, reliance is had upon certain articles of adoption, whereby one Svenson and wife adopted the child, and whereby McKellar, as the purported father thereof, consented to such adoption.

These facts, being found in favor of these defendants by the trial court, became the basis of the decree in their



favor. The allegations here referred to were both denied and avoided by the plaintiffs and the appealing defendants. For them it is contended that McKellar always denied and never admitted the paternity; that the judgment against him in the bastardy proceeding was, at a later date, vacated and rendered wholly nugatory; that, because of such vacation, it is not available to these defendants as evidence that the alleged paternity was proved; that the article of adoption referred to contained no recognition of the paternity by McKellar; that, on the contrary, it implied a denial of such paternity; that, by the adoption, the child Clara became a part of the family tree of her adoptive parents, and her right of inheritance was confined thereto; that, in any event, her heirs could only inherit through her as a part of such family tree; that, even though the child Clara could have inherited from McKellar if she had survived him, yet she predeceased him, and therefore did not inherit from him; that her statutory right to inherit did not carry to her children a right to inherit from McKellar, for want of statutory provision to that effect; that, even though the statute conferred upon her the right to inherit from McKellar, as her putative father, in case of her survival, yet no power of transmitting such right of inheritance through her to her children was conferred by the statute, nor was any relationship created between her legitimate children and McKellar.

It is further urged that there was a want of mutuality, in that, in no event, could McKellar have inherited from the child; and for such reason, a strict construction of the statute should prevail in favor of the legitimate heirs, and against the illegitimate and her heirs. Such is the general nature of the contest. The mere facts are not in dispute. The inferences and conclusions therefrom are in conflict. The contest is argumentative, and in the main pertains to questions of law.

I. McKellar defended the bastardy proceeding. As a witness, he denied illicit relations with the complainant. The verdict and the judgment went against him. By the judgment, he was ordered to pay \$1.00 per

1. BASTARDS :  
proceedings in  
bastardy as  
evidence.

week until the first day of the May, 1877, term of the court, "at which time such order for future provision for said child shall be made as shall then seem proper to the court." He was also adjudged to pay the costs. The payments therein ordered were duly made. On May 19, 1877, it was further ordered by the court that McKellar continue to pay \$1.00 per week for the support of the child, "until the further order of this court." On January 17, 1879, it was further ordered by the court that the defendant pay \$.50 per week, in lieu of \$1.00 per week, for the period of one year. On January 10, 1881, the following order was entered by the court:

"And it is hereby ordered and adjudged by the court that the judgment in this case, rendered in this court January 17, A. D. 1879, be and the same is hereby vacated from this date, on the execution by the necessary parties of the proper instrument in writing authorized by the statute for the adoption of children, said instrument to be one whereby the said child, Clara Johnson, shall be adopted by Olaus Svenson and his wife Sophia. Said Hugh McKellar and the clerk of the circuit court of Clayton County to signify their consent thereto by signing said instrument, and said Hugh McKellar to pay this day to the said Sophia Svenson the sum of \$60; then the judgment in this cause to be vacated."

On the same day, the following article of adoption was executed, pursuant to which the custody of the child passed to the adoptive parents:

"Know all men by these presents, that we, Olaus Svenson and Sophia Svenson, his wife, of the town of Clermont in the county of Fayette in state of Iowa, in consideration

of the sum of sixty dollars in hand paid by Hugh McKellar of the township of Highland in the county of Clayton in the state of Iowa, and in accordance with the order of the district court of said Clayton County this day made, do adopt as our own Clara Johnson aged four years, and confer upon said child all the rights, privileges and responsibilities which would pertain to her if born to us in lawful wedlock, and I, Hugh McKellar, an unmarried man, having the care and providing for the wants of said child, and being by the judgment of said court at its September term, 1876, declared to be the father thereof, do consent to the adoption aforesaid of the said Clara Johnson by the said Olaus and Sophia Svenson, the said child to be hereafter called and known as Clara Svenson, and is to be given to the said Olaus and Sophia Svenson for the purpose of adoption as their own child, the mother of said child being Elsa Johnson, and I, J. F. Thompson, clerk of the circuit court of said Clayton County, Iowa, do hereby give my consent to the adoption as aforesaid.

"In witness whereof, we have hereunto subscribed our names this 10th day of January A. D. 1881.

"Olaus Svenson

her

"Sophia (X) Svenson

mark

"Hugh McKellar

"J. F. Thompson

"Clerk of Circuit Court."

The case for the appellees rests largely upon the following sections of the Code:

"Section 3384. Illegitimate children inherit from their mother, and she from them.

"Section 3385. They shall inherit from the father when the paternity is proven during his life, or they have been recognized by him as his children; but such recognition

must have been general and notorious, or else in writing. Under such circumstances, if the recognition has been mutual, the father may inherit from his illegitimate children."

Was the record in the bastardy proceeding, including the verdict and judgment, available to the appellees as proof of the paternity of the child? Further, was it available to the appellees as evidence that the paternity was proven during the life of the putative father? To answer these queries in the negative would be to render this part of Section 3385 meaningless.

No other form of proceeding is readily conceivable, under our statutes, whereby such proof could have been made in his lifetime. It is argued that the judgment entry did not declare the paternity. This fact was found by the verdict of the jury, rendered in the light of the instructions of the court. In terms, the judgment of the court required the defendant to pay the costs and to pay the installments already mentioned for the support of the child. The finding of guilt was essential to the entering of any judgment whatever against the defendant. We do not think it was essential to the validity of the judgment that it should have contained a recital of the verdict, or of the fact of defendant's guilt. The more strenuous contention of the appellants is not at this point, and we pass it without further discussion. Section 4722 of the Code of 1873 provided:

"The court may, at any time, enlarge, diminish or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe."

Pursuant to the foregoing statute, the circuit court made the successive orders of May 19, 1877, January 17, 1879, and January 10, 1881, already referred to. We have set out the

last order of the court in full, because much of the contention of appellants is based upon it. It is urged that the order of January 10, 1881, was such a vacation of the original

2. JUDGMENT:  
vacation: op-  
eration and  
effect.

judgment as to render it entirely nugatory, and therefore not available to the appellees as evidence, for any purpose whatever. It is ordinarily true that the vacation of a judgment involves the setting of the same aside. It is also true that, when a judgment is set aside, it is no longer a judgment. If it be no longer a judgment, it is no longer enforceable as such, nor available as evidence of the facts upon which it formerly rested. Conceivably, a judgment might be said to be vacated when it was fully satisfied or commuted. In such a case, it could not be further enforceable, but the facts upon which it rested would still remain a verity.

Reading the order of the court in its entirety, its meaning is not obscure. It will bear no other interpretation than that it was intended thereby to commute the payment of installments, and to terminate conditionally the further liability of the defendant therein for further payment. To put the contrary interpretation upon it is to render the entire order inconsistent with itself. By the very terms of such order, it recognized the binding force of the original judgment as an adjudication. Except for the binding effect of such original judgment, the court had no power to order the payment of \$60 by the defendant, nor to attach the condition of adoption to the discharge of the defendant. The three successive orders of the court, made in May, 1877, January, 1879, and January, 1881, all rested upon the authority of the original judgment. They modified successively its requirements, but they did not impeach its validity. The last order did not, in terms, purport to vacate the *original* judgment, but only the judgment of January, 1879, which specified the installments of payment at that time exacted. The order in question was not based upon any re-investigation of the facts, nor upon any challenge by the defendant of the verity of the judgment and the facts upon which it rested. Pursuant to such order, the defendant Mc-

Kellar became a party to an article of adoption of the child. In such writing, he expressly recognized the continuing validity of such judgment. The liability of a judgment defendant for further performance in a bastardy proceeding must appropriately terminate sometime, and under some conditions. *State v. Hastings*, 74 Iowa 574. He may settle with the mother and obtain full discharge. *Holmes v. State*, 2 G. Greene 501; *Black Hawk County v. Cotter*, 32 Iowa 125; *State v. Nobles*, 70 Iowa 174. In the absence of such settlement, the power rests with the court to fix time and condition. It is not misleading to term such an order a vacation of the judgment. Such an order is entirely consistent with the propriety and legality of all previous proceedings; nor does it undo the verity which inheres in the original judgment. We think it clear, therefore, that the evidential value of the record of the original judgment and of the proceedings leading up thereto, was not destroyed by the order under consideration.

II. Did McKellar acknowledge the paternity of the child in writing? In view of our finding in the foregoing division, this question is of doubtful materiality. It may have some bearing, however, upon a question to be later considered, and it has been argued fully by the parties. If there was an acknowledgment in writing, it is to be found in the article of adoption already set forth. Section 2308 of the Code of 1873 sets forth the requirements of a valid article of adoption. It provides:

3. **BASTARDS:**  
written recog-  
nition: arti-  
cles of adop-  
tion.

"In order thereto, the consent of both parents, if living and not divorced or separated, or, if unmarried, the consent of the parent lawfully having the care and providing for the wants of the child, \* \* \* shall be given to such adoption by an instrument in writing signed by the parties," etc.

One of the conditions of the vacation order already set

forth was "the execution by the *necessary* parties of the proper instrument in writing authorized by the statute for the adoption of children. Said instrument to be one whereby the said child Clara Johnson shall be adopted by Olaus Svenson and his wife Sophia." Under the statute above quoted, a necessary party to such instrument was "the *parent* lawfully having the care and providing for the wants of the child." The signature of the "parent," therefore, was essential to the validity of the instrument. The mother did not sign it; McKellar did. He so signed it in purported compliance with the statute already quoted. The language adopted by him in the body of the instrument was as follows:

"I, Hugh McKellar, an unmarried man, having the care and providing for the wants of said child, and being (by the judgment of said court at its September term, 1876, declared to be) the father thereof, do consent," etc.

The parentheses are ours, and are used for convenience of reference. It is contended by appellants that the parenthetical words amounted to an implied denial of the parentage, and that they indicated a mere submission to an unjust judgment. It is not impossible that the language adopted was intended to cover mental reservations on the part of McKellar, but the words must be construed in the light of the purpose for which they were incorporated by him into the instrument. If he had, in terms, denied the paternity, it would have rendered the article void on its face. The condition to the vacation of the judgment would thereby have failed. To imply a denial, therefore, where no direct denial was made, would be to work a fraud upon the adopted child and the adopting parents. If McKellar was not the parent having the care and providing for the wants of the child, then his name had no proper place in the instrument. The order of vacation required that such instrument should be executed by "the necessary parties."

A *parent* was a necessary party. McKellar was the only parent, if any, who signed the instrument. The instrument was presented as a compliance with the condition enforced by the court. In order to sustain the validity of such adoption, it would have to be held that McKellar was the consenting parent. Suppose that a proceeding had been had, assailing the validity of the adoption in question, and that, in such proceeding, it had been proved that McKellar was not, in fact, the father of the child. Suppose, further, that the adoption had been defeated on such ground. The fact would remain that, in the execution of such paper, he purported to be the father. This is all that is essential for our present consideration herein. If he purported to be the father, then he acknowledged the paternity in writing. Such acknowledgment, being thus made, is available to the appellees, as evidence both of the fact of paternity and of the written acknowledgment thereof; and its admissibility as evidence cannot be destroyed by subsequent denials or contrary proof. And this is so even though its weight as evidence of the fact of paternity might be overcome by contrary proof. The admissibility of this instrument as evidence is not affected by any ulterior purpose or mental reservations which McKellar may have had. It is enough that he signed the writing, knowing what it was. *Britt v. Hall*, 116 Iowa 564; *Watson v. Richardson*, 110 Iowa 673; *Brock v. State*, 85 Ind. 397. The parenthetical statement above set forth can be construed as a recital in corroboration of the paternity. The fact that the child was born out of wedlock would invite such corroboration; and such recital could be deemed as analogous to a pleading of evidence. Such construction gives recognition to the purpose for which the acknowledgment was made. To imply a denial of paternity or absence of acknowledgment thereof, would be to destroy the instrument of which the recital became a part. We are clear that the recitals of this instrument, and



the signing thereof by McKellar, were a formal and solemn acknowledgment of the paternity of the child, and that they will not bear implication to the contrary.

III. Clara Johnson Adams having predeceased her putative father, can her legitimate children stand in her shoes, and inherit such estate as she would have inherited from such parent if she had survived him?

4. DESCENT AND  
DISTRIBUTION:  
heirs of  
bastard: puta-  
tive grand-  
father.

It is earnestly contended by appellants that they cannot. The contention is that, though the statute gives to the illegitimate child a right to inherit from the father, where the paternity is proved during his life, or where it has been acknowledged in writing, such statute does not carry such right to the descendants of the illegitimate. To put the contention in another way, her descendants are her heirs, but they are not heirs of her father. It is true that our statute which confers a right of inheritance upon an illegitimate child does not, in terms, confer the right of inheritance upon the descendants of the illegitimate, from the ancestors of the illegitimate. The question, however, is quite foreclosed in this state by *Johnson v. Bodine*, 108 Iowa 594, and by *McGuire v. Brown*, 41 Iowa 650; and we might well rest the question upon these prior decisions. But appellants insist that these cases are unsound, and out of joint with the rest of the world. It is also urged that our opinion in the *Bodine* case erroneously assumed that the result reached was required by the holding in the *McGuire* case; and that the later opinion shows that the holding would have been otherwise, if the holding in the *McGuire* case had been properly understood. Under a statute which is now Section 3384 of the Code, it was held in the *McGuire* case that an illegitimate child of a deceased mother did inherit, through the mother, and, through the mother's parents, from the mother's brother. In that case, the mother had died before the inher-

itance was cast. In the *Johnson* case, it was held that the children of an illegitimate daughter would take, through their mother and through the putative father of such mother, a devise to the heirs of such putative father. This holding involved interpretation of a statute now appearing as Section 3385 of the Code. The opinion in the *Johnson* case does not indicate a misunderstanding of the holding in the *McGuire* case. The writer of the opinion did express doubt as to the correctness of the holding in the *McGuire* case, but joined in adherence thereto because the same had become a rule of property. In neither of the statutes under consideration in these cases was there any express provision that an illegitimate could inherit from an ancestor of its parent; nor was there any provision, in terms, that the descendants of an illegitimate could inherit from an ancestor of either father or mother. The effect of our holding in the *McGuire* case was that the right conferred upon an illegitimate to inherit from her mother carried with it the right to inherit from her ancestors whatever the mother herself would have inherited, if living. What we held in the *Johnson* case was that Section 3385, conferring upon an illegitimate the right to inherit from the father, when the paternity is properly proved, carries with it the right of inheritance down the line of the descendants of the illegitimate. It may be conceded that there is much authority to the contrary. The decisions referred to were not made in ignorance of that fact. The general purport of the argument in support of the contrary authority is the old rule at common law, that an illegitimate has no inheritable blood, and is without kin and without ancestry. Inheritances, therefore, cannot pass through the blood of a bastard. He can have no heirs save those of his own body; and the ancestry of such heirs terminates in the bastard. The rule is stated briefly by Kent as follows:

"A bastard \* \* \* has no inheritable blood, and is incapable of inheriting as heir either of his putative father or his mother, or of anyone else, nor can he have heirs but of his own body." 2 Kent, Commentaries, 212.

This rule has been one of the reproaches of the common law, which has shocked the legislative and judicial conscience of the civilized world. That a bastard has no inheritable blood is only a legal fiction. Legal fictions have their appropriate uses. They are the stepping stones of the law's reasoning; the parables whereby its principles are illustrated. When its reason fails, the fiction falls. The fiction that a bastard has no inheritable blood has been shorn of its reason in this state by legislation. It remains, therefore, a fiction only. Our legislation has conferred upon the illegitimate the right of inheritance, with appropriate safeguards as to the certainty of paternity. Why, therefore, should we deal with finespun theories of the common law as to inheritable blood? The only justification ever offered for the common-law fiction was that bastardy should be rendered odious. But bastardy is the sin of the parent; not of the child. The illegitimate child is as innocent as the babe of Bethlehem. Yet the common law held its fiction as a shield over the guilty parent, and frowned upon the guiltless child with the disdain of a Pharisee. Our early territorial legislation struck at the cruel injustice of this fiction. From territorial days until now, there has never been a time in this state when it has not been contradicted by existing legislation. The *McGuire* and *Johnson* cases were decided in response to the spirit of such legislation, and are in entire harmony therewith.

IV. It is urged that the putative father had no right of inheritance from the children of the illegitimate, and that, for want of mutuality, therefore, such children should have no right of inheritance from him. The argument has its force, as a rule of construction, and not otherwise. It

would be an appropriate consideration, also, for a legislative body. In the case before us, the want of mutuality is to be found in the existing statute. It is within the power of the legislature to withhold mutuality. Under Section 3384, there is mutuality as between a mother and an illegitimate child. Under Section 3385, there is only a qualified mutuality provided as to the putative father. Notwithstanding such want of mutuality, such section does confer the right of inheritance upon the child. It is not wholly without reason that the statute should withhold the right of inheritance from the putative father, except upon the condition specified therein. The provision for the child may be looked upon as a species of redress for the wrong perpetrated by the father. Moreover, the condition imposed is not an onerous one. This condition is that, in order to entitle the putative father to inherit from his illegitimate child, there must have been appropriate recognition or acknowledgment of the paternity by such child. There is a touch of the uncanny in this requirement. It implies that there may be doubtful or conflicting claims of paternity of an illegitimate child; and that the child should "know its own father." Such conflicting claims of paternity are so rare that none has ever come to our attention. If such a case of conflict should arise, it would indeed be a "wise child" that could extend recognition to the proper contender. As a matter of common observation, it may safely be said that the illegitimate child has usually been glad to acknowledge the paternity which first extends the arms of acknowledgment to it.

Furthermore, while the argument based upon the want of mutuality is directed in the brief only as against the descendants of the illegitimate, yet, if adopted, its logical result would be to withhold the right of inheritance from the illegitimate herself. This would be in direct contravention of the statute.

It is urged, also, that the statute which confers the right of inheritance upon the illegitimate does not change its status as an illegitimate. This may be conceded. It was so held in *Brisbin v. Huntington*, 128 Iowa 166, 175. But this does not reduce the effect of the statute which confers upon the illegitimate the right of inheritance. Though illegitimate, her disabilities as to right of inheritance are lifted by the statute. Her paternity being proved with that certainty required by the statute, her biological blood line becomes endowed with the right of inheritance.

Lastly, it is urged that the adoption of an illegitimate so connects her with the blood line of the adopting parents that she should thereafter be deemed as the child of the adopting parents, and not of the putative

5. DESCENT AND  
DISTRIBUTION:  
adoption of  
bastard: effect  
on inheritance  
from natural  
parent.

father. It was held in *Wagner v. Varner*, 50 Iowa 532, that an adopted child, though acquiring by adoption the right to inherit from its adopting parents, did not thereby lose the right to inherit from its natural parents. The child in that case was legitimate. We see no reason to say that the adoption of an illegitimate child would deprive it of such right as it had of inheriting from its natural parents.

We reach the conclusion that the trial court correctly decided all features of the case. The case has been presented here on both sides with great ability and thoroughness. Nothing in the way of appropriate argument has been overlooked by counsel. After the fullest consideration of the briefs, we find ourselves content with the holding in *Johnson v. Bodine*, supra. The decree entered below is, therefore,—*Affirmed*.

PRESTON, C. J., LADD and STEVENS, JJ., concur.

MIDLAND LINSEED COMPANY, Appellee, v. AMERICAN LIQUID  
FIREPROOFING COMPANY et al., Appellees; CHICAGO  
GREAT WESTERN RAILROAD COMPANY, Appellant.

**CARRIERS: Delivery Without Bill—Subsequent Acquisition.** A car-  
1 rier is absolved from all liability on the score of delivery by de-  
livering a shipment without obtaining possession of the bill  
of lading, but subsequently acquiring the bill of lading from one  
who had title to it.

**CARRIERS: Unauthorized Delivery.** A shipper who sends to a bank  
2 a bill of lading with draft attached, may not, as between himself  
and the carrier, claim that the act of the bank in delivering the  
bill of lading to the buyer was unauthorized. So held where  
the bank, erroneously supposing the draft to be paid, delivered  
the bill of lading to the buyer, and the buyer delivered the same  
to the carrier.

**CARRIERS: Unauthorized Delivery—Ratification.** A shipper who,  
3 with knowledge that a carrier had made an *unauthorized* de-  
livery, treats the one to whom the delivery was made as his  
debtor, thereby ratifies the unauthorized delivery and necessa-  
rily precludes himself from proceeding against the carrier as  
for conversion. So held where the shipper retained partial pay-  
ments made by the one to whom delivery was made, and later  
brought suit against said party to collect the balance.

**CARRIERS: Non-Delivery—Form and Time of Making Claim.** A  
4 provision in an interstate bill of lading requiring claims for  
non-delivery to be made (a) in writing, and (b) within a stated  
time, applies, in compliance with Federal court rulings, to a  
*misdelivery*.

**CARRIERS: Form of Claim—Authority of Agent to Receive.** A  
5 shipper, obligated by a bill of lading to make his claim for dam-  
ages in a specified form, must show such authority in the per-  
son to whom the claim is made that it may be inferred that  
service on such person was service on the carrier. Certain  
indefinite evidence held insufficient to show such authority.

*Appeal from Cerro Gordo District Court.—J. J. CLARK,*  
Judge.

MARCH 6, 1918.

REHEARING DENIED JUNE 24, 1918.

ON this appeal, the sole question is whether the defendant railroad is liable to the plaintiff company because of an alleged misdelivery of an interstate shipment entrusted by the plaintiff to said railroad company. The district court held the railroad was thus liable, and defendant appeals.—*Reversed and remanded.*

*Carr, Carr & Evans*, and *Blythe, Markley, Rule & Smith*, for appellant.

*Kelleher & O'Connor*, and *Cliggett & Smith*, for appellees.

SALINGER, J.—I. We need not consider whether it would help the plaintiff if its allegation that the defendants colluded were proved. There is absolutely no evidence of any collusion or bad faith.

The defendant Fire Proofing Company ordered a carload of oil of plaintiff. Plaintiff shipped the car over the defendant railroad, and consigned it to itself. At the same time, it sent the bill of lading to the defendant bank, with draft for the amount of the purchase price attached. It was the duty of the bank not to surrender this bill of lading to the buyer except on payment of this sight draft. The carrier was authorized to deliver the oil to the buyer upon surrender of the bill of lading. It delivered before such surrender, but received the bill of lading later. The shipper was paid part of the purchase price; but, for present purposes, we will deal with the case as though no payment had been made to the seller.

All the authorities agree that, if a shipment is to be delivered only upon the surrender of the bill of lading, and the carrier delivers without obtaining such bill, the shipper

1. CARRIERS: delivery without bill: subsequent acquisition.

may, as to any loss resulting, treat the carrier as guilty of a conversion. 2 Hutchinson on Carriers (3d Ed.), Section 727; *Chicago & S. E. R. Co. v. Fifth Nat. Bank*, 26 Ind. App. 600 (59 N. E. 43). But no case holds that, if the carrier does obtain the bill of lading, he is guilty of conversion merely because he made delivery before he obtained the bill of lading. If the fact that delivery was made before the bill was surrendered were controlling, then, upon proof of such premature delivery, the seller could recover the purchase price of the carrier after the buyer had already paid. The liability of the carrier for conversion is not a penalty for premature delivery. He is liable because he delivered to one who was not, in truth, authorized to receive. The effect of a consignment by a shipper to himself, and sending bill of lading with draft attached to someone other than the carrier, is an agreement that obtaining the bill of lading from one entitled thereto shall conclusively acquit the carrier from liability to the shipper. The bill of lading is contract evidence of the right to deliver. The liability is for wrongful delivery, not for delay in obtaining evidence of rightful delivery. Had the bill been surrendered before the shipment was delivered, this would have been no protection to the carrier if the presentor had no right to the bill. Exactly that is the situation if presented after delivery. It is not the time of surrender, but the right to surrender, that matters.

While *Nebraska Meal Mills v. St. Louis, S. W. R. Co.*, 64 Ark. 169 (41 S. W. 810), upon which appellant greatly relies, turns off on the fact that the carrier knew nothing of a bill of lading with draft attached being out, the case does support the proposition that the test is not timely presentation of the bill, but whether delivery was made to one who was, under the contract of the parties, entitled to receive it. If the shipment be delivered before the bill is presented, the carrier takes his chance on whether the person



receiving the goods is entitled to them. He takes his chance on whether the bill of lading is genuine, or of a false impersonation. In one word, he takes his chance of rightfully obtaining the bill of lading. If he never gets it, or if he does and the person who surrenders it has no right to it, he must make good the loss of the seller. *Schlichting v. Chicago, R. I. & P. R. Co.*, 121 Iowa 502, 505, 506; *Forbes v. Boston & Lowell R. Co.*, 133 Mass. 154, at 157; *Foy v. Chicago, M. & St. P. R. Co.*, 63 Minn. 255 (65 N. W. 627); *Midland Valley R. Co. v. J. A. Fay & Egan Co.*, 89 Ark. 342 (116 S. W. 1171); *Pacific Exp. Co. v. Critzer*, (Tex.) 42 S. W. 1017; *American M. U. Exp. Co. v. Milk*, 73 Ill. 224; *Merchants & Miners Transp. Co. v. Moore & Co.*, 124 Ga. 482 (52 S. E. 802); *Ridgway Grain Co. v. Pennsylvania R. Co.*, 228 Pa. 641 (77 Atl. 1007). The bill was surrendered to the carrier, although it was done after it had delivered the oil. The controlling question is whether the buyer who surrendered it had,

2. CARRIERS: unauthorized delivery.

as between the carrier and the shipper, the right to surrender it. The shipper had created two agencies. The carrier was its agent to transport, and it was agreed that its possession of the bill of lading should be a voucher for authorized delivery. The bank was an agent, whose duty it was to make it impossible for the carrier to obtain the bill of lading until after the purchase price had been paid to the bank. If the carrier did not get the bill of lading because it had no right to receive it, it was liable for the purchase price. If the bank parted with the bill of lading, and thereby absolved the carrier from liability, the bank became liable for the purchase price, unless its principal in some way released it. Neither agent was liable to the principal for any loss caused solely by the default of the other agent. The bank surrendered the bill to the buyer. Had it there-after paid the seller the amount of the draft, no one would

be liable, though the carrier parted with the goods before the surrender of the bill.

What and who caused loss? It is only depriving one of property by an unauthorized act that constitutes conversion. *Kreher v. Mason*, 33 Mo. App. 297, citing Addison on Torts (6th Ed.), Section 525. To be sure, the bank has not paid the shipper. But does that make the delivery of the bill of lading to the buyer an unauthorized act, in such sense as that the carrier who delivered without presentation of the bill is responsible as for a conversion? The damage is not due to the fact that the bill was not presented before the goods were turned over, but because the bill was turned over by the bank, and the bank did not pay the draft. The vital question is whether the shipper is in position to say that delivery of the bill by the bank to the buyer was, as to the carrier, an unauthorized act. The bank only was responsible to the shipper if it voluntarily gave up the bill of lading without collecting the purchase price. *State Nat. Bank. v. Thomas Mfg. Co.*, 17 Tex. Civ. App. 214 (42 S. W. 1016). If the bank had been paid the actual cash by the buyer, the shipper could not claim anything of the carrier. But it was not thus paid. A large part of what the bank received from the buyer was the check of a third person, which both the depositor and the bank believed to be good. This check, later, went to protest. If the carrier is liable, it is because the bank accepted in payment a check which proved worthless. What the situation would be, had the carrier known that the bill was obtained by turning over said check therefor, we need not determine. It is not claimed it had any such knowledge. We think that, as between the carrier and the shipper, the transfer from the bank to the buyer gave the buyer title to the bill of lading; that the case is the same as if the bank had taken the note of the buyer, and the note had proved uncollectable.

The case stands precisely as if the buyer had deposited

the worthless check with the shipper himself, and the shipper had, thereupon, surrendered the bill of lading, or directed the carrier to deliver to the buyer; and it is determined by *Rathbun v. Citizens' Steamboat Co.*, 76 N. Y. 376, that, in such case, the carrier would not be liable to the shipper. And see *Dobbin v. Michigan Cent. R. Co.*, 56 Mich. 522 (23 N. W. 204); *National Bank of Phoenixville v. Philadelphia & R. R. Co.*, 163 Pa. 467 (30 Atl. 228). The carrier is not liable, because it obtained the bill of lading from one who had title thereto. That its surrender to the buyer made the bank liable to the seller, does not concern the carrier. That question lies wholly between the bank and its principal. Nor is it material that the trial court found in favor of the bank, and that the seller has fallen between two stools, and may not collect from the bank because no appeal was taken by the shipper from the decree in favor of the bank. It is not the fault of the carrier that the plaintiff has not appealed.

We hold that the carrier has the contract acquittance. It did obtain the bill of lading. The person who surrendered it had title to it, even though the bank had a cause of action against the presentor because of nonpayment of the check deposited to pay the purchase price, and though the shipper had a cause of action against the bank for its failure to remit the amount of the draft. We hold, also, that it is immaterial that the bill was not surrendered until after the shipment had been delivered, so long as it was surrendered at some time when the presentor had title to it; and that it is immaterial that, thereafter, the buyer obtained the bill from the carrier for some such purpose as showing it to the bank, and its physical possession was not thereafter restored to the carrier.

II. A considerable time after the draft had been sent, the shipper received and accepted a partial payment. If, at that time, it knew, or, by inquiries suggested from the cir-

cumstances, could have learned, that the oil had already been delivered, this would clearly estop a recovery against the carrier. But there is evidence that the shipper supposed the partial payment to be one upon the draft, and that the goods had not yet been delivered. So we will assume that the receipt of this partial payment did not work a ratification. But after the plaintiff discovered that the oil had already been delivered, it retained this partial payment. It demanded payment of the balance of the purchase price from the buyer, and finally it sued it for that purchase price. Why does not this constitute a ratification in favor of the carrier, or, for that matter, against the bank? The suit against both carrier and bank is confessedly for conversion, which implies a claim that no title passed to the buyer. A demand for the purchase price implies there was a purchase, and, therefore, that the buyer obtained title. While inconsistent defenses may be pleaded, it is so because the statute so says. There is no authority for inconsistent claims in a petition, and their making operates as an estoppel. We hold the carrier cannot be made liable for conversion of the goods consisting of giving them to someone who was not entitled to them, where the plaintiff declares that the buyer owes him the purchase price. *Kearney Mill. & Elev. Co., v. Union P. R. Co.*, 97 Iowa 719. If the delivery was unauthorized, demand of the purchase price ratifies the unauthorized act. See *Nanson v. Jacob*, 93 Mo. 331 (6 S. W. 246); 1 Am. & Eng. Encyc. of Law (2d Ed.), 1196, 1209; *Eadie, Guilford & Co. v. Ashbaugh*, 44 Iowa 519; *Deering & Co. v. Grundy County Nat. Bank*, 81 Iowa 222; *Russ v. Hansen*, 119 Iowa 375. It does not matter that taking the contrary positions has worked no injury. *Kearney Mill. & Elev. Co. v. Union P. R. Co.*, 97 Iowa 719, at 724. We hold the plaintiff is estopped to assert that defendant railroad has converted the shipment.

8. CARRIERS : unauthorized delivery : ratification.

III. A provision in the bill of lading is that claim for damages, including those for failure to make delivery, must be made in writing, and within four months after a reasonable time for delivery has elapsed; and un-

4. CARRIERS: less claims are so made, the carrier shall not be liable. Such contracts are valid. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S.

190 (36 Sup. Ct. Rep. 541); *Erisman v. Chicago, B. & Q. R. Co.*, 180 Iowa 759; 4 Elliott on Railroads, Sec. 1512. The plaintiff says, first, a provision covering failure to make delivery has no application to misdelivery; second, that it did make written claim within the time stipulated; third, that, if there was not strict compliance, strict compliance has been waived.

For the claim that the contract does not cover misdelivery, it is said that misdelivery is a conversion, and that the contract does not cover conversions. It may be conceded that this position is supported by *Merchants & Miners Transp. Co. v. Moore & Co.*, 124 Ga. 482 (52 S. E. 802); *Cleveland, C. C. & St. L. R. Co., v. C. A. Potts & Co.*, 33 Ind. App. 564 (71 N. E. 685); and perhaps by other decisions. The reasoning in the *Moore* case indicates that a wilful act is referred to when speaking of conversion, and it may be doubted whether these cases have any application to anything but where the delivery is knowingly made to the wrong person. Be that as it may, this was an interstate shipment, and the construction of this contract is a Federal question, upon which the pronouncement of the Supreme Court of the United States controls. See *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190 (36 Sup. Ct. Rep. 541). That case settles, not only that the construction of this provision is a Federal question, but also that it applies to misdeliveries. It is a case where delivery was made without payment of the draft and surrender of the bill of lading, though these were ultimately remitted to the shipper; and the

Federal decision is an "all fours" case. Among other things, it is said:

"It necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but, as the state court said, 'If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.'"

See also, as giving some support, *Lee v. Coon Rapids Nat. Bank*, 166 Iowa 242; and *Richter & Sons v. American Exp. Co.*, 180 Iowa 1037.

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It may be conceded that what was done constitutes a timely claim in writing. It was made to one who is said to be the commercial agent of the defendant railroad at the point where the shipment originates. The difficulty is that there is no competent evidence of what authority this man had. A written claim was addressed to "Commercial Agent, C. G. W. R. R., City." Further written communication was addressed to "Mr. Goodsell, Agent C. G. W. R. R., Minneapolis." A witness for the plaintiff testifies that the man written to was the commercial agent who solicited freight for the defendant road; that witness has settled "a little bit with him in the matter of adjusting claims and matters of that kind,—not a great deal;" that "quite frequently there were cases of claim adjustments coming up which I referred to him for verification of the price or verification of shipment or something like that, that came up and referred to us when they wanted to investigate our files, get information that the claim office asked for. Sometimes other agents of the company were sent by it to do that business, agents from the head claim office in Chicago." Further testimony is that this "commercial agent" had his office "with the ticket agent's office and the commercial office

5. CARRIERS:  
form of claim:  
authority of  
agent to re-  
ceive.

for most all railroads." All this testimony was received over apt objection. The statement that the man written to was the agent of the defendant railroad is a pure conclusion, and is not receivable to prove that the addressee had powers which would make notice of this claim to him notice to the carrier. See *Heiman v. Felder*, 178 Iowa 740; *Georgia, F. & A. R. Co. v. Blish*, 241 U. S. 190 (36 Sup. Ct. Rep. 541). Neither is such authority shown by the fact that he had an office in the place where all the railroads had their ticket and commercial agents. That may be proof he was a commercial agent,—whatever that is,—but is no proof of what authority he possessed to act for the carrier in the premises. That he solicited freight and talked about claim adjustments would be competent proof of agency, if there were any evidence that the railroad authorized his doing so, or acted upon what he had done. In the last analysis, the proof of agency at this point is the acts and declarations of the alleged agent. We think the required claim was not made, because it is not shown it was made to the carrier. This situation relieves us from determining whether the intimation in the *Blish* case that such a claim must be made to a general officer is the law. It also relieves us from passing on the question whether the possibility of favoritism and rebating that would be created if there be the right to waive the provisions as to the manner of making claim, prohibits a waiver of such provision. And we need not pass upon whether, if the power to waive exists and Goodsell had it, what he did constitutes a waiver. See *Clegg v. St. Louis & S. F. R. Co.*, (C. C. A.) 203 Fed. 971.

Our conclusion is that the trial court erred in holding defendant railroad liable. The cause is remanded, with direction that judgment be entered in favor of the defendant Chicago Great Western Railroad Company, as between it and the plaintiff. The motion to dismiss appeal, made by de-

fendant First National Bank, is overruled.—*Reversed and remanded.*

PRESTON, C. J., LADD and GAYNOR, JJ., concur.

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ELIZABETH NORRIS et al., Appellees, v. WILLIAM LOYD, Appellee, et al., Appellants.

**WILLS:** Equitable Conversion—Avoidance. Directions in a foreign

1 will to sell Iowa real estate and to divide the proceeds among named devisees do not, *ipso facto*, under the fiction of equitable conversion, necessarily and irrevocably fix the status of the property *as personality*, and work a transference of the property *as personality* to such foreign state, for distribution *as personality*, and according to the laws of such foreign state. The devisees may, by unanimous record agreement, take the land *as land*, and thereby cause the will to operate thereon *as land*, and according to the laws of this state; and this, too, over the protest of a nondevisee heir, who, under peculiar legal conditions, has been adjudged by the courts of such foreign state to be entitled to take a portion of the testator's estate *in spite of and in opposition to the will*.

**PRINCIPLE APPLIED:** The will of a resident of California was duly probated in said state, and later filed in Iowa, and in the county where testator owned certain land. This will directed that said Iowa land should be sold, under the approval of the Iowa court, and the *proceeds* divided among twelve named sons and daughters, all *sui juris*. Shortly after the death of testator, said twelve children filed, in the court of the county where the Iowa land was situated, an election to take the land *as land*; and the executor and the Iowa court duly approved such election. A California statute provided that, if a testator omitted to provide for a child, such child should take the same share as he would take, were there no will. After the will was probated, one Hicks, who was not a devisee under the will, brought an action in the courts of California, claiming to be the illegitimate child of said testator, and prayed for a decree establishing his rights. Said twelve children were made parties to this action. The California court decreed that Hicks was such child, and that he was entitled to a certain fractional part of testator's estate "*wherever situated*." Later, the twelve children brought partition proceedings for the division of the Iowa land. Hicks



intervened, claiming: (a) That he was, under the California decree, the owner of his fractional part of the land; and (b) that the said twelve devisees had no right to reconvert the fictitious proceeds of the Iowa land *into land*; that the land must be sold, and the proceeds—personalty—transferred to California for distribution.

*Held*: 1. The devisees were the sole owners of the Iowa land, and possessed the absolute right to take the land *as land*, and thereby defeat a sale thereof.

2. The California court was wholly without jurisdiction to adjudicate the title to the Iowa land.

**WILLS: Disinheriting Bastard.** Principle recognized that a duly  
2 acknowledged illegitimate child, as well as a legitimate child, may be disinherited.

**CONVERSION: Avoidance by Reconversion.** The fiction of equita-  
3 ble conversion of real estate may be avoided by the agreement of the sole beneficiaries to take the land *as land*—the gift being immediate, and not in trust.

PRINCIPLE APPLIED: See No. 1.

**JUDGMENT: Foreign Judgment In Re Title to Real Estate.** An  
4 adjudication by a foreign court of the ownership of Iowa real estate is entitled to no "faith and credit" in the courts of Iowa, even though all parties in interest were properly before such foreign court when it rendered such adjudication.

PRINCIPLE APPLIED: See No. 1.

*Appeal from Monona District Court.*—GEORGE JEPSON,  
Judge.

JUNE 24, 1918.

SUIT in partition of lands owned, at the time of his death, by George E. Loyd. All the parties save one are the widow and devisees under the will of Loyd. The other party is Charles Hicks, who intervened in the action, claiming to be the illegitimate son of the testator, and to be duly recognized by the testator as such. Hicks proved an adjudication in the state of California of his paternity, and due acknowledgment thereof. He was not, however, a devisee under the will. The trial court confirmed the title of the property pur-

suant to the terms of the will, and awarded it to the devisees therein and to the widow. The intervening defendant has appealed.—*Affirmed.*

*George H. Clark and E. A. Burgess, for appellant.*

*S. A. Frick, Miles W. Newby, and M. F. Harrington, for appellees.*

EVANS, J.—The property in question consists of 800 acres of land in Monona County. The devisees, parties hereto, are the twelve legitimate children of the testator, George E. Loyd. At the time of his death, and for a few years prior thereto, Loyd was a resident of California. The original probate of his will and the administration of his personal estate were there had. The question of the paternity of Hicks and of the due acknowledgement thereof was litigated in California, in a proceeding wherein the widow and all the legitimate heirs were parties. The finding of fact in that proceeding was that George E. Loyd was the father of Hicks, and that he had duly acknowledged the paternity in writing. The same adjudication held, as a conclusion of law, that Hicks was entitled to take two thirty-ninths of the estate of George E. Loyd, "wherever situated." This conclusion of law was predicated upon a California statute, which purports to protect the children of a testator against omissions in his will. Under such statute, if a testator omits to provide in his will for any of his children, such child has the same share in the estate of the testator as if he had died intestate. No provision was made for Hicks in the will of the testator.

The will of the testator directed the executors to sell the Iowa land in question, and to divide the proceeds among his twelve children, naming them. Shortly after the death of the testator, the widow and the twelve children, being all

1. WILLS: equitable conversion: avoidance.

*sui juris*, elected and mutually agreed to take and hold the land in question as land. They so notified the executors, who assented thereto. Their election was also filed in the district court of Monona County and presented to that court for approval, and was approved. Later, this action of partition was brought. No controversy is presented, as between the widow and the twelve devisees. The only controversy is between this family group, on the one hand, and Charles Hicks, on the other. The contention of Hicks may be stated in two general propositions:

(1) That the adjudication in California was binding upon all the parties thereto everywhere; and that the full faith and credit clause of the Constitution of the United States requires that it be recognized by the courts of this state in the devolution of this title.

(2) That the provision of the will which directed the executors to sell this real estate was an equitable conversion thereof; that it thereby became personalty, and attached to the testator at his domicile, and came within the jurisdiction of the California courts; that the devisees had no power to work a reconversion into land without the consent of *all* parties in interest, including himself.

The contention for the devisees may also be stated in two general propositions:

(1) That, though the will worked an equitable conversion of the land into personalty, the election of all the devisees before actual conversion, worked a reconversion into land, and terminated the power of the executors to convey the title; that the question of conversion of the land concerns no one except a devisee, or one claiming under a devisee; that Hicks took nothing under the will, but claimed in hostility thereto; that, under Iowa law, the devise of the real estate was valid, even as against an heir.

(2) That there was no jurisdiction in the California

court to adjudicate the question of title to real estate in Iowa.

These general propositions have some ramifications of detail. After Hicks obtained an adjudication of his paternity, he brought a proceeding against the executors to compel them to sell the land in question, and to bring the proceeds before the California court. As an alternative, he asked the removal of the executors. In this proceeding, he was again successful, in the *nisi prius* court. This adjudication was also in force and effect, pending, however, on appeal to the Supreme Court of California, at the time of the trial of the present suit in the district court of Monona County. This status continued until after the first arguments were filed in this court. The arguments, therefore, have been built, to some extent, upon the effect of that adjudication. Later, however, the Supreme Court of California handed down a reversing opinion on that appeal, and the contentions of the appellant herein, based on that adjudication, have necessarily fallen with it. In the consideration of the case, it will simplify the discussion if we consider first what the rights of the parties would be as to this land under our law, disregarding, for the moment, the California adjudication, but assuming the fact of paternity and acknowledgment thereof to be as found by the California court. We can then turn our attention upon the qualifying effect, if any, of such alleged adjudication.

I. The testator disposed of the property in question by his will. This is so whether the will worked an equitable conversion or not. Under our law, he had a right to so dispose of it, to the exclusion of any legitimate child. He had the same right to dispose of it to the exclusion of a duly acknowledged illegitimate child. *Lepper v. Knox*, 179 Iowa 419. The land having been properly disposed of by will, Hicks acquired no interest in it, either as heir of the testator or as devisee

2. WILLS: disinheriting bastard.

under his will. While the will stands, the only persons interested in the land are the widow and the devisees, and such as may claim under them.

Assuming that the will, in the first instance, worked an equitable conversion of the land into personalty; did the land thereby lose its situs, and did the title thereto escape its subjection to Iowa law? The will provided that the executors should sell the property, with the approval of the district court of Monona County. An equitable conversion is a legal fiction, and is simply anticipatory of an actual conversion. There could be no actual conversion without a transfer of the title, and there could be no legal transfer of the title, except in pursuance of Iowa law. The doctrine of equitable conversion by will is not usually, if ever, applied in hostility to the devisee. It is well settled by authority that, though a will work an equitable conversion of land, the beneficiaries of the devise may, at any time before actual conversion, work a reconversion into land, by so electing and agreeing among themselves. That question was before this court in *Boland v. Tiernay*, 118 Iowa 59, and again in *Atlee v. Bullard*, 123 Iowa 274, 279. In the latter case, it was said:

“It may be further remarked that property subjected to equitable conversion may be reconverted by the consent or acquiescence of all the parties directly interested in the subject-matter. *Mellen v. Mellen*, 139 N. Y. 210 (34 N. E. 925); *Craig v. Leslie*, 3 Wheat. 563 (4 L. Ed. 563); *Fluke v. Fluke's Exrs.*, 16 N. J. Eq. 478; *Cropley v. Cooper*, 19 Wall. 167 (22 L. Ed. 109); *Beadle v. Beadle*, (C. C.) 40 Fed. 318; *Madlebaum v. McConnell*, 29 Mich. 86 (18 Am. Rep. 61). The parties to this action, being all who have any right to claim under the will of the testator, having elected to treat the property as real estate instead of personalty, must be held

3. CONVERSION:  
avoidance by  
reconversion.

to have effected a reconversion, if, indeed, an equitable conversion ever took place."

A few excerpts from other jurisdictions will indicate the uniformity of authority upon this question. In *Griffith v. Witten*, 252 Mo. 627, 646 (161 S. W. 708), it is said:

"The 'equitable conversion' of the real estate into money continues until such time as there is an actual conversion, or until by election there has been a 'reconversion.' This reconversion may take place at any time prior to the actual conversion. The constructive conversion, or 'equitable conversion,' is as of date of the will or death of testator; the actual conversion is as of the date of the sale of the real estate. [*Nall v. Nall*, supra, and cases therein cited and reviewed.] As stated in the *Nall* case, the reconversion may take place at any time during the period of constructive conversion, and prior to actual conversion. In the case of adults, there must be an election, but this election may come at any time before actual conversion. In the case of infants, as here, the court of equity may make the election for them, if the necessities of the case so require it, and the interest of the minors would thereby be best subserved. In the instant case, the real beneficiaries are the eight minors. Under the will and the showing made in this case, they would be entitled to all the proceeds of this land, if it were sold. Under such facts, the trial court had the power to elect for them to reconvert the property into land and decree that they so hold it. Upon this theory of the law, the judgment *nisi* is correct."

In *Bank of Ukiah v. Rice*, 143 Cal. 265, it was said:

"The appellants' right to maintain the action, by reason of their relation to the land as the beneficiaries under the sale directed by the decree, is to be determined upon a consideration of different principles. It is a well-settled rule in equity that, where a testator directs land to be sold, and the proceeds thereof to be distributed among certain desig-

nated beneficiaries, such beneficiaries may elect, before the sale has taken place, to take the land instead of its proceeds; and when they have so elected, and sufficiently manifested their election, the authority to sell the land cannot thereafter be exercised by the executor, but is extinguished. The estate is thereby reconverted into real property, and by reason of such reconversion, the relation of the beneficiaries to the land is the same as if it had been directly devised to them. (*Pearson v. Lane*, 17 Ves. 101; *Craig v. Leslie*, 3 Wheat, 563; *Hetzel v. Barber*, 69 N. Y. 1; *Prentice v. Janssen*, 79 N. Y. 478; *Greenland v. Waddell*, 116 N. Y. 234; *Mellen v. Mellen*, 139 N. Y. 210; *Baker v. Copenbarger*, 15 Ill. 103; *Huber v. Donoghue*, 49 N. J. Eq. 125; *Swann v. Garrett*, 71 Ga. 566; *Sears v. Choate*, 146 Mass. 395; Pomeroy's Equity Jurisprudence, Sec. 1175; Chaplin on Express Trusts and Powers, Sec. 691.) This right rests upon the presumption that the power of sale given to the executor was intended for the benefit of the beneficiaries, and upon the principle that, as they are the absolute owners of the entire property in the land, they have the right to direct the disposition to be made of it; and also in consideration of the practical effect of a contrary rule. If they are entitled to the entire proceeds of the sale, they could outbid any other purchaser, and thus indirectly accomplish their desire to retain the land."

In *Mellen v. Mellen*, 139 N. Y. 210 (34 N. E. 925), it was said:

"It is a principle now well settled that where, by a will, money is directed to be laid out in the purchase of land for designated beneficiaries, or land is directed to be sold and the proceeds distributed, it is competent for the parties beneficially interested, provided they are competent and of full age, and the gift is immediate, and not in trust, to elect, before the conversion has actually taken place, to take the money in the one case, and the land in the other, and when

they have so elected, and the election has been made known, the power of the trustee for conversion ceases and becomes extinguished, and he cannot thereafter lawfully proceed to execute the power. This doctrine is founded upon the presumption that such a power is given by the testator for the benefit and convenience of the devisees and legatees, and, unless made so in terms, was not intended to be imperative, so as to prevent the beneficiaries from taking his bounty, except in the precise form in which the property would exist after the conversion."

In the case at bar, there was a complete agreement of all the devisees working the reconversion. Such reconversion was specially approved by the district court of Monona County. There is a claim for the appellant that, at one time, one of the heirs, Mrs. Gent, filed in court a protest, and refused to agree. He contends that this was an election on her part and a finality, and that she could not thereafter agree. The point cannot be sustained. If it could be, as between contesting devisees, it is not available to the appellant, who is not a devisee. But it is quite clear that the right remains to the devisees to reach an agreement for a reconversion at any time before actual conversion. True it is that any devisee could withhold his assent, and thereby defeat a reconversion. Such is not this case.

It must be said, therefore, that these devisees did work a reconversion whereby the title to the land as land vested in them, and whereby the power of the executor to convey the land was terminated. It follows that, under Iowa law, title to this land can only be acquired through or under these devisees. A conveyance by Hicks would convey nothing. An encumbrance by him would encumber nothing. Unless, therefore, the California adjudication is effective, notwithstanding Iowa law, to confer upon him a title or interest therein, decree must go against him.

II. We proceed, therefore, to a consideration of the



effect of the California adjudication. We are not called upon to deal with the effect of a California judgment or decree

4. JUDGMENT: foreign judgment in re title to real estate. *in personam*; nor with the power of a court of equity in any state to coerce the parties before it into the performance of its mandates by appropriate processes of contempt

or otherwise; nor even with the power of a court of equity in a sister state to affect title to land in Iowa indirectly, through the processes of coercion, by compelling conveyance thereof. The question before us at this point is the narrow one as to whether the full faith and credit clause of the Constitution requires us to give force and effect to a prior California decree, in our adjudication of title to Iowa land. It is doubtless a complete answer to the affirmative on this question that the California court had no jurisdiction to enter any decree adjudging the devolution of title to land in Iowa.

We will not enter into a discussion as to whether the finding of facts by the California court as to the paternity of Hicks and the acknowledgment thereof were such an adjudication of such fact as entitled it to full faith and credit in every other state. For the purpose of this case, we shall assume the verity of such fact. As already indicated, the California decree not only made this finding of fact, but it declared a conclusion of law as to the effect of this fact upon the rights of Hicks in the property of the testator. This legal conclusion was necessarily predicated on California law. If this decree must receive full faith and credit in the courts of this state, it will necessarily result in applying California law to the devolution of title to Iowa land. Indeed, the question is not fairly open to debate. If any principle is firmly established, it is that the law of the state where land is situated governs its alienation or descent. To say that this principle cannot be recognized when a prior adjudication of title has been had in some other state, is to deny the

principle itself, fundamentally. Judicial precedents on this question are definite and abundant. An instructive case is *Clarke v. Clarke*, 178 U. S. 186. In that case, a conflict of decrees between the South Carolina and Connecticut courts was presented. A resident of South Carolina died testate, leaving real estate both in South Carolina and in Connecticut. The construction of her will, adopted by an appropriate decree in South Carolina, purported to affect the title to the Connecticut land. The Connecticut court construed the will otherwise, and awarded the title to a different devisee. The following excerpt from the opinion in that case is pertinent to the case at bar, and is, in itself, quite a sufficient discussion of the question.

"It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. *United States v. Crosby*, 7 Cranch. 115; *Clark v. Graham*, 6 Wheat. 577; *McGoon v. Scales*, 9 Wall. 23; *Brine v. Ins. Co.*, 96 U. S. 627.' Now, in the case at bar, the courts of Connecticut, construing the will of Mrs. Clarke, have declared that, by the law of Connecticut, land situated in that state, owned by Mrs. Clarke at her decease, continued to be, after her death, real estate for the purpose of devolution of title thereto. The proposition relied on, therefore, is this: although the court of last resort of Connecticut (declaring the law of that state) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut, where the real estate is situated.

governed, in such a case. It is conceded that, had the will been presented to the courts of Connecticut in the first instance, and rights been asserted under it, the operative force of its provisions upon real estate in Connecticut would have been within the control of such courts. But it is said a different rule must be applied where the will has been presented to a South Carolina court and a construction has been there given to it; for, in such a case, not the will, but the decree of the South Carolina court construing the will, is the measure of the rights of the parties as to real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective states controlling the transmission of real property by will, or in case of intestacy, are operative only so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate. This is but to contend that what cannot be done directly can be accomplished by indirection, and that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is, in legal effect, dependent upon the nonexistence of a decree of a court of another sovereignty, determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time. These conclusions are not escaped by saying that it is not the law of Connecticut which conflicts with the interpretation of the will adopted by the South Carolina court, but the decision of the court of Connecticut which does so. In this forum, the local law of Connecticut as to real estate is the law of that state, as announced by the court of last resort of that state. As correctly observed in the course of the opinion delivered by the Supreme Court of Errors of Connecticut, the question as to the operative effect of the will of Mrs. Clarke, upon the status of land situated in Connecticut, was one directly involving

the mode of passing title to lands in that state. This resulted from the fact that, if the will worked a conversion into personalty immediately upon the death of Mrs. Clarke, as contended, it necessarily vested her executor with authority at once to sell and convey the real estate of Connecticut by deed sufficient, under the laws of that state, to transfer title to real estate—a power which was held by the courts of Connecticut not to have been conferred. Had the executor assumed to exercise such a power, however, the validity or invalidity of a conveyance thus executed would have been one exclusively for the courts of Connecticut to determine, just as would have been the question of the sufficiency of the will to vest title. Such being the case, there is no basis for the contention that it was not the exclusive province of the courts of Connecticut to determine, prior to the execution of such a conveyance, whether or not the power to do so existed. As further observed by the Connecticut court, whether Mr. Clarke, as executor and trustee under the will of his wife, had any power, duty, or estate with respect to lands situated in Connecticut, depended upon the laws of that state. The courts of the domicile of Mrs. Clarke could properly be called upon to construe her will, so far as it affected property which was within, or might properly come under, the jurisdiction of those tribunals. If, however, by the law as enforced in Connecticut, land in Connecticut owned by Mrs. Clarke at her decease was real estate for all purposes, despite provisions contained in her will, that land was a subject-matter not directly amenable to the jurisdiction of the court of another state, however much those courts might indirectly affect and operate upon it in controversies where the court, by reason of its jurisdiction over persons, and the nature of the controversy, might coerce the execution of a conveyance of or other instrument encumbering such land.

\* \* \* From these conclusions it follows that, because the court of Connecticut applied the law of that state in de-

termining the devolution of title to real estate there situated, thereby no violation of the constitutional requirement that full faith and credit must be given in one state to the judgments and decrees of the courts of another state was brought about as the decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a want of jurisdiction in the court of South Carolina over the particular subject-matter which was sought to be concluded in Connecticut by such decree. *Thompson v. Whitman*, 18 Wall. 457; *Cole v. Cunningham*, 133 U. S. 107; *Grover & Baker Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287; *Simmons v. Saul*, 138 U. S. 439; *Reynolds v. Stockton*, 140 U. S. 254; *Cooper v. Newell*, 173 U. S. 555. *Judgment affirmed.*"

There remains to consider the question whether the California decree, being valid *in personam* as against all the parties now before us, had the effect to confer upon Hicks such an *interest* in the real estate, either under the will or in hostility thereto, as to entitle him to insist upon the equitable conversion provided in the will, and to object to the reconversion. It is readily seen that it would be advantageous to Hicks if the devisees had failed to agree to a reconversion; or, more accurately, it would be advantageous to him if an actual conversion of the real estate by the executors had been made, pursuant to the provisions of the will. This would have brought the proceeds of the lands within the jurisdiction of the California court, and within its power of distribution. Because of the relative advantage or disadvantage to him, involved in this question of equitable conversion, it is plausibly argued in his behalf that he has, by force of the California decree, such an *interest* in the subject-matter of the litigation in the Iowa court as entitles him to insist upon the provisions of the will as to equitable conversion. Upon this premise is based the further conclusion that, in order to work a reconversion, the consent of all

parties in interest must be had, and that *his* consent was not had. Was he a party in interest, in a legal sense? The devisees alone were, *prima facie* at least, if not conclusively, the parties in interest. The equitable conversion was intended for their benefit, in the first instance. Any one of them was entitled to claim its benefit, and to object to a re-conversion. Hicks was not a devisee under the will. He had no right thereunder. His rights were awarded to him notwithstanding the will. For the purpose of awarding to him his right as a child overlooked, the testator was deemed to be an intestate. If he had been intestate in fact, the Iowa land would have descended to the legitimate heirs. Hicks could have raised no question of equitable conversion then. The enforcement of his rights under California law ignores the will. His insistence upon enforcing the equitable conversion is an attempt to enforce the provisions of the will, which were not made in his behalf. If he has such an interest in the land as entitles him to enforce an equitable conversion under the will, whereby the proceeds of the land might be carried to California, and distributed to him there under the California decree,—if he has such an interest as entitles him to demand such a course of procedure,—then he has an interest which could be and ought to be enforced here in the state of his residence, and he would have no need at all of a California distribution. It is because he has no interest here which can be recognized, that it becomes advantageous and necessary for him to get the proceeds of the land into the California jurisdiction. If we could recognize his interest for any purpose, it would be our duty to recognize it to the extent of full equitable relief. We are clear that he has no right to insist upon the enforcement of the provisions of the will as to equitable conversion.

That there is no conflict of view between this court and the California court is indicated by the reversing opinion of the Supreme Court of California, recently handed down in

this very litigation. The question of conflict of jurisdiction was there presented, as well as the question of the duty of the executors to carry out the provisions of the will as to equitable conversion. The trial court had removed the executors, for alleged failure of duty in that regard. The following excerpts from the opinion of the Supreme Court of that state indicate its views as being in entire harmony with those expressed herein. Quoting therefrom:

"In setting forth the facts touching the asserted conversion and reconversion of this Iowa real estate, it will be assumed that an equitable conversion was worked by virtue of the language of the testator's will; for this assumption, as we shall see, is borne out by the law of Iowa. Nevertheless, it was not an actual conversion, but a constructive conversion merely, and all the devisees of this land,—the 12 children and the widow—all the parties, in short, who were recognized by the will,—elected to take the property in kind. They did this, not only before there was any actual conversions by sale (for such actual conversion has never taken place), but even before Hicks filed his petition, which resulted in the orders and decrees hereunder reviewed.

\* \* \* These, then, are the facts, and under them not the slightest doubt can be entertained but that the parties in interest, and owners of this land under the will of the deceased, effectuated, as they had the right to effectuate, a reconversion, which wholly superseded the equitable conversion, which destroyed all power of sale vested in the executors, and left the beneficiaries under the will the owners of the whole legal and equitable title. The law controlling the foregoing statement is, of course, the Iowa law; but the decisions of the Iowa courts leave the matter in no doubt.

\* \* \* This reconversion may take place at any time during the period of constructive conversion, and prior to the actual conversion by sale. *Griffith v. Whitten*, supra. It is effected when all the parties beneficially interested in the

property, by some explicit and binding action, direct that no actual conversion shall take place, and elect to take the property in its original form. *Duckworth v. Jordan*, supra. Did all the parties beneficially interested so indicate their election; or is Charles Hicks such a party beneficially interested for whose nonjoinder the reconversion could not, in law or equity, take place? What has previously been said, touching the well-settled doctrine that a pretermitted heir does not take under a will, but in hostility to it, should be, in and of itself, a sufficient determination against this asserted right of Hicks. \* \* \* It is manifest that, upon reason alone, such a child does not and cannot take under the will, since he is permitted to take because he has been omitted from the will. The intent of the testator, as expressed in such a will, is clear. It is to give his property to others, to the exclusion of the omitted heir, and this intent is not affected by the fact that the omission to name the pretermitted heir was or was not intentional. As the omitted heir, in contemplation of the law entitling him to inherit, was never in the testator's mind, by no stretch of imagination can it be said that the testator designed any of the provisions of his will to apply to that heir. \* \* \* Underlying all these cases is the same principle of strict applicability to this respondent—the principle that one who does not take under a will can claim no benefits from that will. So here, the testator's clear and unmistakable design was that his children and widow should have the Iowa property, to the exclusion of Charles Hicks. What the law gives him as a pretermitted heir, he takes outside of and in hostility to the will, and it is not open to him to invoke nor to ask the aid of the court in probate to enforce any of the provisions of the will for his benefit. But it is next said that the respondent had the right to invoke the provisions of the will because he was a party interested in the subject-matter, and in this, reliance is placed upon *Atlee v. Bullard*, 123



Iowa 274. A reading of that case demonstrates how fallacious respondent's effort is to detach a single phrase from its context; for only those are interested in the subject-matter who are the beneficiaries of the particular devise under the will. And finally, it is said that the election of the devisees and the widow was nugatory because there was a time when one of the children—a Mrs. Gent—did not join in the formal election to take the land as land, though subsequently she did so. The sole effect of a failure of all the parties in interest to join in the election is that no reconversion takes place, and the equitable conversion still stands. But this is no bar to a subsequent reconversion by the act of all the parties in interest before sale, since, being all the parties in interest, no one has or can have legal or equitable right to complain of the election when finally made."

The foregoing discussion by the California court is in harmony with our conclusions herein. This was the holding of the trial court, and its decree is, accordingly,—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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JOE NUGENT, Appellant, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellee.

**CARRIERS:** Loss or Injury—Burden to Show Human Agency. Receipt by a carrier of live stock in good condition, followed by the death of the stock prior to arrival at point of delivery, creates a presumption of negligence on the part of the carrier *only* in those cases where the conditions attending the dead stock indicate injury *by human agency*. In the absence of such indications, the shipper must negative death by natural causes.

*Appeal from Polk District Court.*—W. H. McHENRY, Judge

MARCH 5, 1918.

REHEARING DENIED JUNE 24, 1918.

ACTION for the value of a horse which died during transportation, resulted in a directed verdict for defendant and judgment thereon. The plaintiff appeals.—*Affirmed.*

*S. G. Van Auken*, for appellant.

*James C. Davis, George E. Hise, and Henry L. Adams*, for appellee.

LADD, J.—A carload of horses, including that in controversy, reached Webster City from Marathon, over the defendant's line of railroad, at about 7 o'clock in the morning of October 31, 1915. An employee of Leonard & Carson's directed the unloading of the horses and placed them in that company's yards. This particular horse, with 5 or 6 others, occupied one of the pens until it, with 19 others, was loaded on defendant's car at about 1 o'clock A. M. of November 2d following. In the meantime, the horses in this pen were fed twice a day, from an open trough, with hay, and 25 or 30 ears of corn raised in 1914; and the evidence tended to show that the horses were in good condition when loaded. The horses were unaccompanied by the shipper. Upon reaching Des Moines, at about 9 o'clock in the morning of the same day, the horse particularly referred to was lying dead in the car, without any mark, scratch, or scar on its body, "except right on his forehead, there was a cut of about three inches." Whether there was such a cut even was in dispute; but no one expressed the opinion that such cut may have been the cause of death, nor do counsel for either party so claim. Some of the witnesses qualified to speak on the subject were of the opinion that death was from flatulent colic, while others testified that the cause of death could not have been ascertained by such an examination as was made, and that this was possible only by an autopsy, which was not had. The evidence of the conductor and brakemen tended to show that the train was carefully handled. Appellant relied on the rule, well established in this

state, that from proof that live stock is delivered to the carrier in good condition, and is found in bad condition on arrival at its destination, a prima-facie case of negligence is made out, which the carrier must overcome, in order to relieve itself from liability. *Mosteller v. Iowa Cent. R. Co.*, 153 Iowa 390; *Swiney v. American Exp. Co.*, 144 Iowa 342; *Gilbert Bros. v. Chicago, R. I. & P. R. Co.*, 156 Iowa 440. Ordinarily, the "bad condition" in which live stock has been delivered is manifestly due to some human agency, though this is often put in issue. As is said in 6 Cyc. 524:

"Inasmuch as the carrier is not liable for death of animals during transportation due to natural causes, or their inherent vice or natural disposition, mere proof that the animals died after delivery to the carrier and before the end of transportation is not sufficient to establish liability; but the evidence must further show that the loss was due to human agency. But if the loss or bad condition appears to have been due to human agency, then the carrier must show that it did not result from his negligence, in order to escape liability on the ground that it was due only to delay, or from causes within the common-law exemption, or within a valid particular limitation."

The law is similarly stated in 3 Elliott on Evidence, Sec. 1919; *Gilbert Bros. v. Chicago, R. I. & P. R. Co.*, supra; *Schaeffer v. Philadelphia & R. R. Co.*, 168 Pa. St. 209 (47 Am. St. 884).

Nothing in the record indicated that the death of this horse might have been attributed to rough handling, or to any want of care on the part of defendant's employees. The evidence affirmatively showed, without dispute, that there were no marks, scratches, or scars on the body, save the cut in the skin over the forehead. Its condition was more consistent with death from disease or natural causes than because of violence consequent upon any want of care in its transportation. In other words, death from disease or nat-

ural cause was conclusively shown to have been more probable than from some human agency in its transportation. *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577 (4 Am. St. 670); *Illinois Cent. R. Co. v. Word*, 149 Ky. 229 (147 S. W. 949). Even if not more probable, the cause of death was mere matter of conjecture, save as light may have been thrown on the subject by the experts as to whether the cause was colic; and it would have been mere matter of speculation by the jury.

There was no error in directing the verdict for defendant, and judgment thereon is—*Affirmed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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JOHN PAUCHER, Appellee, v. ENTERPRISE COAL MINING COMPANY, Appellant.

**NEW TRIAL:** *Interested Interpreter.* Basis for new trial is not furnished by the fact that plaintiff, without conscious fraud, called and used, in the trial of the case, an interpreter who, unknown to the court, jury, and opposing counsel, was interested in the outcome of the suit, when it appears that the testimony interpreted (a) was correctly interpreted, (b) was not vitally material, and (c) was practically without dispute in the record. (Sec. 4091, Code, 1897.)

*Appeal from Polk District Court.*—C. A. DUDLEY, Judge.

JUNE 24, 1918.

APPELLANT filed a petition for a new trial within one year after judgment was entered, asking that the judgment be set aside on the ground of fraud and collusion, under Section 4091 of the Code. The petition was denied, and defendant, appellant, appeals.—*Affirmed*.

*Clark, Byers & Hutchinson*, for appellant.

*S. F. Prouty and Mulvaney & Mulvaney*, for appellee.

PRESTON, C. J.—The petition alleged, substantially, that, upon the original trial, judgment was entered for \$4,000, in favor of plaintiff and against the defendant; that appeal had been taken therefrom to the Supreme Court of Iowa. The matter had not been determined in the Supreme Court at the time the petition was filed, but it has been since, and affirmed. *Paucher v. Enterprise Coal Mining Co.*, 182 Iowa 1084. Appellant's petition for rehearing has been overruled.

The petition further alleged that, upon the trial of said cause, one Krantz was called and sworn as an interpreter to interpret the testimony of plaintiff and some of his witnesses, and took an oath that he had no interest in the case or the result of the trial; that, after judgment, defendant discovered that said interpreter was, in fact, interested in the case; that he had a written agreement with plaintiff, under which he was to receive 10 per cent of the recovery; that both the plaintiff and his counsel knew of the interest of said interpreter, at the time he was sworn; and that the defendant, the presiding judge, and the jury were not aware of the fact; that, with fraudulent intent, and to gain an unfair and unlawful advantage, they proceeded to take the testimony through said interpreter; that, on account of the reliance of the defendant, court, and jury upon the oath of Krantz, and on account of the silence of plaintiff and his counsel, verdict was rendered in favor of plaintiff and against defendant, and judgment was entered for \$4,000; that defendant could not have discovered these facts with reasonable diligence before the end of the term; that it used due diligence; and that it has a good defense to plaintiff's action.

Plaintiff answered, and admitted that the interpreter had a contract with plaintiff, as alleged, and that Krantz acted as interpreter for plaintiff and another witness: he stated that Krantz was familiar with the language, and a suitable person to interpret: denied that Krantz stated on

oath that he had no interest in the controversy: stated that said interpreter was called by plaintiff with no thought or attempt to deceive the court, defendant, or its counsel, and that the plaintiff's counsel who called the interpreter to be sworn did not, at that time, know that the interpreter had any contract, or was to receive a part of the proceeds, but that the other attorney of plaintiff, who did know, was not there in person when the interpreter was sworn; that defendant knew that said interpreter had taken an active part in presenting the claim of plaintiff and in negotiating a settlement of the same; that the defendant has no defense.

There is a conflict as to whether the interpreter made the statement that he had no interest before he was sworn as interpreter or when he was sworn. There is testimony to that effect; but the reporter's transcript does not show that fact, and plaintiff introduced evidence to the contrary. Appellant concedes, in argument that, even though the interpreter did perjure himself, it was not on a matter directly connected with what was sought to be proved in the case, but only on the question of his qualification; and says that, technically, it was not perjury, and the statement, if made at all, was made to the judge before whom the interpreter was sworn, and that it was extrinsic from the case itself. The trial court made a finding of facts as to any conflict in the testimony, and such finding is conclusive upon us.

However, there is but little dispute in the testimony. Krantz is dead. It is shown that the interpreter's interest was not known by the trial judge in the first case, or by the jury or by defendant's counsel. Had this been known, it would have been a matter proper to consider, as affecting his credibility as a witness.

It is contended by appellant that an interpreter is more than a mere witness, and that he is, in a sense, an officer of the court. We are inclined to think this is so, under the circumstances of this case; and, were it not for some other

matters appearing in the record, which will be referred to later, we would be inclined to hold that defendant was entitled to a new trial.

Appellant cites *State v. Lazarone*, 130 La. 1 (57 So. 532); *State v. Thompson*, 14 Wash. 285 (44 Pac. 533); *State v. Deslovers*, (R. I.) 100 Atl. 64, 73; *Gregory v. Chicago, R. I. & P. R. Co.*, 147 Iowa 715, 723; *State v. Powers*, 180 Iowa 693; 14 Encyc. of Evidence, 119; also the statute; and *Wood v. Wood*, 136 Iowa 128; and *Graves v. Graves*, 132 Iowa 199, where the rule is stated that a new trial will not be granted for perjury, but may be, where there is extrinsic fraud. But these cases do not quite reach the question at issue here, unless, perhaps, it is the *Lazarone* case, *supra*. There is some language in that case which fairly tends to sustain appellant's contention; but that was a murder case, and was reversed on several different grounds, one of which was the use of an interested interpreter.

We shall not review the cases cited, but proceed to state some of the circumstances from which we conclude that defendant suffered no prejudice. Plaintiff was an Austrian coal miner, and had received a serious injury in defendant's mine. He could not speak, read, write, or understand the English language, and was ignorant of American law or proceedings in court. Krantz was a fellow countryman, working in the same mine, who had been in this country for some time, and could speak, read, and write both the English and Austrian languages. It is contended by appellee that it was necessary for plaintiff to have someone to assist him, and that he applied to Krantz; that this was necessary in order that plaintiff might employ an attorney, and look up evidence and look up matters necessary for trial, which plaintiff himself could not do; and that Krantz could not perform these services without loss of time from his work; and that plaintiff was unable to compensate him except there should be a recovery from the defendant; and that

these are the reasons for plaintiff's agreeing to pay Krantz compensation. The question as to the validity of such a contract is not before us. It is contended by appellee that defendant is in no position to complain, because, as soon as defendant's manager learned of the arrangement, he recognized and ratified it, and sought to use it for the benefit of the defendant, in that he offered to recognize the claim of Krantz to the 10 per cent of the recovery, and pay him the \$400, without discount, if he would use his confidential relations and position with plaintiff to induce him to satisfactorily settle with the defendant. These propositions are not very material, perhaps, in this inquiry.

Without setting out the evidence bearing upon the point, we are satisfied that there was, in fact, no actual or conscious fraud on the part of plaintiff or his attorneys in the use of the interpreter. The fact that the interpreter was interested in the recovery was a material fact, and would have been available to the defendant as a ground of objection to his selection, had it been known. A person selected as interpreter ought to be disinterested, unprejudiced, and unbiased. If the fact of his interest were known, ordinarily the court would refuse to appoint such an one, if a competent disinterested interpreter were available. But, though interested, he was not legally incompetent to act as interpreter. But it is quite clear to us that defendant suffered no prejudice because of the matter complained of, and this appears affirmatively in the record. As said, there was no conscious fraud on the part of plaintiff or his attorneys. As said by the trial court, it was not suggested that true interpretation was not made of questions propounded, or of answers given by the witnesses whose testimony Krantz interpreted; although it is claimed that some of the testimony given by plaintiff is not in accord with the facts,—that is, that it is disputed by some of the defendant's witnesses. Krantz interpreted the testimony of but two witnesses,



Dihpol and the plaintiff. It appears that defendant made no complaint of the testimony of Dihpol, as interpreted. It is not claimed that the testimony of plaintiff, as translated, was incorrect. The claim was that plaintiff made a mistake in pointing out Mr. Calvert, the mine foreman, instead of the timberman. Assuming the witness to have been mistaken in this respect, the fact is undisputed that it was the mistake of the witness, and not the mistake of the interpreter; because, in the giving of such testimony, the witness did point out Calvert, and this was manifest to everybody.

Some claim is now made in regard to testimony bearing upon the extent of plaintiff's injury; but whatever there may be about this is claimed to have been discovered since the trial. An important consideration in this case is the fact that the testimony which the plaintiff himself gave in the original action was practically undisputed, and the really contested features of the case did not rest upon the facts testified to by the plaintiff in the original case.

The defense in the original case was as to whether the defendant, at the time of plaintiff's injury, had complied with the provisions of the Workmen's Compensation Act. This appears in this record, and is shown by the opinion in the original case. It further appears that defendant had one Michelovich present in court as its interpreter, and that defendant had him there for the purpose of seeing whether the translation was correct or not; and he stated that the translation by Krantz was substantially correct. It is true, of course, as suggested by appellant, that a case might arise where there would be a conflict between the interpreter selected by the court and the defendant's interpreter, and that this would add another fact for the jury to decide. But we need not pass that bridge now, because in this case there was no conflict, the defendant's interpreter conceding that Krantz had correctly translated the testimony.

Without further discussion of the evidence or law, and

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*Miller & Wallingford* and *Oliver H. Miller*, for appellant.

*J. W. White* and *Thos. A. Cheshire*, for appellee.

SALINGER, J.—I. In so far as Instruction 12, offered, withdrew the allegation that defendant permitted the place where plaintiff was injured to become unsafe from deposits of grease, the instruction was given because the court eliminated grease.

The instructions eliminate every charge of negligence except two: First, that defendant permitted its platform, at the point where plaintiff was injured, to become unsafe and dangerous, because of deposit thereon of particles of glue, which made the surface of the platform at that place "very slick," knowing that plaintiff, in the performance of his work, would be required to walk upon, pass over and upon the platform at that place; second, that defendant permitted water to fall on this platform at the point where plaintiff fell, and there freeze and form ice. It is complained there was no evidence to support either of these claims.

II. We gather appellant claims the court should not have submitted the case to the jury at all, because it had charged that plaintiff could not recover if his injury was due to a deposit of glue made by himself or his fellow servants, and because the evidence shows conclusively that his injury was caused by nothing but glue thus deposited. Whether the jury was bound to find that the injury was due to such deposit, we consider elsewhere. For present purposes, it suffices to say that, even if that were so, there would still be a case for the jury, if it might find that the place where plaintiff was working when injured, was unsafe because of ice formed there. Whether ice made said place unsafe is considered elsewhere.

III. If we assume that a conclusive showing of glue so

deposited would force a direction for defendant, it must still be determined whether the jury was bound to find that the injury suffered by plaintiff was due solely to glue deposited by himself or his fellow servants.

1. EVIDENCE:  
positive assertions  
against  
physical facts.

It must be admitted that, if nothing is to be considered except an answer to a peculiarly framed leading question, answered by plaintiff on cross-examination, it would have to be held the injury of plaintiff was caused by glue deposited by himself or Israel so recently before the injury as that defendant had no opportunity to remove the glue, even if that was its duty. But in our opinion, this one answer in cross-examination does not take from plaintiff the right to have the jury consider, in connection with that answer, all the testimony adduced by plaintiff, and the physical facts disclosed by the evidence. A careful examination of the record as a whole satisfies us that, though plaintiff did answer this one question as he did, the jury might rightly find, upon the evidence as a whole, that the condition of plaintiff's working place was due to deposits of glue and formations of ice that had been making and forming, off and on, for days. Without elaborating upon the testimony, we have to say the jury could find the "slickness" of the place where plaintiff was injured had existed for and on three or four days prior to the injury, and on every morning on which plaintiff worked; that this place was "never clear from glue," except "a couple of times" when the weather was not cold; that more or less glue was falling on this place every time that sacks of glue were trucked. In a word, the jury might find, upon the evidence as a whole, that the conditions that caused plaintiff to be injured were constant and of quite long standing.

The discussion just had disposes, also, of an isolated statement on part of the witness Israel that he does not believe there was any ice present the night before plaintiff was

injured, when barrels were being taken out; and of like testimony on part of the plaintiff.

IV. Originally, the plaintiff claimed that ice was formed by water from melting snow and ice, which was gathered on the covering of the platform on which plaintiff was hurt; and that such water ran through the covering, and caused ice to form on the platform. On the request of the defendant, this was withdrawn. But it is true that, while this eliminated water gathered on the covering and running through its cracks, the jury was still permitted to say whether, in some manner, defendant permitted water to fall on this platform, and there to freeze and form ice. And the next complaint is that there was no evidence to support a claim that any sort of water was in any manner permitted to fall on the platform, and there freeze and form ice.

Plaintiff and his witness Israel testified that there was a covering over the platform, and that water dripped upon this platform from said covering. They explain that this was due to water leaking from pans handled on said upper platform, or covering. To be sure, this is not evidence to support the allegation of the petition as it stood before the court narrowed it. But it is evidence that some kind of water in some way fell upon the platform on which plaintiff was injured; and so far, the instruction given does not lack support in the evidence. Both said witnesses, or the two between them, add that, on the morning on which plaintiff was injured, and on all mornings in freezing weather, this dripping made the lower platform "slick," frosty, and slippery; that ice from dripped water was present that morning; and that the weather at this time was freezing weather. We do not overlook the claim that the ice was of such recent formation as that failure of defendant to remove it was not negligence. But that is a distinct proposition, to be considered by itself. Whatever immunity this may create for defendant, whatever excuse there may be for not removing

ice, if there is evidence that it fell and froze, an instruction that submits whether it fell and froze is not erroneous for lack of support in testimony.

V. It is argued that, even if ice or glue had been upon the platform where plaintiff was injured for so long a time as that it may not be said the injury was due to glue deposited at the time of the injury, and so long as to charge defendant with knowledge of its existence, that yet the place where plaintiff was injured did not have a heavy coat of ice, and was just a reasonably slippery place; wherefore, the place was not perceptibly unsafe. We think that, under the evidence, it was a question for the jury whether ice and glue had been on this place for a sufficient length of time and in such manner as to charge defendant with notice thereof.

The jury could find, from the testimony as a whole,—although a contrary conclusion might have been reached, also,—that it was the duty of neither plaintiff nor of Israel to clean the place where plaintiff was hurt. Be that as it may, as all claim for the failure of plaintiff to clean the place is bottomed on the argument that defendant did not know, and in the exercise of reasonable care could not have known, of the presence of ice and glue, our holding that the jury could find defendant did or ought to have known, disposes of the contention that defendant is benefited by the failure of plaintiff to clean the place.

VI. The jury could find, from the testimony as a whole, notwithstanding there was some from which contrary inference can be drawn, that it was not the duty of either Powers or Israel to clean the place where plaintiff was hurt.

VII. Without setting out the evidence, we have to say that we have read it; and that, whatever may be the effect of it, the jury could find either that Israel was or was not a fellow servant of plaintiff, or find that he was a vice-principal.

VIII. The plaintiff made a statement in writing to one

Mahaffey. We may assume it conflicts with testimony given by plaintiff and weakens it. But, in view of explanations made by plaintiff, and of testimony as to the circumstances in which the statement was made, this conflict and its effect upon the case for plaintiff was for the jury.

IX. Appellant, in dealing with Errors 36 to 40, declares, in Proposition 4, that "the court erred in sustaining plaintiff's objections to questions propounded by defendant

2. APPEAL AND  
ERROR: argu-  
ment in lieu  
of brief point  
not allowable.

to Dr. Leir and to Dr. Stoner on cross-examination, and in sustaining plaintiff's objections to questions propounded by defendant to Dr. Stoner when called to the stand as a witness on the part of defendant, for the reason that the plaintiff had waived the prohibition of the statute." This is, in effect, the naked, "old-fashioned assignment of errors," in a very broad, general, and loose form. No one can, from reading it, have the slightest idea of just what is presented for review. The argument of the proposition deals with a large number of exclusions, and fills some 14 pages of print. Notwithstanding this great elaboration in argument, we are of opinion that, under the rules, Proposition 4 may not be considered.

It was said, in *Mennenga v. Mennen*, 182 Iowa 1147:

"Most of the remaining assignments of error are simply restated in the brief of counsel, but are not argued, and must, therefore, be considered as waived."

We are in no doubt that the mere restatement of an "assignment of error," and not argued, presents nothing for appellate review. But, if any inference may be drawn from this language that the mere restatement of an assignment of error *will* warrant such review if the restatement is argued, the language should be limited, to exclude such an interpretation. To give it that construction will overrule quite a number of our decisions, and disregard the rules of presentation. Section 53 of these rules demands that the brief



shall, among other things, contain, "under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration;" and that "no alleged error or point not contained in in this statement of points shall be raised afterwards." Section 55 provides that the brief "may be followed by an argument in support of such brief, which shall be distinct therefrom, but shall be bound with the same. The argument shall be confined to a discussion and elaboration of the points contained in the briefs in the order stated." These rules bear but one construction: not that an assignment of error or restating it is sufficient, if elaborated in the argument, but that argument in the manner provided by Section 55 is optional, and the right to review depends, not upon elaborating the mere stating or restating of an assignment of error by the argument, but upon presenting, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration. That this is so is made plain by the penalty:

"No alleged error or point not contained in this statement of points shall be raised afterwards, either by reply brief or in oral or printed argument."

The statement of an error relied on, in the point demanded by the rule, and in rule manner, is essential. Failure to make it cannot be atoned for by argument. The rule itself says, in terms, that an error shall not be available *in argument* if there be an omission to furnish the rule brief point or proposition. And see *Wine v. Jones*, 183 Iowa 1166.

It is, however, not amiss to add that many of the exclusions complained of are purely repetitions of what the witnesses had, at some stage or other of the trial, already been

3. APPEAL AND  
ERROR: ex-  
clusion of un-  
necessary  
evidence.

permitted to testify to; and that, moreover, all that could have been accomplished by admitting the rejected testimony would be to strengthen the complaint of the appellant that the verdict was excessive. As we agree to that contention, the exclusion was, in any view, harmless error.

X. Proposition I complains that the statement of the issues, or rather, the claims made by the plaintiff, included claims unsupported by any evidence. If we assume that this is so, it does not follow, as plaintiff claims, that doing so was misleading, and gave the jury an opportunity to base its verdict upon something that had no support in the evidence. Though the jury was told all that was claimed on paper, this was immediately followed by an instruction which eliminated all but two charges of negligence, and told the jury that nothing but these two were submitted to it. If error at all, it is not reversible error to include in the preliminary recital every claim that is made in the petition, even though it is conceded, and the court says elsewhere in the charge, that there is no evidence to support some of the paper claims recited. It is not the function of the part of the charge which states the claims of the parties, to deal with what must be proved. *State v. Chambers*, 179 Iowa 436. We hold that stating to the jury all that plaintiff claims, when followed by a correct statement of just how many of these claims alone may be considered by the jury, constitutes no reversible error.

XI. Instruction 2 charges, in effect, that plaintiff cannot recover, unless he shows by a preponderance that defendant permitted the platform to become unsafe, by deposits of glue or the formation of ice; that this was the proximate cause of the injury to plaintiff, and damaged him in some amount; and

5. TRIAL: stating  
ultimate facts  
for recovery.

that plaintiff is free from contributory negligence. The only complaint made of this instruction may be divided into two parts. The first is that "the negligence referred to therein was not a proper basis upon which to predicate liability of the defendant." We are at a loss to understand why the negligence to which the charge refers is not a proper basis for making defendant liable, if such negligence be proved. The other complaint is that "no exception nor qualification was made or taken in such instruction, so as to correctly advise the jury as to just what constituted negligence on the part of the defendant." To define negligence was no part of what this instruction assumed to do. It confined itself to a statement that plaintiff could have no recovery unless he proved the matters recited in the instruction. In such an instruction was not the place for advising the jury "as to just what constituted negligence on the part of defendant." We think, too, it is fairly clear that the instruction refers to negligence consisting of letting the platform become unsafe and dangerous by deposits of glue or the formation of ice. If, in addition, defendant thought it desirable to have added "just what constituted negligence on part of the defendant," the case would be stronger now had such a request been made.

XII. It may be assumed that Instruction 5, which defines what would constitute actionable negligence, does not have the qualification that defendant would not be liable if the platform became unsafe and dangerous by reason of some act of the plaintiff. Be that as it may, Instruction 7 cures all that completely, by charging that "the defendant would not be liable because of any glue on said platform in the loading of said glue on the two days in question by the plaintiff and the witness Israel."

6. TRIAL: omission in one supplied by insertion in another.

XIII. A proposition on appeal may fail because the exception below is less broad than is the complaint made

on appeal—another way of saying that review of an objection made here to an instruction is, even if the point is properly made, yet limited to the complaint lodged below by exceptions to such instruction. On the other hand, so much of the exception as is not made the basis of "Brief Point" or "proposition" is not for review.

7. APPEAL AND  
ERROR:  
"points" lim-  
ited to ob-  
jections in  
trial court.

8. TRIAL: con-  
flicting instruc-  
tions.

It is complained now that Instructions 5 and 7, given, are in conflict with each other, and the two are in conflict with Instructions 1 and 2. No exception to the 5th instruction complains of it for conflict. No exception asserts that any instruction is in conflict with any other. Instruction 7 is not excepted to at all.

Aside from that, there is, in fact, no conflict. The exception lodged against Instruction 5 is that it erred in failing to tell the jury that, if the platform became unsafe and dangerous through the act of plaintiff or his fellow servant, defendant would not be liable. Now, part of Instruction 7 tells the jury that. And if No. 7 conflicts with No. 5, the conflict must arise because Instruction 7 thus tells the jury the very thing for failure to tell which Instruction 5 is complained of. In other words, the position of appellant is that, if an instruction fails to say something that it should, and such failure is complained of, then, if another instruction supplies such defect, this creates a conflict between the two. A related argument is offered in support of the claim that Instructions 1 and 2 are in conflict with Instruction 5. On analysis, it is again found to be the argument that something that should have been given was omitted from Instructions 5 and 1 and 2; that such omission permitted a recovery though plaintiff was at fault; and that this makes a conflict with Instruction 7, because the last says there may not be a recovery if plaintiff is at fault.

The instructions, taken together, charge harmoniously upon what the defendant is and is not liable for.

We are unable to see how Instructions 5 and 7 conflict with Instructions 1 and 2. The last but state what the paper issue is, and that plaintiff has the burden of proof upon certain of the claims made in the petition.

XIV. We have some difficulty in apprehending it, but gather one complaint to be that, having charged defendant was not liable for injury due to deposit of glue by plaintiff, it was error to submit to the jury whether the platform was slick, since plaintiff had made it slick. It is one thing to charge that a working place is not slick—quite another that defendant was not liable though it was slick. A place made dangerous by the deposit of glue is not less unsafe because plaintiff makes the deposit. Therefore, even if it be true that slipperiness was due to an act of the plaintiff's, this will not condemn an instruction which submits whether the place was slick, for being without support in the evidence. As said, there might be abundance of evidence that a platform was slippery, even though it also appeared that plaintiff was to blame therefor. It was not error to let a jury find that a place which was slippery, was slippery. The only error that could occur would be to permit the jury to pay the plaintiff though he was the one who made the working place unsafe. But as the instructions expressly held the plaintiff could not recover if injured through a deposit of glue made by himself, certainly no such error was committed.

XV. The third proposition charges the court erred "in refusing to give Instructions No. 7, 8, and 9, requested by the defendant." We do not think this proposition is more than a mere, naked, old-fashioned assignment of errors, too general in form. If we may aid the complaint by what precedes it, then all that is complained of is that the

9. TRIAL: submission of issues.

10. APPEAL AND ERROR: sufficiency of assignment.

said offered instructions were conflicting. Surely, appellant may not get any advantage from having offered instructions that were conflicting.

Passing all that, we find no error in rejecting these instructions. In effect, they deal with assumption of risk. With one exception, to be noted later, these offered instructions do not differ in substance from Instructions 7 and 9, given by the court. In these instructions the court charged that plaintiff assumed all the risks and dangers incident to and inherent in the employment in which he was engaged when injured. In Instruction 9, and in dealing connectedly with the subject of contributory negligence, the jury was told:

11. MASTER AND  
SERVANT:  
limitation on  
assumption.

"It was the duty of the plaintiff to exercise ordinary care for his own safety \* \* \* and to act as a careful and prudent person would, in passing over and along said platform; and if you find that the plaintiff did not use his senses, and act with such reasonable care and caution, then plaintiff cannot recover, although you may find that the defendant was negligent."

The one thing in which the instructions offered and those given differ, is that the offered ones leave out the plaintiff did not assume risks of any dangers arising from negligent acts of the master, if any. This omission alone justified the refusal of the offer, and with this proper qualification added, all that the offered instructions ask was, in effect, given.

There are two additional reasons that justify the refusal of these instructions:

A. The answer is a general denial, except that it admits corporate capacity, as charged; that plaintiff was in the employment of defendant when he met his injury; an inferential statement that the injury was accidental; and an

12. MASTER AND  
SERVANT:  
failure to  
plead as-  
sumption.

express statement that this injury was caused by no fault on part of the defendant. Wherefore, the instructions offered inject assumption of risk, when the answer gave no basis for submitting such an issue. That this may not be done, is both the statute and the common law. See *George v. Iowa & S. W. R. Co.*, 183 Iowa 994.

B. For the purpose of making the point that deposits of glue and ice were so recent as that defendant was not negligent for failing to remove same, it is contended that, if either glue or ice were present, they came upon the platform almost at the instant when the plaintiff was injured. Now, if that be true, for the purpose of showing that there was no negligence in failing to remove, it must follow defendant is in no position to say that the glue and ice were constantly present, and that, therefore, the plaintiff assumed the risk of injury from such deposit.

XVI. The court overruled a motion for new trial, which included an assignment that the verdict, one for \$6,000, was excessive.

The fracture suffered was of the kneecap, and ran straight across, from right to left. There is medical testimony that plaintiff will not get over his lameness, meaning such interference as there will be with full power of motion, and it is said that this is so because the injury is not like one to bones of the arm or to ordinary bones of the body, and is not repaired in the same way. The essence of it is that there may be a degree of lameness which might, in certain conditions, be permanent, say on rough or slippery going, extreme fatigue, or during changes of weather. One witness says that, in stating plaintiff would get over his lameness in about two years, he means that, in his opinion, he will so get over the soreness and sensitiveness as that there ought to be no limping. Medical witnesses testify the injury would cause

18. MASTER AND  
SERVANT:  
inconsistent  
attitude of  
master.

14. TRIAL: Ver-  
dict: \$6,000:  
excessiveness.

a shortening, not in the limb, but in the tendons; that the latter would not give as well as before, but this shortening would be permanent; and that there would be a permanent restriction of movement. But some of the same witnesses said that these muscles or tendons would become more elastic by use; that, with use of the limb, the stiffness would disappear, to some extent; that only extreme power to move would be affected; that, for ordinary labor and things of that kind, the limb would be just as good as normal; that there should be no limp, because ordinary motion and walking would not be interfered with; that while, in walking, leaning, or bending, there would be an interference, to some extent, ordinary walking would not be interfered with; that, in about a year and a half or two years, "it ought to be cleared up" so that plaintiff would have practically the same power he had before that; and, while he might be affected in running a foot race, he would not be affected in ordinary walk; that plaintiff would have a very useful limb, as good as an ordinary one could be after an operation of this kind, and would be able to do almost any kind of work without discomfort.

It may be fairly said, on the whole, the jury could find that probably there would always be some limitation of motion. The medical testimony as a whole tends to show very strongly that there has been a good union; that there is no interference with present use of the limb; that the kneecap is joined and is well; that the injury healed nicely; and that, at present, there is no pain; that the kneecap performs substantially the same functions as before the injury; that, while there is, at present, some stiffness, it would not remain for more than a year, or until absorption becomes effective; that the stiffness will disappear, in time, to some extent at least. The strongest contrary position is that the ligament tissues will never be as strong as bone tissues, and will be more easily fatigued.



The fair weight of the testimony, taking into consideration that there is always a difference in size between the left and right kneecap, is that the knee is now not far from normal in size, although, apparently, the left knee is slightly larger than the right in area. The jury could believe the injury was originally so serious as to necessitate remaining in the hospital 41 days and being confined in bed for 40 days; that, during the time when plaintiff was confined to his bed, he had to lie on his back; that a box extension, the main feature of which was a pail of sand, weighing 20 or 30 pounds, was swinging on his left leg; that sand bags on each side were used to keep his leg in shape, and that he had to stay in one position, because of this weight on his leg; and that this made him uncomfortable. It could believe that he reached his home on February 9th, and first put his left foot down about two months after that; that, when he reached home, he remained in bed for about three weeks, and after that, walked about on crutches; that, for some six weeks after reaching home, he would sit up for only about an hour, and then be compelled to lie down; that, during all this time, his wife nursed and cared for him at night. But it appears that, after he reached home, he went to the office of his doctor at least twice a week, after he was on crutches.

The jury could find that, at the time of the injury, when plaintiff was first lifted up, there was pain in the knee. Plaintiff says that, while in the hospital, this knee was badly swollen at the point of the injury,—would swell when he tried to bend it; that he is not able to bend it very far yet; that, while the doctor was manipulating the knee and bending it, awful pain was suffered; that he still suffers pain; and two of his medical witnesses say he will probably suffer pain during the remainder of his life, especially when the atmosphere changes, as from heat to cold, or dry to damp. Plaintiff testifies not only that he suffered great pain during

the 40 days he was bedfast, and all the time he was in the hospital, but that, after he reached home, he couldn't rest. His wife says that, at night, she bathed his knee in warm water, and he could not rest, and that he suffered in this way for three or four months, after returning from the hospital. Plaintiff adds that, at times, he would lie all night without being able to sleep; and that, for two or three months after he returned home, he didn't sleep an hour in the night, and can't sleep yet.

The fair effect of all the testimony is that there is no present pain of any consequences except when there is great heat or cold, or certain changes of weather; and that, when these changes occur, there is a feeling as though needles were going through the knee; that bad weather would cause pain, especially if there was rough going; but that ordinarily, and as to light work and smooth walking, plaintiff is quite comfortable.

The testimony discloses that something like \$312 is the reasonable value of medical services rendered him. It is stated in the petition that plaintiff is unable to state the reasonable value of the expenses incurred for nursing and hospital services.

The expectancy of plaintiff is something over 30 years. But that is material only to the extent that there is permanent injury.

Plaintiff had been earning \$1.75 a day. He tried to work, in July, at cutting weeds with a scythe. He worked four days, and had to stay home a month, before he went to work again. This time, he attempted to put up a small bridge; he worked eight days, and then went home and stayed; and then he worked five days at sewer work in October, but couldn't stand it; and has done no work since. Before he went to work for defendant, he worked on bridges, earning \$2.25 for eight hours; and he worked at this sort of work every summer for the four years prior to his injury.

Earlier than that, he used to work in a roundhouse, working there two winters, at \$2.00 a day. Medical testimony claims that his ability to earn at manual labor in the future would be impaired, in occupations like manual labor requiring that he use his limb a great deal.

We are of opinion that, on careful and impartial consideration of all the evidence, a verdict for more than \$4,000 is not warranted. It is ordered that the judgment be reduced to that sum, costs to be paid by appellant.—*Modified and affirmed.*

PRESTON, C. J., LADD, EVANS, and STEVENS, JJ., concur.

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REX M. RETHERFORD, Appellee, v. KNIGHTS AND LADIES OF SECURITY, Appellant.

**APPEAL AND ERROR: Law of Case.** A ruling, on appeal, that 1 the evidence was sufficient to carry an issue to the jury, is conclusive on a subsequent appeal, on practically the same record.

**TRIAL: Inaccuracy Cured by Other Instruction.** An inaccurate instruction as to the assessments due on a policy of insurance may be rendered harmless, in view of the real issues, by construing the instructions as a whole.

*Appeal from Lucas District Court.*—FRANCIS M. HUNTER, Judge.

JUNE 24, 1918.

ACTION upon a life insurance certificate. Trial to a jury, and a verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

*Stuart & Stuart*, for appellant.

*W. W. Bulman*, for appellee.

PRESTON, C. J.—1. This case has been before us before (177 Iowa 613). The principal question there, as here, was

whether the evidence was sufficient to take the case to the jury on the question as to the date on which the certificate was delivered, that question being material on the question of payments.

1. APPEAL AND  
ERROR: LAW  
of case.

In the first case, there was a directed verdict for the defendant; and on the appeal, the evidence was reviewed, and held sufficient to take the case to the jury. On remand, the case was tried to a jury, and a verdict was returned for plaintiff. Appellant again argues the sufficiency of the evidence. There was some additional evidence admitted on the second trial which the trial court had excluded on the first, which exclusion we held to be erroneous; so that, for plaintiff, there was at least some more evidence on the last trial than on the first. But it is not claimed by appellant, nor can it be, we think, that the evidence is materially different on the second trial than on the first. This being so, we would not be justified in again reviewing the evidence.

2. Appellant complains of Instruction No. 9. The defendant contended that the party to whom the certificate was issued was not in good standing, for that she had not paid all her assessments; while the plaintiff

2. TRIAL: inaccuracy cured  
by other instruction.

contended that all assessments had been paid, the contention being, in substance, that a payment had been made in advance, which, if properly accounted for, would pay the assessment which defendant contended had not been paid. A more detailed statement of the situation will be found in the former opinion.

The question turned, to a considerable extent, upon the time when the policy was delivered, defendant contending that it was delivered in February, while plaintiff contended that it was delivered in March. A determination of this question, and taking into account the payments which were made, would show that deceased was in arrears, if the payment was made in February; but if it was made in

March, as contended by appellee, she would be in good standing. The instruction bearing upon this feature of the case is quite lengthy, and we shall set out only so much thereof as bears upon the objection made to it by appellant. It reads, in part:

"Under the terms and conditions of the contract of insurance between Eva M. Retherford and the defendant, she was to pay, or there was to be paid for her, to the financier of the defendant, at the time or before the delivery of the policy to her, one assessment and dues, amounting to 85 cents, for the month in which the policy was delivered, and thereafter, on or before the last day of each succeeding month, and without notice, pay the sum of one assessment and dues, amounting to 85 cents, to the financier of the defendant; and the assessment and dues for the month of September, 1914, being the month of her death, were to be paid before the policy is to be paid to the beneficiary, the plaintiff in this action. Now you are instructed that you are to find and determine, by a consideration of all of the evidence before you, in what month, February or March, 1913, the policy was in fact delivered to her,—that is, delivered into her physical possession, or that of her husband for her,—and then charge her with one monthly assessment and dues for each month thereafter, down to and including the month of July, 1914. After so doing, give her credit for the payments made, and thereby determine whether or not the assessment and dues for the month of July, 1914, were or were not paid; for if an overpayment, or additional payment, was made in March, 1913, as testified by the plaintiff, then she was entitled to have it credited to her for that month, July, 1914, had been paid during each month respectively."

The instruction then goes on to say that, if the policy was delivered in February, and the first assessment and dues were paid for that month, and only one payment was

made during the month of March, and that such payment was for the assessment and dues accrued for the month of March, as claimed by defendant, then deceased was not entitled to a credit for an advance payment of the assessment and dues for the month of July; that, if the payment was made in advance, as claimed by plaintiff, then the verdict should be in his favor; and that plaintiff did not claim that the payment was made during the month of July, but prior thereto.

Appellee contends that the objection now made to the instruction is different from the exception taken at the trial. The objection now made is that the jury were therein told that they were to find and determine in what month, February or March, the policy was in fact delivered to her, and then charge her with one monthly assessment and dues for each month thereafter, down to and including the month of July; that the instruction should have stated that one assessment and dues must be paid for the month in which the certificate was delivered, and each month thereafter. The complaint is more particularly in regard to the use of the word "thereafter." The exception taken at the trial was as follows:

"The defendant excepts to Instruction 9, for the reason that the court tells the jury therein, as a matter of law, that, if two payments of assessments were made in the month of March, that the plaintiff is entitled to have one of said assessments credited to her for the month of July, 1914, this being a question for the jury to determine alone."

The thought seems to have been that the court assumed that the payment was made either in February or March; but, as said, that was the contention of the parties, one contending that it was in February, and the other, in March. It is doubtful, to say the least, whether the objection now made is covered by the exception at the trial. But, however this may be, we think there was no prejudicial error.

The question for the jury to decide was, in which month, February or March, the policy was delivered; and if in March, then plaintiff was in good standing. Special interrogatories were submitted to the jury, and thereby the jury found that the assessments and dues maturing in July, 1914, were paid before the last day of that month, and found specially that they were paid in March, as contended by plaintiff.

Other instructions were given which have a bearing upon this subject. Among them was a statement by the court as to defendant's claim that the policy and constitution of defendant provide that, before delivering the policy to insured, a financier shall collect one assessment and the local dues from the member for the month in which the policy is delivered, and thereafter on or before the last day of each succeeding month; and as to the defendant's claim that insured failed to pay the monthly assessments and dues which became due and payable on the policy before the last day of the calendar month of July, and that, because of such failure she had forfeited her rights, etc. The court stated, also, plaintiff's claim that she had paid in advance, and that such advance payment paid the assessment and dues which became due in July, and before the last day of that month; also stated that there was no claim made by the defendant that insured was not in good standing for any other reason than that she had not paid the assessment and dues maturing on the last day of July; also stated that, if they were paid in advance, as plaintiff contended, then she was in good standing; and then told the jury, in another instruction, that it was for them to determine, under all the evidence and circumstances, whether insured had paid, or there was paid for her, in advance, the assessment which became due in July. Taking the instructions all together, we think the matter was plainly put to the jury, and that they were not and could not have been misled by anything contained in Instruction 9.

For the reasons given, the judgment is—*Affirmed*.

LADD, EVANS, and SALINGER, JJ., concur.

F. C. SEARS et al., Appellees, v. CITY OF MAQUOKETA et al.,  
Appellants.

**ELECTIONS:** "Electors"—Women Voters—Bonds. The term  
1 "elector," unqualified and unexplained, means a *constitutional*  
elector. A constitutional elector is a *male* person. Therefore,  
when a statute requires "*a majority of all electors voting*," as a  
condition to the issuance of bonds, it means the same as though  
the statute had omitted "elector" and used the terms "male  
voters," *even though women are permitted to vote on such bond*  
*issue*. So held under Sec. 1306-e, Code Supp., 1913, providing for  
bond issues for specified public utility purposes.

**STATUTES:** Unreasonableness. The plea of unreasonableness can  
2 have no weight on the construction of a valid, unambiguous  
statute. So held where statutes authorized women to vote on  
bond issues, but provided, in effect, that *their* favorable vote  
might not be considered in determining whether the proposal  
had received the required favorable vote. (Sec. 1306-e, Code  
Supp., 1913.)

*Appeal from Jackson District Court.*—A. J. HOUSE, Judge.

MARCH 12, 1918.

REHEARING DENIED JUNE 24, 1918.

THE district court enjoined the city of Maquoketa from  
issuing bonds to secure funds with which to construct a  
light plant. Hence this appeal.—*Affirmed*.

D. T. Bauman and Clark & Byers, for appellants.

F. D. Kelsey and Barnes, Chamberlain & Hanzlik, for  
appellees.

SALINGER, J.—I. The issuance of these bonds was  
rightly restrained, unless the proposal to issue had the sup-  
port of such a majority as Section 1306-e, Code Supple-



ment, 1913, requires. The vote in favor must be: (a) "A majority of all the *electors* voting at such election;" (b) it must be larger than half of the vote at the last preceding municipal election. Women were authorized to vote upon this bond issue. Section 1131, Code. If the favorable votes cast by them may be counted in determining whether the proposition had the majority required by Section 1306-e, then it had such majority; otherwise not. The exact question is, Has the legislature declared that, though the women were authorized to vote, their favorable vote may not be considered in determining whether the proposal has received the statutory majority? Was "electors" intended to mean male voters? Assuming, for the sake of argument, that it is illogical to permit one to vote and to exclude him from consideration on the question of whether a majority supports the proposition he has voted on, yet the legislature has power to do illogical things, and the cure lies with the legislature, and not the courts. The mayor has a right to vote in some cases. Yet it is settled his vote may not be counted in determining whether some proposition he has supported has a required majority of the council. As the legislature has the power to permit women to vote on whether bonds shall be issued, and also the power to exclude them from the privilege, of course it has power to grant the privilege and to put limitations upon the privilege. It follows, therefore, that it *may* authorize women to vote on this question, and provide at the same time that their supporting vote may not be counted in determining whether there is a required majority. And the fact that the right to vote on bond issues has been validly granted them does not make women "electors." *McEvoy v. Christensen*, 178 Iowa 1180. On the other hand, while the legislature has no power to make women electors, it can empower them to vote on bond issues, and *can* provide that the issue is authorized if it has

a majority made up of the favorable votes of both men and women. And it may be conceded that, though the statute, in terms, requires a majority of the electors voting, this does not necessarily exclude that "elector" is used as a synonym of "person authorized to vote thereat." Finally, the question is, In what sense did the statute use the word "electors?"

If it be utterly against reason that the word was used in the sense of "male voter," that fact will give powerful support to the claim that it was not used in that sense. Is

there such unreasonableness? We think

2. STATUTES: UN-  
reasonableness.

not. At the municipal elections which are

made the standard of measurement, men alone vote. At the election in review, both men and women vote. It can fairly be said the legislature had in mind that the comparison should be made upon a count of the male votes supporting the bond issue, because otherwise there would be a limitation which usually would be no limitation. That is to say, a requirement that a bond issue should have more than the equal of half the votes cast by males alone will be too easily met by the favorable vote at an election at which the total vote cast would naturally be much larger than that at an election at which only men might vote. In fewer words, we think the legislature intended that the comparison should be made by measuring male votes with male votes.

Utter unreasonableness being disposed of, other canons of construction must be considered. Words are to be given their accepted meaning in the law. An elector is one who has the general right to vote and the right to vote for public officers. Bouvier's Dictionary.

In *McEvoy v. Christensen*, 178 Iowa 1180, we quote with approval the language of *O'Flaherty v. City of Bridgeport*, 64 Conn. 159 (29 Atl. 466), that:

"The Constitution has given to the word 'elector' a pre-

cise technical meaning, and it is ordinarily used in our legislation with that meaning only. An 'elector' is a person possessing the qualifications fixed by the Constitution, and duly admitted to the privileges secured and in the manner prescribed by that instrument."

And we say the same view is expressed in a large number of cases, which we cite, and which includes *Coggeshall v. City of Des Moines*, 138 Iowa 730.

It is said in *McEvoy's* case:

"Whenever the legislature employs the word 'elector,' without qualification or explanation, the word may be assumed to have reference to persons authorized by the Constitution to exercise the elective franchise."

The statute invoked here uses the word without any qualification, except that it excludes electors who did not vote on the proposition involved.

Cases like *Younker v. Susong*, 173 Iowa 663, have no applicability. They merely hold that Section 1131 of the Code authorizes women to vote on certain propositions. But that statute does not contain the word "electors." And we have settled that, therefore, it does not purport to "declare women electors." *McEvoy v. Christensen*, 178 Iowa 1180. And in *Coggeshall v. City of Des Moines*, 138 Iowa 730, it is expressly declared that the right to express a preference on enumerated questions "does not create of her an elector."

We are of opinion that the legislature, in requiring a majority of electors equal to the majority at the last preceding municipal election, had in mind that the majority at said last election was a majority of the votes cast by male voters only; that it used the word "elector" advisedly, because it did not desire a majority made up of male votes only, to be equalled by a majority made up of the votes of both male and women voters; that it employed the word "elector" in its accepted law meaning, and thereby excluded women, for they are not authorized to participate in any voting which

might not be done by non-electors. We think that *McEvoy v. Christensen*, 178 Iowa 1180, and the cases therein cited, control us, and compel us to hold that the bond issue here did not have the majority demanded by the law. It follows that enjoining the issue was right, and must be—*Affirmed*.

PRESTON, C. J., LADD and EVANS, JJ., concur.

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JOHN L. SINGLETON, Appellant, v. NATIONAL LAND COMPANY,  
Appellee.

**JUDGMENT: Parties Concluded—Withdrawal Without Prejudice.**

- 1 A decree which quiets title against *all* defendants, yet later distinctly specifies those against whom title is quieted, is not conclusive on a defendant not specifically mentioned in the decree, especially when the record shows a dismissal, without prejudice, at a later date, and prior to any joinder of issue thereon, of the answer and cross-petition of said latter defendant.

**HOMESTEAD: Sales by Guardian—Validity.** A guardian's sale

- 2 and deed of a homestead belonging to an insane wife, for debts neither antedating the acquisition and occupancy of the homestead nor created by the husband or wife, are a nullity. Especially is this true when the husband is not made a party to the proceedings leading up to and culminating in the sale and deed, and does not join in said deed with said guardian. (Secs. 2974, 2976, 3166, Code, 1897.)

**HOMESTEAD: Sales by Guardian—Husband Joining in Deed. Con-**

- 3 ceding, *arguendo*, that a guardian may, under Section 3225, Code, 1897, validly sell the homestead, to which an insane wife has title, yet such deed is of no validity unless the husband joins therein. (Sec. 2974, Code, 1897.)

**GUARDIAN AND WARD: Validity—Limitation of Actions.** The

- 4 five-year limitation for questioning the validity of a guardian's sale and deed does not apply to a deed which is absolutely void.

**HOMESTEAD: Abandonment by Husband.** The act of a husband

- 5 in neither residing in nor giving any attention to a homestead for four years after he knew that the title, standing in the name of the wife, had been quieted against her, works a complete abandonment of the homestead by him, even though the decree quieting title might have been defeated by proper contest.

*Appeal from Lee District Court.*—HENRY BANK, JR., Judge.

APRIL 1, 1918.

REHEARING DENIED JUNE 24, 1918.

ACTION to recover possession of certain lots alleged to constitute a homestead, and recover rents and profits accrued. On hearing, the petition was dismissed. The plaintiff appeals.—*Affirmed.*

*Bernard A. Dolan*, for appellant.

*H. I. Sawyer, J. O. Boyd, and Craig & Sprowls*, for appellee.

LADD, J.—Azubah Fassett acquired, under the will of Rosilla Height, the front 50 feet of Lots 7, 8, and 9, in Block 6 in the city of Keokuk. Thereafter, on September 14, 1896, she married the plaintiff, John L. Singleton, and within a year a son, Paul T., was born to them. In 1899, Mrs. Singleton was adjudged insane, and committed to the hospital for the insane at Mount Pleasant, where she has been ever since. Up to this time, they had occupied the described premises as their homestead, and plaintiff continued such occupancy, with his son, for about a year and a half thereafter. In 1902, he made an oral agreement with Mary Getz, by the terms of which she was to care for the son, collect rent on the said premises, which was then \$13 per month, and, out of such rent, to receive \$8 per month as compensation for the care of the child. Since then, Singleton has not occupied the premises, has seen little of his son, and has contributed nothing towards his support. On May 20, 1905, Mary Getz, on her own application, was duly appointed guardian of Mrs. Singleton. Subsequently, and on May 22, 1908, as such guardian, she applied for an order authorizing her to sell the premises. The ward was

1. JUDGMENT:  
parties concluded:  
with-  
drawal with-  
out prejudice.

duly notified, and a guardian ad litem was appointed, who filed answer. No notice was served on Singleton. The sale was ordered, the premises duly appraised, and the sale negotiated to Alice M. Walker; and, on report of the same, with the conveyance thereof to her, approved by the court. No debts antedating occupancy of the premises as a homestead of either Mrs. Singleton or her husband existed, nor had any of those for which the sale was made been created by her or her husband. After the execution of the guardian's deed, January 27, 1909, grantee therein began suit to quiet title to the premises, naming several parties as defendants. Mrs. Singleton was served with original notice in the manner required by law, and a guardian ad litem appointed. Said guardian filed answer, as did also Mary Getz, as guardian. The plaintiff herein, on March 17, 1909, filed an answer and cross-petition. This was afterwards withdrawn, and a decree was entered, quieting title in Mrs. Walker.

In this suit, John L. Singleton, with whom Mrs. Singleton joins, by way of petition of intervention filed by him as her present guardian (Mary Getz having been discharged as such), seeks to have the conveyance from Mary Getz, as guardian, set aside and cancelled, as null and void, and, notwithstanding the decree quieting title, that he be put in possession, and recover the rents accruing during the five years preceding the filing of his petition. The defendant relies on the judgments mentioned.

I. The contention that plaintiff was estopped by the decree quieting title may first be disposed of. In the caption of the petition filed by Alice M. Walker, January 27, 1914, praying that title be quieted in her, the name "John Singleton" appears, as one of the defendants. On March 17th, following, he filed an answer and cross-petition, raising all questions now involved. A decree was entered on the 26th

of the same month, with Singleton's name omitted from the caption, in words following:

"Now on this day, this cause coming on for hearing, the plaintiff appearing by John E. Craig, her attorney, and the defendant, Azubah Singleton, appearing by Rice H. Bell, the duly appointed guardian ad litem of said Azubah Singleton, insane, and having filed her answer, and Mary Getz, guardian of Azubah Singleton, also appearing, by John E. Craig, her attorney, and the matter having been submitted to the court upon the pleadings in said cause and the admissions of said guardian, and the court having heard the evidence and being fully advised in the premises, finds that the allegations of the plaintiff's petition are true, and that the said guardian, Mary Getz, did, on the 7th day of November, 1908, execute a guardian's deed to the said property on the said date, and that the said deed was duly approved by the court, and recorded in the records of Lee County, Iowa, of Keokuk, in Book 12, Page 423. [Here follows identification of property and finding as to ownership.] It is therefore ordered, adjudged, and decreed that the plaintiff, Alice M. Walker, is the absolute and unqualified owner of the frt. 50 ft. of Lots 7, 8, and 9, in Block 6, city of Keokuk, and her title and the estate in same is hereby established against the adverse claim of all the defendants to this suit, and that the claims of Azubah Singleton, insane, Zuba Singleton, Mary Getz, Guardian of Azubah Singleton, insane, defendants, are both jointly and severally barred and forever stopped from having or claiming any right or title adverse to the plaintiff in or to said property. And that plaintiff have and recover of the defendants the costs," etc.

In the caption of the original draft of the decree, duly signed by the trial judge, lines were drawn through the name John L. Singleton, appearing as one of the defendants. On the 30th day of March, four days later, Mrs.

Walker filed a demurrer to the answer of Singleton, on the ground that he was without capacity (interest) to sue, inasmuch as title was in his wife. This entry appears, as of September 22, 1909:

"Now on this day, this cause coming on for hearing, the plaintiff appeared by John E. Craig, her attorney, and the defendant John Singleton appearing by John P. Homish, his attorney, and the said attorney withdraws his answer, and dismisses the cross-petition filed by said John Singleton, without prejudice."

It will be noted that the appearances for the parties other than Singleton are recited in the decree, as are also their pleadings, but his answer and cross-petition are not alluded to; and, though it is recited that plaintiff's title in the estate is established adverse to the claims of all the defendants to the suit, this is followed by the words "and that the claims of Azubah Singleton, insane, Zuba Singleton, Mary Getz, guardian of Azubah Singleton, insane, defendants, are both jointly and severally barred and forever estopped from having or claiming any right or title adverse to the plaintiff in or to said property." In other words, though the recital is that the decree is against "all defendants," this is immediately followed by an enumeration of the particular defendants intended. That the decree was leveled against such defendants only, further appears from the circumstance that Singleton's name was erased from the caption, and, though all other defendants are named therein, his name does not appear. Add to this that issue had not been joined on his answer and cross-petition, and the record is all but conclusive that he was not included in the decree entered. This was the conclusion of the plaintiff, else she would not thereafter have lodged a demurrer against the answer and cross-petition. When the decree is read in connection with the record of the cause, there remains little or no doubt as to the construction which should be put up-



on it. We are satisfied that the decree was not intended to and did not quiet the title against the plaintiff herein, John L. Singleton. See *Banning v. Sabin*, 41 Minn. 477 (43 N. W. 329).

II. Nor do we regard the judgment of the court, ordering the guardian, Mary Getz, as such, to sell the property, or her deed to Mrs. Walker, as of any validity. Section 2974 of the Code declares that:

2. HOMESTEAD:                    "No conveyance or incumbrance of or  
sales by                               contract to convey or incumber the home-  
guardian:                               stead, if the owner is married, is valid, un-  
validity.                               less the husband and wife join in the execution of the same  
joint instrument, whether the homestead is exclusively the  
subject of the contract or not, but such contracts may be  
enforced as to real estate other than the homestead at the  
option of the purchaser or incumbrancer."

Section 2976 of the Code provides that:

"The homestead may be sold on execution for debts contracted prior to its acquisition, but in such case it shall not be sold except to supply any deficiency remaining after exhausting the other property of the debtor liable to execution. It may also be sold for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt."

"Section 3166. Neither husband nor wife can remove the other nor the children from the homestead without the consent of the other, and if the husband abandons the wife she is entitled to the custody of the minor children, unless the district court, upon application for that purpose, shall otherwise direct."

Neither the wife nor the husband can, by any separate act, affect the homestead rights of the other, and thereby

change the homestead character of the property. When the right of homestead has once attached to the property, it can be relinquished or divested only by a joint conveyance, or by the abandonment by both husband and wife. *Hunt v. Neeley*, 67 Iowa 97. Mrs. Singleton, having become insane, could not join in a deed. *Alexander v. Vennum*, 61 Iowa 160. Nor was she able to consent to anything. It was not of her volition that she left the homestead for the hospital for the insane, and it cannot be said that she ever consented to her removal from the homestead, under Section 3166, quoted above. Nor is anyone else authorized to speak for her.

In *Ratcliff v. Davis*, 64 Iowa 467, the guardian of an insane widow, alleging that she was indebted to the county for the expense of her care in the hospital for the insane, sought to have her share in 160 acres of land, left by her husband, set apart, so as not to include the homestead, and with reference thereto, the court said:

"It is claimed by her guardian that, because she is incapable of making her wishes known, his preference shall be substituted for hers, and that he can waive the statutory provisions. We do not think he has any power to do so, because, as it appears to us, the right is a personal one, and, if not exercised for any reason, even though it be her incapacity to do so, no other person can act in that behalf in her stead."

Mrs. Singleton has never, by her own volition, yielded her interest in and claim to the property as her homestead. Her right is guarded by the law against alienation through any act of the husband, and may not be wrested from her otherwise than through some voluntary act on her part. Realty is endowed with the homestead character in the interest and for the benefit of the family; and, so long as it retains that character, it is not perceived on what theory either husband or wife may be denied its enjoyment, so

long as such character is retained. Thus it is utterly impossible for either husband or wife, by absenting himself, to divest the homestead character of the premises, in the absence of some act on the part of the other inconsistent with the retention of the property as a homestead. In *Panton v. Manley*, 4 Ill. App. 210, doubt was expressed whether a husband could abandon the homestead, as against the wife. It was said in some early Kansas cases that "nothing that he alone can do or suffer to be done can cast the slightest cloud upon the title of the homestead." *Morris v. Ward*, 5 Kan. 239, 241. See, also, *Coughlin v. Coughlin*, 26 Kan. 116. And in *Withers v. Love*, 72 Kan. 140 (3 L. R. A. [N. S.] 514), the court concluded that:

"The acts which it is claimed amount to equitable estoppel were those of the husband alone. We therefore hold that nothing he did or suffered to be done while his wife was alive cast any cloud upon the title to the homestead, or could estop either her or him from claiming this land as the homestead during her lifetime."

If the homestead may not, as such, be lost save through a joint alienation by deed, in accordance with Section 2974, and neither the husband nor wife may be forced therefrom, in violation of Section 3166, and it cannot be effectually abandoned by either husband or wife unless the other also abandons the same, it necessarily follows that, pending the insanity of either, the premises may not lose their character as a homestead; for she, the insane spouse, is without capacity to join in a conveyance of the homestead, or to assent to removal therefrom. Whatever the sane spouse may do, it continues to be the homestead of the family. The husband and wife are entitled to but one homestead, and the sane spouse may not acquire another while that continues. While the property continues the homestead, then, the insane spouse will not be estopped from asserting his right thereto, as such, by any act or conduct on the part of

the sane spouse; nor are we able to perceive on what theory the latter may estop himself from asserting his right to the premises as a homestead, at any time during the life of the insane spouse. The sane spouse may not alienate or incumber it, or subject it to any charge; and, as it is set apart by the law for the benefit of the family, he may return and resume his residence there at any time so long as its homestead character exists. In other words, the homestead character of property may not be lost save by the concurrence in some manner of husband and wife; and as, without this, it continues for the benefit of both, one may not, by his conduct, estop the other from asserting his right thereto, nor even estop himself from asserting his right thereto and enjoyment thereof while it continues a homestead. This was the view taken in *Withers v. Love*, supra, where the court remarked that:

"It is difficult to see how effect can be given to the constitutional provision requiring the joint consent of husband and wife, and at the same time hold that, while the wife is insane, the husband can either separately convey, or by acts or conduct estop the wife from her right to claim the homestead, or estop himself from claiming it in his own right while she is living. The acts of estoppel must be such as will estop both. (*Law v. Butler*, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856)."

As bearing hereon, see *Weatherington v. Smith*, 77 Neb. 363 (13 L. R. A. [N. S.] 430, and cases cited in note); *Nichols v. Shearon*, 49 Ark. 75 (4 S. W. 167).

III. The interest of Singleton in the premises in controversy, and his right thereto as his homestead, still subsisted when the application for authority to sell was made

by Mary Getz, as guardian; but no notice was served on him. His right in the premises was higher in character than his distributive share, being more in the nature of

3. HOMESTEAD:  
sales by  
guardian;  
husband join-  
ing in deed.

a vested right, and was such as clothed him with the right to redeem the property at tax sale (*Adams v. Beale*, 19 Iowa 61); entitled him to notice of foreclosure of a prenuptial mortgage, if such there had been (*Chase v. Abbott*, 20 Iowa 154); and he might have maintained an action for possession, had his wife yielded same on contract of sale in which he had not joined (*Boling v. Clark*, 83 Iowa 481). His right to the homestead was one he was entitled to protect, even by negotiating for a sheriff's certificate of sale (*Byers v. Johnson*, 89 Iowa 278), and such right has been held to be within the protection of Section 51 of the Code. It has repeatedly been declared to be permanent, fixed, and substantial, and more nearly resembles a life estate than any other, differing therefrom in the manner of acquirement and alienation, and possessing some of the characteristics of a joint tenancy. *Sayers v. Childers*, 112 Iowa 677. Surely, his right in the homestead was such as that he must have been given notice and afforded an opportunity to be heard, before being deprived thereof. See *Millin v. White*, 134 Iowa 681. Nor is there anything in Section 3225 of the Code or elsewhere, authorizing the conveyance of the homestead otherwise than by the husband's joining in the same instrument; and, even though the guardian of the wife may procure an order authorizing him to sell the insane wife's property, in pursuance of Section 3225, this merely empowers such guardian to join the husband in the execution of the same joint instrument, in accordance with Section 2974 of the Code. No notice was served on Singleton, nor did he join in the execution of the deed to Mrs. Walker; and we entertain no doubt in reaching the conclusion that the conveyance was of no validity, and that the grantee therein acquired no title. *Way v. Scott*, 118 Iowa 197. See *Flege v. Garvey*, 47 Cal. 371.

IV. The deed being void, the statute saying that no person may question the validity of guardian's sale after five

years is not applicable. *Rankin v. Miller*, 43 Iowa 11.

V. Had a proper defense been interposed, the result must have been different; but this furnishes no reason for not according it all the consideration due to the final adjudication on the issues involved. She was served with the original notice, precisely as exacted by statute. A guardian ad litem was duly appointed, and answered, as did the regular guardian. Decree was entered as prayed, quieting title in Mrs. Walker as against Mrs. Singleton. This necessarily terminated her claim to the property. As seen, this decree was entered March 26, 1909. On September 23d following, Singleton withdrew his answer and cross-petition, and thereafter asserted no right to nor gave attention to the property until he filed the petition in this case, October 12, 1913, more than four years subsequent to receding from the issues in the suit to quiet title. As he was a party thereto, he must be assumed to have had knowledge that title had been quieted in Mrs. Walker as against his wife, and thereafter, during all this time, he acquiesced in the loss of her homestead right in the property and fee therein, and his conduct cannot be viewed otherwise than as an abandonment of all claim thereto as a homestead. The decree of the trial court may safely be planted on this ground, and it is—*Affirmed*.

PRESTON, C. J., EVANS and GAYNOR, JJ., concur.

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EVA R. SNYDER et al., Plaintiffs, v. W. H. FAHEY, Judge.  
Defendant.

**APPEAL AND ERROR:** Correction of Judgment—Certiorari (?) or  
1 Appeal (?). Review of an order of correction of a judgment must be had by appeal, and not by certiorari, unless the order of correction is one which is absolutely void.

**JUDGMENT: Abatement (?) or Bar (?)—Nunc Pro Tunc Order.**

2 Lapse of time is no obstacle to the jurisdiction of the court, as between the parties to a judgment, to make a *nunc pro tunc* entry. So held where the judgment inadvertently failed to state that it was in *abatement*, and not in *bar*.

**JUDGMENT: Nunc Pro Tunc Order—Correctness.** A judgment, ap-

3 parently in bar, but shown beyond question by the entire record to have been in abatement, will, as between the immediate parties, be corrected by an appropriate *nunc pro tunc* entry.

*Certiorari from Guthrie District Court.*—W. H. FAHEY,  
Judge.

JUNE 24, 1918.

CERTIORARI to a judge of the district court, whereby it is sought to annul an order entered by the defendant judge. The order was one of correction of an entry of his court.—*Affirmed.*

C. A. Robbins and R. O. Garber, for plaintiffs.

Weeks & Vincent, for defendant.

EVANS, J.—The record involved was made in the case of *Citizens State Bank v. Snyder*. This was a forcible entry and detainer suit, brought by the plaintiff therein before a justice of the peace in Dallas County,

1. **APPEAL AND ERROR: COR-** to recover the possession of real estate, and  
rection of judgment: certiorari (?) or appeal (?) transferred to the district court of said county, where trial was had. Defenses in abatement were pleaded in such action. For the purpose of this proceeding, it may be deemed also that a defense in bar was pleaded. A judgment was entered therein, dismissing the petition. The judgment entry did not, in terms, indicate whether the judgment was in bar or in abatement. The effect of this omission was to raise a presumption in favor of the bar. The plaintiff therein filed a motion, supported by a showing, asking a correction of

the record so that the judgment entry should show, in terms, the ground of the dismissal. The showing in support of the motion was, in substance, that the defenses in abatement were the only ones litigated, and the only ones to which evidence was adduced; that, in fact, the ground of the dismissal was in abatement; and that such ground was, through mistake or oversight, omitted from the judgment entry. The application for correction came on for hearing, both parties appearing, before the same judge who entered the original judgment, and who is now defendant herein. His testimony was taken and incorporated in the record, and the same fully sustained the claim of mistake in the judgment entry. It was accordingly corrected, so as to show that it was based upon the defense in abatement, and not upon the defense in bar. Though the plaintiff's application for a correction was denominated a *motion*, and purported to be supported by an affidavit which recited the facts, the parties appear to have treated the motion and affidavit together as a pleading, in the nature of a petition, and the defendant demurred thereto on the ground that it was barred by the statute of limitations, in that it was not brought within one year. This demurrer being overruled, the defendant answered, and again pleaded the statute of limitations. The defendant therein is the plaintiff herein, and seeks here to annul the order of correction of the record in the forcible entry and detainer suit.

I. The defendant herein challenges the right of the plaintiff herein to maintain this certiorari proceeding, because she had plain, speedy, and adequate remedy by appeal. The plaintiff's abstract does not specifically disclose what particular question is presented to us for review. No reference is made therein to the writ of certiorari, nor to the affidavit in support thereof, nor to the particular grounds upon which the issue of the writ was demanded. All this is left to inference. That the plaintiff had a right



to appeal from the order of correction is undeniable. It is by this course that such orders have heretofore come before us for review. No case is cited to us wherein we have heretofore reviewed such an order on certiorari. That the remedy by appeal is, ordinarily, speedy and adequate, seems also undeniable. The order in question was entered in May, 1917. The defendant therein (plaintiff herein) did perfect an appeal therefrom to this court on June 1, 1917. The cause was pending in this court on such appeal until December 22, 1917, when the appellant therein (plaintiff herein) dismissed the appeal, being then in default for failure to file abstract within the statutory time. On the same day, she served a second notice of appeal, and this purported appeal was also dismissed, a month later. Some time thereafter, this proceeding was begun. The appeal taken on June first would have come on for submission, in ordinary course, at our January, 1918, term. The present proceeding was not instituted until after that time. No question is presented to us herein which could not have been fully considered on such appeal.

Unless it can be said, therefore, that the order of correction by the district court was without jurisdiction, in the sense that it was wholly void, and therefore subject to attack by any procedure, collateral or otherwise, the remedy for its review was by appeal, and not by certiorari. We proceed, therefore, to the question of jurisdiction.

II. Plaintiff assumes that the application for a correction of the record below rests upon Sections 4093 and 4094 of the Code. This is an erroneous assumption, and undermines the plaintiff's entire argument.

2. JUDGMENT:  
abatement (?)  
or bar (?):  
*nunc pro tunc*  
order.
- These sections are found in the chapter relating to "Proceedings to Reverse, Vacate or Modify Judgments in the Trial Courts."

The application below is not based upon any mistake or omission on the part of the clerk, nor upon any irregular-

ity in obtaining the judgment; nor was it an application to "reverse, vacate or modify" the judgment. The application in question invoked a power of the court which we have frequently held to be inherent in the court, and which has recognition in Code Sections 244 and 4127. This may be designated as a general power of *nunc pro tunc* entry, which is frequently exercised for the correction of mistakes in the record, either of omission or of commission. It is not a power to review or to change, but it is the power to enter upon the record *now* what was actually done, and what was intended to be entered upon the record *then*. Its function is *now* to supply or perfect the record evidence of what was *then* actually done by the court. In *Fuller & Co. v. Stebbins*, 49 Iowa 376, a *nunc pro tunc* entry of judgment was ordered of record which was intended to have been made three and a half years before. It was held therein that the power to so do was inherent in the court, and was not barred by the lapse of time. A similar holding was made in *Hofacre v. Monticello*, 128 Iowa 239; *Puckett v. Guenther*, 137 Iowa 647; same case, 142 Iowa 35; *Dowling v. Webster County*, 154 Iowa 603; *Lambert v. Rice*, 143 Iowa 70.

In the *Dowling* case, we said:

"The time within which a record may be corrected is not limited by the above statute, and only laches or equitable considerations will obviate the remedy provided."

In the *Lambert* case, we said:

"The right of the court to correct an evident mistake in the record is inherent. It is not forbidden by the statute, nor affected by the mere lapse of time. The correction asked in this case is in the nature of a *nunc pro tunc* entry. It in no sense qualifies the former action of the court, but causes such former action of the court to appear correctly upon the record, according to the very truth as it was at that time."

The foregoing relate to the exercise of the power of correction, as between the parties to the judgment. Notice to the adverse parties is requisite to such proceeding, and intervening equities of third parties are entitled to due protection.

It will be seen, therefore, that the court did have jurisdiction of the subject-matter of such application for a correction. Though it err in making the correction, its jurisdiction would not be affected thereby.

Upon the record before us, however, the court did not err in making such correction. The pleadings and the evidence in the forcible entry and detainer suits are incorporated in the abstract herein. On the trial of the forcible entry suit, no competent evidence was offered or introduced by the defendant, except in support of her defenses in abatement. The case was finally submitted upon a pending motion of the defendant therein for a dismissal of plaintiff's petition on specified grounds, which were wholly in abatement. There is no room for doubt that the omission from the judgment entry of the ground of the dismissal was a mere oversight and mistake, and that the presumption arising from such omission failed to express what was actually done by the court. The order of the district court is, therefore,—*Affirmed*.

8. JUDGMENT:  
*nunc pro tunc*  
order: correctness.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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CHRIS SORENSON, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee.

**RAILROADS: Negligence of Lessee—Liability of Lessor.** A railway company may not lease or license its line of railway to another and escape liability for the negligence of the lessee or licensee in operating the trains, even though, by the terms of the license

or lease, the owner retains no control over the operation of such trains.

**RAILROADS: Switch Tracks—Liability of Owner for Negligence**  
 2 of Licensee. A railway company which, under command of Sec. 2113, Code Supp., 1913, furnishes switch track connections to another railway, is, under the terms of said statute, liable for the negligence of such connecting road in negligently operating its trains over such switch tracks.

*Appeal from Cass District Court.*—THOMAS ARTHUR, Judge.

JUNE 24, 1918.

THE appellee permitted the Atlantic, Northern & Southern Railway Company to operate its trains over tracks owned and operated by the appellee. The plaintiff was injured because the licensee road, by negligent operation of one of its trains, frightened the horses of plaintiff, and caused them to run away and be injured. The sole question is whether the appellee is liable for such negligence on part of its said licensee.—*Reversed and remanded.*

*H. M. Boorman*, for appellant.

*F. W. Sargent* and *B. A. Goodspeed*, for appellee.

SALINGER, J.—I. The plaintiff seeks to make the defendant liable, upon an allegation that the Atlantic, Northern and Southern Railway Company ran a train at a high and negligent rate of speed on the track of defendant, and that, as the locomotive reached a point about 20 feet from where plaintiff's horse was, the engineer caused a sharp blast of the whistle to be blown, in a negligent and unreasonable manner, and thus frightened the horse, causing it to run away and to be killed, and the plaintiff to be injured. This train was operated by the employees of the Atlantic Railway. Neither defect in machinery nor in roadbed is involved, and the sole question is whether such arrangement in the way of

1. RAILROADS:  
 negligence of  
 lessee: liability  
 of lessor.

leasing as the defendant may have made with the Atlantic Railway absolves the defendant from responsibility for injury caused by said negligent operation of a train. It may be conceded that the negligence was nothing but negligence at common law. The question remains whether its being no more than that is material.

It will be useful to eliminate certain authorities relied upon by appellant, which, in our opinion, are of no help to him. *Bower v. B. & S. W. R. Co.*, 42 Iowa 546, *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, and 1 Elliott on Railroads (2d Ed.), Section 477, we thus view. In the *Bower* case, the essential point is that if, at the time of the accident, the road is being run in the name of the defendant, and no change in business or management is perceptible to the outside world, such road is liable, though it may in fact have been leased, and be in fact controlled by others. No more than this is determined by *Railroad v. Brown*, 17 Wall. (U. S.) 445, which the *Bower* case cites in its support. In *Brown's* case, the injury was sustained by one riding on a through ticket, issued in the name of the defendant railroad. It is upon this case that Mr. Elliott bases his statement that it has been held by the Supreme Court of the United States that a railroad company which permits another to make joint use of its tracks is liable to the person injured by the negligence of the company to which the permission is granted. And it is as to this holding he says that the weight of authority supports it. *McAllister v. Chesapeake & O. R. Co.*, 198 Fed. 660, holds no more than that, under the law of Kentucky, a lessor railroad company is not liable for the injury of a trespasser on the track by the negligence of employees of its lessee in operating a train. It has been held a railroad lessor is not released where, despite the lease, he tickets through passengers, and these are injured on a connecting road (*Chollette v. Omaha & R. V. R. Co.*, 26 Neb. 159 [41 N. W. 1106]; *Railway*

*Company v. Brown*, 84 U. S. 445; *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987); and that maintenance of a joint depot will not make liability in the lessor for negligent operation by the lessee (*Missouri, K. & T. R. Co. v. Jolly*, 31 Tex. Civ. App. 512 [72 S. W. 871]; *Miller v. West Jersey & S. R. Co.*, 71 N. J. L. 363 [59 Atl. 13]). The effect of these is that the lessor remains liable under conditions which are not presented by this record. Therefore, they are of no help to the appellant. But that some cases wherein the lessor is not held liable are not available to appellant, of course, detracts nothing from his case, if it be the weight of authority that the lessor remains liable in circumstances that may not be differentiated from the ones present in the record at bar. It is not so important that many decisions in which the lessor is held liable do not help the appellant as it is whether the lessor is liable in such a case as appellant has.

II. The question is not whether there are cases in which the lessor is not liable, nor whether the lessee is also liable. The sole question is whether the lessor is liable under the facts of this case. This being so, we are unable to see how appellee is aided by the cases upon which it relies. *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165, followed in *Hayes v. Northern Pac. R. Co.*, 74 Fed. 279, is that, where a lease is made without authority from the legislature, the lessor continues liable for all the negligences of the lessee, because, in such case, the latter is treated as the agent of the lessor in operating the railroad. That a void lease will not relieve the lessor from liability, of course, does not establish that the lessor is not liable if the lease is not void.

While appellee concedes it is under charter duty to maintain its road in proper condition, and that *De Lashmutt v. Chicago, B. & Q. R. Co.*, 148 Iowa 556, at 560, holds that both owner and lessee are liable for injury due to faulty construction, it insists the rule applies only to defec-

tive construction. But the rule is not thus exclusive,—or, rather, the *De Lashmutt* case is not. That both may be held to answer where defective construction causes the injury does not prove they are under no liability for anything but defective construction.

It is thoroughly well settled, and elaborate briefs for the proposition were scarcely necessary, that a lessor of a railroad is not liable to an employee of the lessee's where his employer negligently injures him, unless the injury is due to some defect in construction or maintenance.

In *Banks v. Georgia R. & B. Co.*, 112 Ga. 655 (37 S. E. 992), it is held that a chartered railroad company which, under legislative authority, leased its franchises and tracks to another such company, is not liable for the homicide of an employee of the latter, caused by the negligence of a co-employee. To say nothing of the distinction that here was a total lease, and that this is a tort committed by one employee upon another, this appears in the opinion:

"There is great contrariety of judicial opinion in respect to the responsibility to the public of a lessor railroad company for the acts of the lessee's servants in operating the franchise, where the lease is authorized by statute, but without a provision for the lessor's exemption from liability. We apprehend, however, that no case can be found where it is held, in the absence of a statute creating the liability, that a proprietary railroad company which has, by legislative authority, leased its road and franchise, is responsible for a tort to an employee of the lessee, resulting from the negligence of a co-employee."

It is the manifest purpose of Sections 2066 and 2039 of the Code to put upon the lessee or licensee the same liability under which the owner rests. The Supreme Court of the United States, dealing with what is now said Section 2066, held, in *Chicago & N. W. R. Co. v. Crane*, 5 Sup. Ct. Rep. 578, that a leasing thereunder did not destroy the

identity of the lessor; wherefore, a foreign lessor sued in Iowa may not, on suit against the leased road, have a removal to a Federal court.

Section 2039 of the Code of 1897 provides that all of the duties and liabilities imposed by law upon corporations owning or operating railways shall apply to all lessees, as fully as if the latter were expressly named in the law, and that any action which might be brought, or any penalty that might be enforced against such corporation under any provisions of law, may be brought and enforced against such lessee. The utmost that this statute and Section 2066 effect is to make the lessee, as well as the lessor, liable. Because of these statutes, recovery could have been had against the Atlantic road, had it been sued. But, though this settles that the lessee is liable, it in no way determines that the lessor is not liable.

Due, no doubt, to the absence of such statutes as these, it was held, in *Sprague v. Smith*, 29 Vt. 421, that a lessee is not liable for injury caused solely by the misconduct or negligence of the lessor. It holds further, but not more than that one actually operating a railroad is as liable for such injury, if due to its own negligence, as it would be if it owned the road over which it is running. This would support a claim that the Atlantic Northern is not liable for negligence on part of the defendant, though liable for its own negligence. But it gives no support to a claim that the lessor is not responsible for negligent act of the Atlantic Northern road. Nor does *Wasmer v. D. L. & W. R. Co.*, 80 N. Y. 212, 216, 217, hold to the contrary. Our statutes and all these cases merely settle that the lessee cannot escape liability for injury caused by defective condition of the track, and that, under certain conditions, a lessee may be liable, though it is not the owner of the road upon which it operates. It has no bearing on the claim that creating a license or making a lease will absolve a rail-



road corporation from responding for the negligent acts of its lessee or licensee.

There are cases holding that, where there is a valid lease, and not a mere running arrangement, with license to use the road, the lessee is, under certain statutes, liable for stock wrongfully killed. In one of the cases so holding, the two companies agreed that they would operate the road jointly, and have equal rights thereon, and that each company should settle all claims for damages caused by its own trains, and that the lessor was to direct the running of all the trains and prescribe the rules therefor. See *Wabash R. Co. v. Williamson*, 3 Ind. App. 190 (29 N. E. 455). This, for various reasons, holds that the lessee is liable in the case stated. Self-evidently, this is no authority for the position of appellee.

We are unable to see how cases which hold that, because of statute, the lessor only is liable for injury caused by failure to fence, helps either party. Of this class is *Pittsburg, C. & St. L. R. Co. v. Hunt*, 71 Ind. 229; *St. Louis, W. & W. R. Co. v. Curl*, 28 Kans. 622; *Pierce v. Concord R. Co.*, 51 N. H. 590; *Liddle v. Keokuk, Mt. P. R. Co.*, 23 Iowa 378; and so of *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa 282, which distinguishes the *Liddle* case, and holds that a lessee for a term of 50 years who exercises the right to maintain fences along a line is liable for injury caused by failure to fence. *Stephens v. D. & St. P. R. Co.*, 36 Iowa 327, and *Clary v. Iowa Midland R. Co.*, 37 Iowa 344, seem to us to hold no more than that statute law, properly interpreted, relieve lessor and lessee, respectively, for damages for stock killed by the other. *Brockert v. Central Iowa R. Co.*, 82 Iowa 369, but decides that, where a railroad is being operated by a receiver, he, and not the company, is liable for the value of stock injured on the unfenced right of way, through the negligence of the railroad employees.

## 2-a

The defendant maintains and operates a large switchyard and tracks which run east and west through Atlantic. The Atlantic Northern Railroad has a depot situated on the north side and at the west end of said yards.

2. RAILROADS:  
switch tracks:  
liability of  
owner for neg-  
ligence of  
licensee.

It owns and operated its own line from Kimballton to this depot. It also owns and operates its line from a point starting on the south side of the Rock Island tracks, and near the east end of said switchyard, from whence it operates south to Villisca. There is thus a break in its lines. Under some arrangement with the defendant, the Atlantic Northern Railroad used the tracks of defendant to fill this gap. The importance of this situation lies in the fact that appellee claims that, in permitting the use of its tracks, it only obeys the statute which requires it, under certain conditions, to give connection by proper switch tracks. Now Code Section 2037 and Section 2113, Code Supplement, 1913, do provide that railway companies are compelled by law to make connections with and furnish interchange tracks for other railway companies for the interchange of cars. Thereupon, appellee attempts to distinguish *Harden v. North Carolina R. Co.*, 129 N. C. 354 (40 S. E. 184). It argues that the Atlantic road was merely permitted to use what is, in effect, a transfer track; and it is said that defendant might have been compelled, by the order of the Board of Railroad Commissioners, to construct a transfer track for this use.

We are not prepared to hold that, where one railroad leaves a break in its own lines, and operates in different direction from each end of the break, that any statute puts a duty upon another railroad to give the use of its tracks for the purpose of becoming a part of the line of the other carrier, and of thereby filling the break which the other has left in building. And Section 2113, Code Supplement, 1907,

which contemplates some sort of action when a carrier fails or refuses to give proper switch track connection, has the express limitation that nothing therein shall be construed to relieve any railroad company from present responsibility or liability for damage to persons or property. So that, if it were conceded that the defendant furnished nothing but a switch track connection, and was in duty bound to do so, that fact will, under the terms of the statute itself, not permit it to say to this plaintiff that the duty to furnish the switch track relieves it from all liability, if the other carrier used said track in such manner as to have injured plaintiff.

III. *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165, attempts to distinguish *Railway Company v. Brown*, 17 Wall. (U. S.) 445, because the lease involved in the *Arrowsmith* case is total. The same distinction is attempted in *Hayes v. Northern Pac. R. Co.*, 74 Fed. 279, and *Little Rock & Ft. S. R. Co. v. Daniels*, 68 Ark. 171 (56 S. W. 874). The reasoning is that, when a complete lease authorized by law is made, this effects a transfer of the management, and so of the rights and liability of the management, from which it is deduced that the owner is not liable for torts of the lessee. See, also, Patterson on Railroad Accident Law, Section 131; Pierce on Railroads, page 283. These assume the lessor retains no control (*Hutchinson on Carriers* [2d Ed.], Sec. 515b; *Caruthers v. Kansas City, Ft. S. & M. R. Co.*, 59 Kan. 629 [54 Pac. 673]), and assume, also, that there is no breach of any duty which the lessor owes to the public (1 Elliott on Railroads [2d Ed.], Sec. 469). The general rule stated by these is illustrated by *Mahoney v. A. & St. L. R. Co.*, 63 Maine 68, where it is applied to a passenger who contracted with the lessee only, and where such lessee had exclusive control. We might well dispose of all this by forbearing to indulge in speculating upon matters not presented by this record. It does not appear that defendant

made a total lease,—abandoned the operation of its own road to a lessee,—and that in any sense it did confer exclusive control upon another. But the question is important, and we think it advisable to determine it.

In essence, it is the position of the appellee that this case comes within the general rule which absolves the landlord from liability for the negligence of the tenant, where the landlord elects to retain no right of control. See Wood on Landlord & Tenant (1st Ed.), Section 539. The position is well illustrated by the reference appellee makes to 2 Blackstone's Commentaries, 309, 310, which classes a lease among the six things that constitute an original conveyance, and by the statement that the general public has, in the case of a lease by a railroad, no greater rights against the lessor and lessee than it has in the case of any other lease. This, of course, is perfectly sound, if it can be maintained that the defendant railroad corporation is the ordinary landlord. But does it occupy that position? It operates under a franchise grant by the public, and assumes a relation to the public that the owner of a leased house does not stand in. The ordinary landlord has the right to lease his premises without grant from the legislature. It is not and cannot well be claimed that a railroad corporation can lease without authority from the legislature. The claim is that, having such authority, the leasing ends the responsibility of the lessor. Now, Section 2066 of the Code authorizes any railway corporation to lease its property and franchises to, or make joint running arrangements not in conflict with law with, any other railway corporation. It contains the further provision that any corporation operating the railway of another shall be liable in the same manner and extent as though such railway belonged to it. Section 2039 of the Code provides that all the duties and liabilities imposed by law upon corporations owning or operating railways shall apply to all lessees as fully as if they were expressly named, and any ac-

tion which might be brought or penalty enforced against the owning corporation may be brought or enforced against such lessees. It will be noticed that, in giving the authority to make leases or joint running arrangements, that, at the least that can be said, the statute hints most strongly that the authority to lease or make joint running arrangements does not relieve the lessor from any duty owing the public. But relying on inference is unnecessary. If there is anything thoroughly settled in the law, it is that, though authority to license and to make joint running arrangements is given by statute, yet the owner is not relieved from the negligence of the other if such negligence injures anyone to whom the lessor is under duty as to the management of its property, unless exemption from such liability is expressly given by the legislature. That a complete lease by a railroad is authorized does not relieve the lessor from negligent acts of the lessee. *McCabe's Adm'r. v. Maysville & B. S. R. Co.*, 112 Ky. 861 (66 S. W. 1054); *Clinger's Adm'r. v. C. & O. R. Co. of Ky.*, 128 Ky. 736 (109 S. W. 315); *Chicago & N. W. R. Co. v. Crane*, 5 Sup. Ct. Rep. 578. It cannot be so relieved by inference, but only by an unequivocal legislative release (*Driscoll v. Norwich & W. R. Co.*, 65 Conn. 230 [32 Atl. 357]); by an unequivocal release from its charter duties (*McCabe v. Maysville & B. S. R. Co.*, 112 Ky. 861 [66 S. W. 1054]; *Central & M. R. Co. v. Morris & Crawford*, 68 Texas 49 [3 S. W. 457], *De Lashmutt v. Chicago, B. & Q. R. Co.*, 148 Iowa 556, at 560). In *Chicago & G. T. R. Co. v. Hart*, 209 Ill. 414 (70 N. E. 654), it is held, on an application of *Logan v. North Carolina R. Co.*, 116 N. C. 940 (21 S. E. 959), that there can be no release by inference of *any* charter duty, and that, if the charter exacts compensation to injured servants, then the lessor, despite the lease, remains as liable for such an injury to a servant of the lessee as if lessor had remained in charge, and had itself injured the plaintiff while he was its own servant. In *McMillan v. Michigan S. & N. I. R. Co.*, 16

Mich. 79, 102, the statute considered authorizes a railroad company "to make any arrangements with other railroad companies, within or without this state, for the running of its cars over the road of such other company, or for the working and operating of such other railroads, as said companies shall mutually agree upon." It is held, as to the effect of this statute, that the intent to relieve the lessor must be clearly expressed, or at least be a matter of inevitable inference; that, from mere permission to the proprietors to lease such roads, it should be presumed, in the absence of any declaration to the contrary, that it was not intended to dispense with regulations which the law deems important in the public interest and for its protection; that the power to lease does not imply power to transfer greater rights than the lessor has, and, where the obligations assumed by the lessor pertaining to the management of its business and the liability which should spring therefrom are the consideration upon which it got its franchise, it would be a violent inference that the legislature designed to waive these when a lease is made, and when they remain no less important to the public protection after the lease is made than they were before.

In *Clinger's Adm. v. C. & O. R. Co.*, 128 Ky. 736 (109 S. W. 315), it is said:

"This rule is established and adhered to by the courts of almost all the states, and is a just one."

The same conclusion is announced in *McCabe's Adm. v. Maysville & B. S. R. Co.*, 112 Ky. 861 (66 S. W. 1054).

IV. Departing now from the negative proposition that appellee presents no adequate support of the judgment it has, we have to say that the case law fully sustains the appellant.

In *Jefferson v. Chicago & N. W. Co.*, 117 Wis. 549 (94 N. W. 289), a railroad corporation permitted a lumber company to connect its private logging track with one of the

railroad's tracks. The lumber company ran its engines upon one of these tracks, to remove some logging cars to the woods for loading. While on the tracks, this engine, which was defectively equipped, set fire to property of the plaintiff piled near by, under some license to pile it there. It is said:

"It appears the defendant company allowed a private corporation to use part of its tracks with a dangerously defective engine, by reason of which plaintiff's property was destroyed. The defendant now seeks to avoid liability for the loss, because the private corporation was engaged in its own business, and the defendant did not know that the engine it used was defective. It cannot thus escape liability. Leaving out of consideration the fact that the act of drawing loaded cars upon the loading track for transportation or taking empty cars therefrom for loading was essentially an act in the course of the defendant's own business, and partly, at least, for its own benefit, the principle is well established that, when a railroad company permits another to make joint use of its track, it is liable for injuries caused to person or property by the actionable negligence of such licensee. \* \* \* *Railroad Co. v. Barron*, 5 Wall. 90. It has received its franchise to operate a railroad subject to certain *well defined* duties as to the machinery which it uses. It cannot, while exercising those franchises, allow others to come in with defective machinery and use the quasi public highway jointly with it, and escape the duty laid upon it by its charter to use machinery. Such a rule would open a door by which public servants, while reaping all the pecuniary benefits of their franchises, could easily escape from a considerable portion of their correlative duties by licensing irresponsible third persons to transact certain portions of their business. In the present case, it is clear that, while the lumber company was moving its engine over the defendant's side tracks, it was operating the franchise of the de-

defendant with its consent. It was as much the duty of the defendant company to see that this engine was not defective while using such track as to see that its own were not defective."

In *Pennsylvania Co. v. Ellett*, 132 Ill. 654 (24 N. E. 559), the court said:

"The law has become settled in this state by an unbroken line of decisions that the grant of a franchise giving the right to build, own and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its track, the company owning the railway and franchises will be liable."

It is held, in *Chicago & Erie R. Co. v. Meech*, 163 Ill. 305 (45 N. E. 290), that a railroad company which allows other companies to run over its track is jointly liable with such other companies for injury caused by the negligence of the latter.

In *Railroad Co. v. Barron*, 5 Wall. (U. S.) 90, the Supreme Court of the United States holds that the giving the privilege of using the road did not relieve the owner from responsibility. In that case, the railroad was operating its own road, and in addition, had granted to another company the right to operate trains on the tracks of the defendant. A train operated by this licensee negligently struck a passenger emerging from one of the lessor's trains, and the lessor was held responsible for this negligence on part of the train that ran on its road with its permission. The appellee seeks to distinguish this by saying that it is applicable only had a passenger of the appellee's been injured by negligence in operating a train of the Atlantic Northern & Southern,



and concedes that, in such case, the defendant would be liable for the negligence of the Atlantic Northern. We do not think the distinction is tenable. The license given either absolves or fails to absolve this defendant from responsibility for negligent operation on part of its licensee. If giving the license absolves, then defendant would not be liable, even if injury to a passenger of appellee's was the particular thing effected by the negligence of its licensee. If absolved from the negligence, it does not matter whom the negligence injured. On the other hand, if there was no absolution, this defendant is responsible, not only where one of its passengers is hurt, but in any case where the negligence of its licensee is one for which the defendant would be responsible if it itself had done what its licensee did. If not absolved, it remains responsible, as it was before it gave the license; and it is not claimed that, if this plaintiff had been injured by the negligent operation of one of the trains of the appellee, that it would not have been liable for the very injury suffered by plaintiff. If not absolved, it does not matter that the breach of duty injured someone other than a passenger. The question is not what the injurious breach of duty was, but whether the defendant was released from responding for the negligence of its licensee. It seems to us, therefore, that the *Barron* case is fully applicable. And it is not only case law. The underlying reasoning is very cogent.

4-a

Undoubtedly, it is a sound abstract proposition that a party is not liable for the negligence of an independent contractor, and that is the utmost that *City & S. R. Co. v. Moores*, 80 Md. 348 (30 Atl. 643), comes to. But even in that case it is held that, where there is a duty owing to the public by a turnpike company to see to it that no injury be sustained by persons traveling over its roads, it may be liable even for the negligence of an independent contractor,

if the existence of the duty owing the public made it proper to anticipate that negligence of the contractor might imperil the safety of the public. And it is said that:

"Even if the relation of principal and agent or master and servant does not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work."

In *Water Co. v. Ware*, 16 Wall. (U. S.) 566, and in many cases here and in England, the result is reached in substance that, "when the employer owes certain duties to third persons or the public in the execution of a work, he cannot relieve himself from liability, to the extent of that duty, by committing the work to his contractor." In *Mayor, etc., of Baltimore v. O'Donnell*, 53 Md. 110, a city was held liable for an accident which resulted from a rope's being stretched across the street, which was being repaired. A lantern had been hung on the rope, but was shortly afterwards broken by some boys, and not replaced. The city claimed freedom from liability because the work was being done by an independent contractor; but it was held responsible because of the duty imposed on it to have the work done properly, and have precautions against accident observed. With reference to street improvements by a municipal corporation, it has been held that the duty of the city to maintain its street in a safe condition cannot be delegated, so as to relieve the city from liability for failure to perform this duty. *Prowell v. City of Waterloo*, 144 Iowa 689. In *Nelson v. Vermont & Can. R. Co.*, 26 Vt. 717, it is said that, on lease, the lessor "must, at all events, be held responsible for just what they expected lessees to do." and probably for all which they do do as their general

agents; for the public can only look to that corporation to whom they have delegated this portion of the public service, and certainly they are not bound to look beyond them—although they doubtless may do so. Upon which it is ruled that the lessor shall see to it that the road “is properly finished before they suffer it to be run by anyone.” *Clinger's Adm'r. v. C. & O. R. Co.*, 128 Ky. 736 (109 S. W. 315), approves this.

More persuasive still is another reason often given. It is said in the *Ulinger case*, 128 Ky. 736 (109 S. W. 315):

“This rule is established and adhered to by the courts of almost all the states, and is a just one. If the rule were otherwise, the inducement would be great for all domestic corporations to lease their roads to foreign corporations and avoid litigation in the state courts.”

And *McCabe's Adm'r. v. Maysville & B. S. R. Co.*, 112 Ky. 861 (66 S. W. 1054), reaches the same conclusion, on the reasoning that, otherwise, liability might be avoided by making a lease without “regard to the financial ability of the lessee or his amenability to suit.” In *Nelson v. Vermont & Can. R. Co.*, 26 Vt. 717, the lessor railroad made lease permitting the lessees to run the road under a long lease. An injury occurred because the lessees operated without sufficient cattle guards or fences, and the lessor was held responsible for this, on the reasoning that this must be done, unless the lessor may be permitted to put its road into the hands of a corporation or individual of no responsibility, in order to avoid which the English courts denied the legality of leasing at all, except on consent of Parliament.

*Harden v. North Carolina R. Co.*, 129 N. C. 354 (40 S. E. 184), is an extreme case in that it permits an employee of a lessee to recover of the lessor for injuries sustained while operating for the lessee. It may be the result was influenced by the fact that the lessor had taken an indemnity bond from the lessee. We are not minded to follow it, in so far as it

may hold that the lessor must respond to an injury to such an employee, where the injury is not due to some defect in the roadbed or the construction of the road. But, while this is so, we do agree with the decision in so far as it declares why leasing or "farming" out the franchise of a railroad will not exempt such lessor from responding for the negligence of its lessee, unless a statute expressly exempts the lessor from responding. That reasoning is that, in the absence of such exemption, the lessor is estopped from setting up the lease as a defense, and so release itself from liability for the negligence of its lessee; since it would be against public policy to allow a railroad corporation to put off the liability incident to its franchise, while enjoying the profits that may accrue by the medium of a lease.

V. This record does not advise on whether the defendant did or did not reserve control. We might stop here, and dispose of the case. For, if loss of control acquits defendant, it was for it to show it had lost it. But we are not minded to stop with this. Assume that control was surrendered to the licensee, and the question remains, Who shall suffer, the defendant who might have kept control, or the public that had no power to protect itself from the creation of a negligent lessee? Loosely speaking, the defendant did not have control of the negligent employees of its licensee. but it could have kept control of their employer. It could have reserved power to eject the employer. It could have protected itself before consent to the occupancy by demanding indemnity bond arrangements. No member of the public could make such demand. Defendant certainly was, at all times, in duty bound to see to it that the public was not injured by negligent operation on its own part. When it arranged with the Atlantic Northern, it had that duty, and it had the power to make negligent use of its property by the Atlantic Northern impossible by exercising its right to keep that railroad off its property. It could have

made sure of redress for negligence of its licensee. It cannot permit that company to use its tracks and so make negligent operation thereon possible, and say to a member of the public injured by such negligence that it must look to the lessee for redress. In one word, it could take the chances of what the lessee might do, or refuse to take them. It could perform its duty to the public, by keeping control of all agencies that might injure a member of the public, and properly operate such agencies. It cannot absolve itself from this duty by taking chances on whether its lessee would perform that duty,—chances against which the public could not protect itself. The law obligates defendant to see that the general public should not be injured by a negligent use of defendant's property. The rights of the public are in the keeping of the legislature, and so are the rights of the corporation. The corporation could not free itself from its obligations by its own act. It requires the consent of the legislature; and, while it had consent to permit the Atlantic Northern to operate, it had no agreement by the legislature that it should not be responsible if its licensee did not do for the lessor what the lessor was always under obligation to do.

We are of opinion that the case must be—*Reversed and remanded.*

PRESTON, C. J., LADD and EVANS, JJ., concur.

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SPAHN & ROSE LUMBER COMPANY, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**APPEAL AND ERROR: Incompetent Evidence on Competently Established Fact.** Harmless error results from the reception of incompetent evidence of a fact fully established by competent evidence.

**JUSTICES OF THE PEACE: Writ of Error—Scope.** Sufficiency of evidence to sustain a judgment in justice court may not be

reviewed on writ of error, either by the district court or by the Supreme Court on appeal from rulings on the writ by the district court.

*Appeal from Bremer District Court.*—M. F. EDWARDS, Judge.

APRIL 1, 1918.

REHEARING DENIED JUNE 24, 1918.

ACTION for damages for shortage in the quantity of coal shipped to the plaintiff and delivered to it by the defendant. There was a trial before a justice of the peace, and a judgment of \$11.55. A writ of error was sued out to the district court, which affirmed the justice and certified the case to this court.

*F. W. Sargent, Dawson & Wehrmacher, and J. H. Johnson, for appellant.*

*Sager & Sweet, for appellee.*

EVANS J.—The alleged shortage in the weight of the car of coal shipped to the plaintiff was 4,200 pounds. The coal was shipped by the consignor from Kentucky to the plaintiff, as consignee, at Cedar Rapids. The car was invoiced to the plaintiff at 81,400 pounds of coal. It actually weighed 77,200 pounds. The principal error alleged for our consideration is that there was no competent evidence before the justice as to the original weight of the car at the time of its consignment. For the purpose of proving such weights, the plaintiff introduced in evidence its invoice. Objection was made to the competency thereof, and a motion to strike on the same ground. While the question was under the consideration of the justice, the plaintiff testified, as a witness, that it paid to the defendant, as the delivering carrier, freight charges on 81,400 pounds. This was in accord with the invoice. Presumptively, the defendant railway

1. APPEAL AND  
ERROR: Incom-  
petent evi-  
dence on com-  
petently estab-  
lished fact.

company based its collection of the freight charge upon the bill of lading. Clearly, the bill of lading would have been admissible. The fact that the delivering carrier demanded and received of the consignee the freight charge on 81,400 pounds was, itself, presumptive evidence that such was the amount of coal delivered to the initial carrier. The admission of the invoice in evidence was, therefore, harmless.

It is further urged that there was not sufficient evidence that all the coal that was contained in the car when it arrived at Cedar Rapids was actually weighed by the plaintiff. Sprecher, the manager of the plaintiff, testified that he personally attended to the weighing. For that purpose the car was unloaded into wagons, and the contents were hauled three or four blocks to the scales. The time employed in making such transfer was two days. It is earnestly argued that there was no evidence to show that none of the coal was overlooked or lost or stolen. The evidence on the question was brief and without details. It is, of course, always possible that coal may be lost or stolen from a car. That is always an appropriate matter for the consideration of the court or jury, in the trial of such question. It is not necessary, as a matter of law, that such a question shall be dealt with negatively or in detail. The case was in the district court on writ of error only. The sufficiency of the evidence was not subject to its review, nor is it subject to ours. *Anthes v. Booser*, 112 Iowa 511. The writ was properly dismissed in the district court.—*Affirmed*.

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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STATE OF IOWA, Appellee, v. JOE BERTINELLI, Appellant.

**INTOXICATING LIQUORS: Possession of Liquors—Presumption.**

- 1 The finding of intoxicating liquors in unusual quantities in a private dwelling house of a person *not* keeping a tavern, etc.,

raises no presumption of illegal sale or keeping for sale. (Sec. 2427, Code, 1897. But now, see Ch. 323, Acts 37 G. A.)

**CRIMINAL LAW: Presumption and Burden of Proof.** The presumption of illegal sale or keeping for sale which the law indulges from the fact that intoxicating liquors are found in unusual quantities in the defendant's residence, etc., does not justify an instruction that the jury must convict unless the *accused* overcomes the presumption.

**WITNESSES: Bad Reputation—Time and Place of Acquiring.** A witness who for eight months preceding the trial, has resided in a populous locality, and has, apparently, acquired no reputation therein, may be impeached by a showing of his bad reputation at a time eight months preceding the trial, in the locality where he then resided.

*Appeal from Polk District Court.*—CHARLES HUTCHINSON,  
Judge.

JUNE 24, 1918.

THIS is a prosecution for maintaining a liquor nuisance. There was a verdict of guilty, and the defendant appeals.  
—*Reversed.*

*Miller & Wallingford*, for appellant.

*H. M. Harner*, Attorney General, *Ward Henry*, County Attorney, *Arthur T. Wallace*, *Arthur G. Rippey*, and *Louis B. Cohen*, Assistant County Attorneys, for appellee.

EVANS, J.—Seventeen bottles of beer and a quart bottle partly filled with whiskey were found in the residence of the defendant. This seizure is the foundation of the prosecution. Beyond the fact of this seizure, the evidence of guilt was meager. The defendant is an Italian. He claimed to have obtained and kept the whiskey for hospital purposes only, and that he had the beer for family use. One member of his family, a brother-in-law, was bedridden at the home for many weeks, because of personal injury consisting

1. INTOXICATING  
LIQUORS: pos-  
session of liq-  
uors: pre-  
sumption.



of a broken back. It was claimed that the beer was used habitually by the family with meals, in lieu of tea or coffee. There was evidence of one Kegley that, on two occasions, he had bought beer from the defendant in his kitchen. This was denied by the defendant and by other members of his family. The trial court gave the following instructions:

"The statutes of this state further provide that 'the finding of intoxicating liquors in unusual quantities in a private dwelling house in the possession of one not legally authorized to sell or use the same shall be presumptive evidence that such liquors were kept for illegal sale.' And you are instructed that in this case the defendant was not legally authorized to sell intoxicating liquors, and was not authorized to use the same except for his own personal consumption. And if you should find, beyond a reasonable doubt, that intoxicating liquors were found upon the premises in question in unusual quantities, considering all the circumstances of the case, then the law raises a presumption that such liquors were kept by the defendant for illegal sale, which presumption must be overcome by the defendant before you can return a verdict of not guilty. And if you do find that intoxicating liquors were found upon the premises in unusual quantities, considering all the facts and circumstances in the case, then, unless the defendant has overcome the presumption raised against him, it will be your duty to find him guilty as charged."

Error is assigned on this instruction. It is defended by the State in that it is predicated upon Code Section 2427, and that it presents a correct construction of such section. Section 2427 contains the following:

"Or the finding of the same in unusual quantities in a private dwelling house or its dependencies of any person keeping a tavern, public eating house, grocery, or other place of public resort, shall be presumptive evidence that such liquors are kept for illegal sale."

It is undisputed that the defendant did not come within any of the classes above specified. The offense charged antedates the enactment of Chapter 323 of the Acts of the Thirty-seventh General Assembly. We think the instruction does not present a correct construction of Section 2427. Indeed, we see no ambiguity in the statute. If there were any, we have already construed it in *True v. Hunter*, 174 Iowa 442. The instruction was clearly erroneous at this point.

The instruction was erroneous, also, in the rule of burden of proof announced by it. It laid upon the defendant the burden of overcoming a presumption, before a verdict of "not guilty" could be rendered. Under the

2. CRIMINAL  
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burden of  
proof.

law, burden of proof of guilt is, at all times, upon the State. It may have the aid of "presumptive evidence" to that end, but it does not thereby escape the burden of proof. If, under all the evidence in the case, including proper presumptions, the jury has a reasonable doubt of the guilt of the defendant, it must acquit; and this is so even though it may have a reasonable doubt of the innocence of the defendant. It is immaterial, in such a case, whether the reasonable doubt arises out of the evidence for the State or out of the evidence for the defendant. The effect of the instruction was to require the defendant, as a condition to his acquittal, to prove affirmatively that the liquors were not kept for illegal sale. If, under all the evidence, the jury had a reasonable doubt of the intent to sell, the defendant was entitled to acquittal.

In view of a new trial, it seems to us unnecessary to deal with other questions presented. The most important one pertains to a question of impeachment of the witness

Kegley, and the rejecting of evidence offered by the defendant to that end. Even if we were to hold that the evidence rejected by the court because of the change of residence of Kegley since the knowledge of his reputation was acquired

3. WITNESSES:  
bad reputa-  
tion: time and  
place of ac-  
quitting.

by the witnesses, should have been received, it would not follow that the same evidence would be admissible in the next trial. Sufficient to say that we are impressed that the trial court held a pretty tight rein on the defendant in his offer of proof of the general reputation of Kegley. Where a witness has acquired a bad reputation in a community or communities which are not centers of large population, and thereafter moves to a large city, where the reputation of an ordinary person is not rapidly acquired, it should not be said that evidence of the bad reputation of the witness in the community of his residence eight months before the trial, is too remote for consideration.

For the error contained in the instruction above, the judgment below is—*Reversed and remanded.*

PRESTON, C. J., LADD and SALINGER, JJ., concur.

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STATE OF IOWA, Appellee v. FORREST DILLMAN, Appellant.

**HOMICIDE: Self-Defense—Duty to Retreat.** Defendant's failure

- 1 to avail himself of reasonable opportunity to retreat, and there-
- by avoid the killing, is quite persuasive on the question whether
- a jury question as to murder has been made out by the State.
- Evidence held to present a jury question, though deceased was
- of superior size, was drunk, was quarrelsome, but was unarmed.

**JURY: Voir Dire—Effect of Evidence.** A juror may not be asked,

- 2 on *voir dire*, as to the effect which certain contemplated evi-
- dence will have on his mind.

**CRIMINAL LAW: Other Offenses.** A witness may not, on cross-

- 3 examination, be interrogated as to offenses alleged to have been
- committed by an accused, which offenses are separate and dis-
- tinct from the one under investigation, and which were in no
- manner brought out on direct examination.

**WITNESSES: Depraved Habits, Antecedents, Etc.** The right, on

- 4 *cross-examination*, to delve into the past depraved habits, ante-
- cedents, and character of a witness, by inquiry as to specific
- acts, in order to undermine his credibility, may always be car-

ried as far into his past life as the examiner would be permitted to go were he inquiring as to reputation for truth or moral character. It seems to be an abuse of discretion for the court to permit a more remote inquiry, unless the remote facts inquired about have some fair relation to the material facts in issue. An inquiry into facts occurring eight years previous to the occurrence under consideration, with no showing of non-reformation during said following eight years, held too remote.

*Appeal from Lee District Court.*—W. S. HAMILTON, Judge.

JUNE 24, 1918.

THE indictment charged defendant with having committed the crime of murder in the first degree. He was found guilty of murder in the second degree, and sentenced accordingly. He appeals.—*Reversed.*

*John E. Craig*, for appellant.

*H. M. Havner*, Attorney General, *J. M. C. Hamilton*, County Attorney, and *E. W. McManus*, Deputy County Attorney, for appellee.

LADD, J.—I. At about 9 o'clock in the evening of September 23, 1916, defendant shot and killed Ed Scarlett. To the indictment charging him with having committed murder in the first degree, he interposed the plea that the shooting was in self-defense. Several errors are assigned, and among these that the evidence was not sufficient to sustain the verdict, and that, in any event, it should have been for manslaughter only.

The evidence tended to show that, shortly after 8 o'clock in the evening, the defendant and his wife walked over to the residence of her mother, Mrs. Miranda, who was keeping a boarding house, and, while they were seated in the kitchen, decedent, Ed Scarlett, accompanied by one Schneider, came to the house; that they had had three drinks each at Jerry Stack's before coming; that, as Scarlett en-

1. HOMICIDE:  
self-defense:  
duty to retreat.

tered, he remarked that he was hunting trouble, and suggested a fight with Mrs. Ellis,—who was making her home with her mother, Mrs. Miranda,—and then with the latter; that, as both declined, he walked into the kitchen, where defendant's wife offered him a chair; that he immediately returned to the front room, where he denounced those present in the vilest language; that Mrs. Miranda requested him to leave, which he at first declined to do, but was finally induced to do by Schneider, assisted by Mrs. Ellis; that defendant and his wife left immediately afterwards; that Mrs. Miranda overtook them, and requested defendant "to go over on Main Street and see if you can find the police for me;" that he went over that way; that, as Scarlett and Schneider went across the street from Mrs. Miranda's house, they noticed Mrs. Miranda and defendant's wife, when Scarlett remarked, "There is more of them from up at that house. and I am going over to hammer Hell out of them;" that, when they came up, a discussion arose as to the language Scarlett had employed at the house, one or both of the women insisting that he ought not to have made use of the names he did; that he denied having called them names; that defendant then came up, and remarked that he did call them the names. According to Mrs. Miranda, Scarlett then "struck at Forrest (defendant). He had something in his hand, and Forrest staggered back towards them. I am not going to say that he hit him, but he surely must have, for Forrest staggered back against me. I stepped back out of the way and started to run, and the shot was fired."

Schneider testified that defendant's wife accused Scarlett of calling her a whore, whereupon Scarlett said, "You're a damned liar;" and that defendant interposed, "You're a damned liar,—you did, and I am going to take a poke at you;" that Scarlett undertook to strike him, when defendant shot; that he did not see the shot fired, but, as he ran, heard it; that he did not see anything in Scarlett's hand when he

raised it to strike defendant, but that Scarlett raised his hand, and was plainly preparing to strike defendant. Defendant's wife's story of the transaction is not essentially different from her mother's; for she swore that, as defendant came up, decedent declared that "whoever said I cussed everybody in the house is a G—D— liar;" that her husband remarked, "Yes, Ed. you cussed everybody in the house;" that thereupon, decedent, using a vile name, said, "I fix you right now," and struck at defendant. The witness was unable to say whether he hit defendant, but declared that he attempted to strike again, when she heard a shot fired. The defendant's version of the affair was that, as he returned to where the parties were standing, he "stepped around in front of them about 3 feet from him;" that decedent said, "I never called you that. Whoever said I did is a G—D— lying s— of a b—," — to which he replied, in a kindly manner, "Ed, you did call them all names;" that decedent stood looking at him probably 10 seconds; that he, defendant, turned with his left side towards decedent, and was not looking when Scarlett struck him.

"I got the full force of the blow. He struck pretty hard. and I had the welt from it until the next morning. He knocked me back three feet, and I took a couple of staggering steps backward and staggered into my mother-in-law, and he said, 'You son-of-a-bitch, I'll fix you;' and the first thing that popped into my mind, when I seen that he hit me and I staggered that way, was that he was coming at me with some weapon,—his hand was back here. just like this. I could not see whether it was in his hip pocket or not, and he made one step at me, and the first law of nature entered my mind. I knew he was a big man. I knew I was just like a baby attacked by an elephant. attacked by a man like him, and I knew that, if he got close enough to me to get in one of his blows, he would knock me out or injure me very badly, if not kill me; and I pulled the gun out of my right-hand coat pocket and shot him. I

shot at him. I didn't know that I hit him. I didn't know that he was dead till 12 o'clock that night. I was starting to take hold of my wife's arm to take some bundles that she was holding, and said, 'Let's go.' When I got up there, I had no purpose or intention of injuring Ed Scarlett. I never thought anything about it. My sole idea was to get away, and get my wife away. I saw him stagger and fall. I did not know how badly he was hurt. I was panic-stricken, and the first thing that entered my mind was the idea or impulse to get away. I did not go home. I went to Alexandria."

The accused went on to St. Louis, where he went under an assumed name for some weeks, when he was arrested and brought back for trial. The defendant's weight at the time was 121 pounds, while that of Scarlett was 176 pounds or more. The evidence was in conflict as to whether Scarlett was peaceable and quiet, or a quarrelsome man, and a like conflict appears as to the character of the accused. The record is silent as to whether any attempt to retreat was made. From this evidence, it cannot be said that there was no evidence on which to base a finding that defendant was guilty of murder in the second degree. Manifestly, decedent was under the influence of liquor, and was out for trouble. But he was without weapon of any kind. His superior size and strength, though indicating that he might prove formidable in an encounter, did not establish conclusively that the accused might not have evaded this by retreat. Indeed, the disparity in the size of the men was suggestive that the larger would not be likely to deem resort to weapons necessary. The circumstances were such that the jury might have rejected the plea of self-defense interposed, and have found that, in view of decedent's drunken condition, defendant might have avoided taking his life by retreating; and that he was actuated by malice, induced by the outrageous language to his wife immediately preceding the shooting, and to her mother and sister at the house. The evidence was sufficient to carry the issue to the jury.

II. In the examination of George Wertz on *voir dire*, counsel for defendant asked, "Would the fact that the defendant ran away after the shooting prejudice your mind in any way?" An objection as incompetent, immaterial, and

irrelevant was sustained, and, as we think,  
 2. *JURY: voir dire: effect of evidence.* of properly so. It appeared that, immediately

after the shooting, the defendant went to Alexandria, Missouri, and then on to St. Louis, of the same state, where he went under an assumed name, until arrested and brought back for trial. To test the qualifications of persons called to sit as jurors, neither party may inquire concerning his views of evidence to be adduced on the trial, or the weight he would be inclined to attach thereto. These are matters on which the jurors are to act under the guidance of the court. In any event, the juror is to be guided by the court as to the consideration he must accord the testimony adduced; and, through expressions extracted from him in examination on *voir dire*, guidance by the court should not be rendered more difficult. Evidence of flight is a circumstance tending to show guilt, and the juror must have so regarded it, even though he might have been induced, without reflection, to have stated that it would not influence or prejudice his mind. There was no abuse of the large discretion lodged in trial courts in the matter of securing fair and impartial jurors. *State v. Arnold*, 12 Iowa 479; *State v. Dooley*, 89 Iowa 584; *Simons v. Mason City & Ft. D. R. Co.*, 128 Iowa 139; *Brusseau v. Lower Brick Co.*, 133 Iowa 245.

III. Lorine Ellis, sister of defendant's wife, after testifying to what happened at the house, and to finding a revolver under defendant's pillow on two different mornings

when defendant was stopping there, while  
 3. *CRIMINAL LAW: other offenses.* his wife was visiting, and that she had given him the revolver about a year previous, at

Moberly, Missouri, when he was employed by the Wabash Railroad Company, was asked, on cross-examination, whether "he always carried a gun? A. I cannot



say that he always carried it; I know of one time before that he carried a gun. There is no use to lie about it,—I know that.” Defendant objected to the testimony, and moved that it be excluded, as incompetent, irrelevant, and immaterial. This objection was overruled. “Q. That was the time that he shot a man at a dance at Hannibal? A. Yes.” Counsel for defendant objected to the question, and moved to exclude the answer, as incompetent, irrelevant, immaterial, and not proper examination.

This motion should have been sustained. The inquiry related to a distinct transaction, in no manner connected with that under investigation, nor with anything brought out on direct examination.

IV. The defendant testified in his own behalf. On cross-examination, for the purpose of testing his credibility as a witness, he was asked whether, in April, 1907, he had a fight at a shoe factory in Hannibal, Missouri, and got fined; whether, on May 7th, he and one Hammond got into a fight at the same place, and licked three fellows, one of whom had brass knuckles; whether on July 15, 1907, he slugged one Young, and was fined; whether, on November 25, 1907, he got into a fight in Cheny’s Hall, at Hannibal, Missouri, and was searched, and found to be armed with a dirk and a revolver; whether, on August 29, 1908, he got into a fight at Alger’s Hall, in that city; whether, on October 28, 1908, he fought the Banta boys and bruised the leg of one of them, and on the next day was followed by officers to Moberly, Missouri, thrown into jail, and taken back to Hannibal; and whether, 7 or 8 years ago, he assaulted Officer Little, at Hannibal, by hitting him over the head with a club, during a shoe factory strike; and whether, at one time, he made application to a detective agency for a position. Objection to each inquiry as incompetent, irrelevant, and immaterial, not cross-examination and too remote, was overruled. The answer to each

4. WITNESSES:  
depraved  
habits, ante-  
cedents, etc.

question was a denial, or that he did not remember, except that he was fined one dollar and costs. He was then shown what purported to be a diary kept by him during 1907 and 1908, and, after repeated inquiries, admitted that the entries, except one item, appeared to have been made by him; and then all the matters referred to above were gone over again, in connection with the diary, and answers made, either explanatory of those previously given, or that he did not remember. Then extracts from the diary were introduced, as that of February 11, 1907, that he was 19 years old today; April 1, 1907, that he got into a fight at the factory and was discharged; May 12, 1907, that he and Jack Hammond whipped three fellows, but Jack got his head split "with a pair of nucks;" July 13, 1907, was arrested for throwing and hitting Albert Young on the head, and fined one dollar and costs; November 25, 1907, got into a fight at a dance, when the cops searched him, but did not arrest him, and did not discover a dirk or revolver he had on his person; February 1, 1908, that he was 20 years old that day; August 29, 1908, that he attended a dance at Alger's Hall, and got into a fuss with a fellow; September 6, 1908, that he got drunk, and went to a dance, from which two fellows undertook to take him home, when they had a fuss, and he went on alone, reaching his room at 4:54 o'clock in the morning; October 21, 1908, attended a dance, and got into a fight with Banta, who hit him without provocation, and he (defendant) shot at him (Banta), whereupon 7 fellows followed him home, and threatened to kill him; November 6th and 7th, 1908, was arrested at Moberly, Missouri, and taken back to Hannibal, Missouri, where he was tried and acquitted, at a cost of \$40. Possibly some of these have been omitted. All the above were received, over objections like that recited, and all related to transactions occurring at Hannibal or Moberly, Missouri, when the accused was 19 or 20 years of age, according to the diary, or 17 or 18 years of age, as he

testified,—and was corroborated by Little,—and, as observed, 8 or 9 years previous to the offense charged in the indictment.

As the defendant had tendered himself as a witness, he was subject to all the tests of credibility applicable to other witnesses. *State v. Teeter*, 69 Iowa 717; *State v. Hayden*, 131 Iowa 1; *State v. Wasson*, 126 Iowa 320; *State v. Kuhn*, 117 Iowa 216; *State v. Pugsley*, 75 Iowa 742. That specific acts, tending to discredit a witness, even though the accused, may be inquired into on cross-examination, is well settled. *State v. Brooks*, 181 Iowa 874, and cases therein cited. As remarked in *People v. Webster*, 139 N. Y. 73:

“It is now an elementary rule that a witness may be specifically interrogated upon cross-examination in regard to any vicious or criminal act of his life, and may be compelled to answer, unless he claims his privilege. A party who offers himself as a witness in a criminal case is not exempt from the operation of the rule. He is not compelled to testify; and if not examined, the law provides that it shall not give rise to any presumption against him. When he elects to become a witness, it is for all the purposes for which a witness may be lawfully examined in the case, and he is not, in the constitutional sense, ‘compelled to be a witness against himself;’ although, when subjected to the test of a legitimate cross-examination, he may be required to make disclosures which tend to discredit or to incriminate him. (*People v. Tice*, 131 N. Y. 657.) The extent to which disparaging questions, not relevant to the issue, may be put upon cross-examination, is discretionary with the trial court, and its rulings are not subject to review here, unless it appears that the discretion was abused.”

Appellant does not question this rule, nor that, if the several inquiries related to recent events, the rulings would be correct—a point on which no opinion is expressed. The

contention is that these matters were too remote to be accorded any bearing on the credibility of the accused.

Nothing was shown, tending to his discredit, from 1908 up to the time of the tragedy under investigation. Even the evidence adduced by the State, tending to show that he was reputed a quarrelsome person, related to his residence at Hannibal, Missouri, over 8 years previous; and neither this nor any particular acts were shown by the proof to have continued, or to have been continuous or in any manner connected, through this span of years. The character or repute of a witness must, of course, relate to the time when he testifies. And inquiry must be confined to such recent period as that the evidence elicited will be likely to throw some light on his present character. *McGuire v. Kenefick*, 111 Iowa 147; *People v. Mix*, 149 Mich. 260; (12 Am. & Eng. Ann. Cases 393, and note). Impeaching evidence, other than that elicited on cross-examination, is restricted "to the neighborhood of the present residence of a witness sought to be impeached, and to proof of reputation at a time near that of the trial. When a residence has been so recently acquired that the neighbors of the witness are not likely to have ascertained his true character, and he, in all probability, has not thrown off that established in the neighborhood of his former abode, evidence of his reputation at the latter place may be received, as it may also when he has subsequently remained in no place long enough to become well known to his neighbors." *McGuire v. Kenefick*, supra.

It would seem that cross-examination bearing on credibility should have limitations somewhat analogous with those put upon inquiries concerning reputation and moral character of other witnesses; though courts apparently have been much more liberal in the period covered by cross-examinations,—and so for the very evident reason that the matter of best evidence is not involved in the latter, and the search

in cross-examination is into the inner life of the witness, as manifested by what he has done.

Character, the inner man, can be known to the world through what he has done and said, as manifested by the outer man; and the world's estimate of him is reputation, and reputation is taken as proof of character. It is not always correct; for a person of bad character sometimes is of good repute, and vice versa. It is, however, the best evidence available. Cross-examination tends to uncover for the jury or court the life the witness has led, and to allow the jury to say for themselves what influence the life lived would have on the credibility of the witness. Even to cross-examination there should be some limit, beyond which the veil should not be raised. *State v. Reed*, 53 Kan. 767 (42 Am. St. 322); *Eads v. State*, 17 Wyo. 490 (101 Pac. 946); 40 Cyc. 2597, and cases collected. See interesting discussion in 2 Wigmore on Evidence, Sections 981 *et seq.* Where the line shall be drawn, is quite generally left to the discretion of the trial court, and only on abuse thereof will its exercise be interfered with. So much depends on the peculiar circumstances of each case that no unvarying rule can be laid down; but it may be said that the cross-examination can be extended back as far as inquiry of general reputation for truth and veracity, or proof of general moral character; and there seems no tenable reason for permitting cross-examination relating to specific acts to extend farther into the past, unless these are in some way related to the facts or acts under consideration, and are in some manner given significance thereby. This is a rule well calculated to allow sufficient leeway to inquiry, and, at the same time, put a stop to opening up the past, short of turning cross-examination into oppression and an attempt to harass or disgrace the witness, rather than to test his credibility.

The accused had come to Keokuk on March 16th previous to the shooting, prior to which he had resided at Mober-

ly, Missouri, since November 8, 1913. He seems to have been in Keokuk from February 2, 1913, until May 8th, and to have gone from there to Moberly, Missouri, and on to Marshall, where he remained until shortly before returning to Moberly, as before stated. What he did, save that he was married, July 21, 1912, or where he lived during the years from 1908 to 1913, does not appear; but he certainly, in living at Moberly from November 8, 1913, until September 23, 1916, nearly three years, remained there long enough to establish a reputation as to character and veracity; and there was no occasion for skipping back another five years for proof, in the evidence of others and in his cross-examination, as to his general moral character, as bearing on his credibility as a witness at the trial. Especially so, inasmuch as, in so doing, the inquiry related to the indiscretions and vanities of youth and inexperience. Even though all he recorded were true, the subsequent years, without apparent fault on his part, would seem quite sufficient to wipe away the stain of youthful follies. The prejudicial character of the evidence is manifest. We are of opinion that the court abused its discretion in receiving this evidence.

The suggestion was made on oral argument that the evidence was elicited on cross-examination on defendant's remark that he was "not a man that looks for trouble;" but that was brought out in cross-examination, and surely might not be regarded as a basis for cross-examination otherwise improper. No inquiry was made of him as to his character as a peaceable person.

Exceptions to the instructions are hypercritical, and require no attention. For the errors pointed out, the judgment is reversed, and the cause remanded.—*Reversed and remanded.*

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. FRANK FOUNTAIN, Appellant.

**INTOXICATING LIQUORS: Possession of Liquors—Revenue Stamp**

- 1 **Presumption.** Presumption of guilt of unlawful sale and keeping for sale is raised both by the finding of liquors in a place of business, and by the possession of an internal revenue stamp for such liquors. (Sec. 2427, Code, 1897.)

**INTOXICATING LIQUORS: Evidence—Relevancy, etc. Evidence**

- 2 bearing upon defendant's want of knowledge of the possession of liquors is wholly irrelevant, when it is conceded that defendant had full knowledge.

**EVIDENCE: How Strangers Would Testify. What another person**

- 3 would testify to, if asked as to a certain matter, is wholly incompetent.

**INTOXICATING LIQUORS: Intent Not Element of Sale The mat-**

- 4 ter of *intent* is not involved in an accusation of *selling* intoxicating liquors.

**INTOXICATING LIQUORS: "Gift" as Violation. A "gift" of**

- 5 intoxicating liquors to one's employee, *in order to induce the employee to continue work*, is a violation of that part of the statute which prohibits gifts of such liquors "in consideration \* \* \* of any services or in evasion of the statute." (Sec. 2382, Code Supp., 1913.)

**TRIAL: Instructions—Defining Terms. Failure, in the absence of**

- 6 a request, to define the term "evasion of the statute," is not error.

**INTOXICATING LIQUORS: Place Made to Resemble Saloon. The**

- 7 jury may, on the issue whether a so-called "Temp Bar" was a place for the unlawful sale of intoxicating liquors, take into consideration the fact that the place was equipped in all respects as intoxicating liquor saloons were formerly equipped.

**INTOXICATING LIQUORS: Offenses—Judgment—Modification.**

- 8 Fine reduced from \$1,000 to \$600.

*Appeal from Polk District Court.*—CHARLES HUTCHINSON,  
Judge.

JUNE 24, 1918.

THE defendant was convicted of maintaining a liquor nuisance, and appeals.—*Affirmed.*

*T. L. Sellers*, for appellant.

*H. M. Havner*, Attorney General, *F. C. Davidson*, Assistant Attorney General, *C. G. Watkins*, and *Ward C. Henry*, County Attorney, for appellee.

LADD, J.—The defendant, with one Roberts, was indicted, April 6, 1917, for having maintained a place where in intoxicating liquors were sold and kept with intent to sell. Both were found guilty. Roberts was

1. INTOXICATING LIQUORS: possession of liquors: revenue stamp: presumption. granted a new trial, and a fine of \$1,000 was imposed upon defendant, Fountain.

I. He challenges the sufficiency of the evidence to sustain his conviction. With one De Bolt, he operated what is known as a "Temp Bar." at the corner of West Second Street and Grand Avenue. in the city of Des Moines, and for himself, conducted a garbage business. On March 21, 1917, policemen searched the premises for intoxicating liquors, and found two pints of whisky on the shelf under the bar, and, back of the bar, a government liquor license, in De Bolt's name; and, in an old store building, nearly half a block distant, where he kept his garbage cans, found a garbage can, among about 100 others, in which there were 14 pints of whisky in pint bottles; and in the hay, another pint of whisky, also 12 or 14 empty bottles; and in the desk of his office, 7 bottles of whisky.

De Bolt testified that he had purchased the two bottles of whisky found under the bar, to take to his wife, who was sick; and Fountain explained that the government license had been procured under the advice of "revenue men." in order to avoid trouble, and that, after consulting one Weimer, the license was procured. He denied having knowingly or intentionally permitted the clerk, barkeeper, em-



ployee, or partner to sell intoxicating liquors at the place or at the time in question, and swore that he did not attend the bar; that he bought the liquor found in the old storeroom, or barn, the night before, but not with intent to sell or to have it sold, by himself or anyone else; that this liquor came in two packages, which he placed in the can, and some of the boys working there took two or three bottles out; that he bought this liquor from somebody who came around with it; that he intended to take that in his desk home with him; and further:

"I always kept whisky, and gave them (the men employed in the garbage business) what they wanted. It is hard to get a fellow to work in the scavenger business unless you give them a little drink, and that is why I appeal this case. I have been 30 years in the business, and have always kept liquor for them. There are lots of fellows you cannot get to work unless you give them a little of whisky to drink. Some days it was raining, and they came in, cold and wet, and I would get out a bottle; and sometimes I would bring a few into the office, so they would not know where it was. If I left it out where they could get their hands on it, they might drink it all up at once."

He testified, further, that he got no pay from the boys, and that De Bolt knew nothing of this. It is manifest, from this recital of the evidence, that the issue as to defendant's guilt was for the jury. Presumption thereof was raised, both by the finding of the revenue stamp and by the keeping of intoxicating liquors. Sections 2382, Code Supplement, 1913, and 2427, Code. Whether his explanation was sufficient, was for the jury to determine. If kept for the purpose of illegal sale, this was done about as one would in concealing it from the officers of the law. On the other hand, if it was kept solely for personal use, or for the purpose of giving it away, without any consideration what-

ever, the defendant should not have been convicted. The issue, as said, was solely for the jury.

II. One Dawson operated a horse-shoeing shop, next to the old barn, or store; and, owing to objection's being sustained, was not permitted to say whether he had observed any whisky sales at the "Temp Bar," or persons purchasing whisky or congregating there, or persons going there, or anything indicating that liquors were being sold there, or persons going in and out of there for the purpose of trading or purchasing anything, or whether he attempted to purchase whisky and was refused, or whether he saw anyone **drink intoxicating liquor** there. The several rulings were correct. The answers, if given by Dawson, would have had no bearing on the issue, except as to defendant's want of knowledge, and whether he had obtained intoxicants there,—neither of which the State had sought to prove. The character of the general business carried on by defendant and De Bolt was not in dispute, so that this did not furnish ground for the interrogatories; and, in any event, to inquire into the details of their business, save as these related to the sale or keeping for sale of intoxicants, was not relevant to the issues. There was no error.

III. The defendant was asked:

"Was there ever any intent on your part that intoxicating liquors should be sold at that place? A. Mr. Roberts would testify that I have often told him not to let a man have a bottle there."

3. EVIDENCE:  
how strangers  
would testify.

On motion, this was stricken, as incompetent, irrelevant and immaterial. The ruling was correct; as it was immaterial what Roberts might but did not, testify to.

"Q. Did you instruct your barkeeper to not sell intoxicating liquors? (Objection as suggestive was sustained.)

Q. What instructions did you give your barkeeper with

reference to selling intoxicating liquors at that place? (The same objection was sustained.)”

These rulings are said to have been erroneous; but, if so, this was obviated by his testimony subsequently that he never permitted any employee or barkeeper to sell intoxicating liquors at the place. Moreover, the

4. INTOXICATING LIQUORS: intent not element of sale.

matter of intent is not involved in an accusation of selling intoxicating liquors. If the defendant or anyone else for him actually sold intoxicating liquors on the premises, he would be guilty, whether he intended so to do or not.

IV. In the third instruction, the court directed the attention of the jury to the law under which the defendant was indicted, to his admission that he was owner of the

5. INTOXICATING LIQUORS: "gift" as violation.

“Temp Bar” building and of the old storehouse where intoxicating liquors were found, and then instructed that, in order to find him guilty, as charged in the indictment, the jury must find from the evidence, beyond reasonable doubt, that defendant (1) used or assisted in the use of the premises for the purpose of selling intoxicating liquors; or (2) kept or assisted in keeping, for himself or others, in said premises, intoxicating liquors, for the purpose of selling, exchanging, bartering, or dispensing same, or giving same in consideration of services, or “in evasion of the statute;” and (3) continued to use such premises for the purpose of keeping intoxicating liquors with intent to sell the same. Later on, the jury was told that there was no evidence justifying a finding that Roberts “gave intoxicating liquors to anyone in consideration of services or in evasion of the statute.” This instruction is criticised, for the reason, as is said, that there is no evidence that appellant gave liquor “for a consideration,” and that the clause “in evasion of the statute” should have been explained and its meaning expounded to the jury; and that the suggestion with reference to Roberts

impliedly advised the jury that there was evidence against Fountain tending to show a gift by disposing of intoxicating liquors, "in consideration of services or in evasion of the statute."

There was such evidence; for Fountain testified, in substance, that he purchased the whisky with the design to give most of it to the men in his employment, in order to induce them to continue working for him. His testimony on the subject has been set out. He claimed to have gotten no pay from the boys for the whisky furnished them. The tender solicitude of such a philanthropist for his employees is always very touching. This scheme of reducing expenses in the employment of laborers formerly was quite extensively pursued. The roustabout about the saloon or tavern was paid in drinks; and in numerous large enterprises, intoxicants were regularly issued to employees in lieu of a portion of their wages, always to the profit of employers. But the plan has been quite generally abandoned. Under modern methods, payment of fair wages, gauged according to the character and amount of labor exacted, is required, and the workmen are allowed to determine for themselves how and for what it shall be spent; and if defendant, by pandering to the appetites of men, induced them to labor as scavengers at wages received in more cleanly employments, and thereby turned into his coffers the difference between such wages and what he otherwise must have paid, less the cost of the whisky given to them, he is not in a situation to plead that this was a mere giving away, or that it was not disposing of it for a consideration.

We are of opinion that whether he was keeping the whisky with intent to sell, or to give to his employees solely as a gratuity, or to induce them to continue in his employment at lower wages than otherwise he must have paid, was for the jury to decide. As remarked in *State v. Hutchins*, 74 Iowa 20:

"The section evidently requires the statute to be so construed as to forbid all gifts for a consideration, direct or indirect, or remote, or made with the purpose of receiving anything in return. Thus, when liquor is given to those who buy other things, or to induce trade or attract custom, or in a hundred different ways which the ingenuity of law-breakers has or may devise to defeat the law, it is to be regarded as a violation of statute."

Nothing said in *State v. Flemming*, 86 Iowa 294, or *State v. Bernstein*, 129 Iowa 520, is inconsistent herewith. We do not say that giving whisky to his employees was a mere scheme to keep down their wages and obtain work at a reduced cost, but that such a conclusion was open to the jury.

What is meant by "in evasion of the statute" might well have been explained to the jury; but omission so to do, in the absence of a request, ought not to be denounced as error. Jurors are presumed to understand words in common use. *State v. Penney*, 113 Iowa 691. These need not be defined, in the absence of a request so to do.

V. The jury was told, in substance, that, if what was known as the "Temp Bar" was equipped in all respects as a saloon, they might take this circumstance into consideration in determining whether the place was used for the purpose of keeping for sale or selling intoxicating liquors.

6. TRIAL: in-  
structions:  
defining terms.

7. INTOXICATING  
LIQUORS:  
place made to  
resemble  
saloon.

The evidence disclosed that the bar was "almost a perfect imitation of the saloon bar, and has a keg like a saloon, and tubes; and the bar fixtures are as near an imitation of a saloon as they can get up,—as near as I have ever seen, as far as the fixtures are concerned. I think they are old saloon fixtures."

Why have the furniture and fixtures been made to resemble those of a place where intoxicating liquors are sold,

if not for advertising purposes? There was no error. The fifth instruction correctly states the law.

VI. Appellant was given the extreme penalty,—a fine of \$1,000. The offense does not appear to be other than the first of which he has been convicted. He seems to have been

8. INTOXICATING  
LIQUORS: of-  
fenses: judg-  
ment: modi-  
fication.

a person of some business capacity and influence, and should have known better than to pursue the course he did. The penalty imposed, however, should be measured somewhat by the manner of the offense and the character of the offender dealt with; and, so doing, we are inclined to regard the fine as somewhat more than was demanded, and therefore modify the judgment by reducing the same to \$600. As so modified, the judgment is—*Affirmed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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CELIA A. WINE, Appellee, v. C. B. JONES, Appellant.

**NEGLIGENCE: Crossing Streets Between Intersections.** The act of

- 1 a pedestrian in crossing a street at a point other than at regular crossings, even without looking both ways, or listening, does not necessarily constitute negligence *per se*, especially where the surface of the street was the same at all points.

**APPEAL AND ERROR: Brief Points—Insufficiency.** A statement

- 2 of error and the brief points thereunder must be sufficient, *in and of themselves*, to definitely lay before the court, without independent investigation on its part, the *precise* ruling complained of, and the law as applicable thereto, as contended by appellant.

**PRINCIPLE APPLIED:** The statements of error and the brief points in connection therewith simply revealed the following: 1. "That the charge as a whole was erroneous because it failed to apply the law to the facts, as contended by defendant \* \* \* as shown by the record, and instructions asked by defendant, and the exceptions taken by defendant to the court's instructions."

2. "That the court erred in refusing to give Instructions 1 to 7, as requested by defendant."

3. "That the court erred in giving Instructions 1 to 12, inclusive, as a whole, and, in particular, Instructions 5, 11, and 12 thereof, for all the reasons stated in defendant's objections."

*Held*, wholly insufficient.

**TRIAL:** Refused Instructions Otherwise Covered. Refusing instructions which dealt with the degree of care necessary under given conditions leaves no error, when the court adequately covered the same ground in its charge to the jury.

**NEGLIGENCE:** Failure to Give Statutory Signals. It is suggested that the failure of a motor vehicle driver to give the statutory signals may not be excused on the ground that the driver "believed" he could, in safety, pass a pedestrian without giving such signals.

**APPEAL AND ERROR:** Argument in Lieu of Brief Point Not Allowable. A brief point applicable to each statement of error is absolutely essential. Subsequent argument is not essential. Therefore, a point or proposition not appearing as a *brief* point, or insufficiently stated as a brief point, may not be considered, even though fully covered in the general argument.

**CONSTITUTIONAL LAW:** Right of Appellate Court to Prescribe Rules. The legislature may not deprive the Supreme Court of its inherent power, as a court for the correction of errors at law, to prescribe appropriate rules for the orderly and accurate presentation of appeals; moreover, rules which require "statements of error and brief points" are not in conflict with Sec. 4136, Code Supp., 1913.

**NEGLIGENCE:** Proximate Cause—Instructions. An instruction to the effect that plaintiff may not recover unless he establishes (1) that defendant was negligent, (2) that such negligence was the proximate cause of the injury, and (3) that plaintiff did not, by his own negligence, contribute to his injury, sufficiently protects defendant on the subject of proximate cause.

**APPEAL AND ERROR:** "Points" Limited to Objections in Trial Court. A brief point may not be so expanded as to embrace an objection not made in the trial court.

*Appeal from Story District Court.*—E. M. McCall, Judge.

APRIL 5, 1917.

REHEARING DENIED JUNE 24, 1918.

ACTION for damages consequent on a collision with a motorcycle, resulted in judgment for plaintiff. The defendant appeals.—*Affirmed.*

*C. G. Lee and I. R. Meltzer*, for appellant.

*R. E. Nichol and John Y. Luke*, for appellee.

LADD, J.—Main Street in the city of Ames is 80 feet wide, with 54 feet paved between the curbings. It extends east and west, and in it is laid the track of a street railway, extending to that portion of the city where the Iowa State College is located. It intersects Grand Avenue, extending north and south. This street is paved 30 feet between the curbings, north of Main Street, and 38.6 feet between curbings, south of Main Street, and is the main thoroughfare to the college.

1. NEGLIGENCE:  
crossing  
streets between  
intersections.

On June 20, 1914, the pavement between the car tracks at the intersection had been removed, and cinders put in its place. In the morning of that day, plaintiff, with her daughter and two children, walked north on the west side of Grand Avenue until about 20 feet south of Main Street, when they started across the avenue to the east, or northeast; and, when plaintiff was about 8 feet from the curbing, as is alleged, she was struck by defendant's motorcycle, coming from the north on Grand Avenue, and was injured. The defendant had ridden west on Fifth Avenue (a street about 216 feet north of Main Street), and turned south on Grand Avenue. The speed at which he was moving was estimated by the several witnesses at from 10 to 35 miles per hour. But two grounds of negligence are charged: excessive speed and failure to warn. The evidence was such as to carry both of these to the jury.

I. Appellant contends that the evidence established



conclusively that plaintiff, by her own negligence, contributed to her injury. That she attempted to cross the street at a point other than at the regular street crossing would not alone, as a matter of law, constitute negligence. *Bell v. Town of Clarion*, 113 Iowa 126; same case, 115 Iowa 357; *Finnegan v. Sioux City*, 112 Iowa 232; *Middleton v. City of Cedar Falls*, 173 Iowa 619; *Fox v. Village of Manchester*, 183 N. Y. 141 (2 L. R. A. [N. S.] 474); *Magaha v. Hagerstown*, 95 Md. 62 (93 Am. St. 317; *City of Denver v. Sherret*, 31 C. C. A. 499; *City of Olathe v. Mizce*, 48 Kana. 435 (30 Am. St. 308). See collection of cases in note to *Lerner v. City of Philadelphia*, (Pa.) 21 L. R. A. (N. S.) 614, 666. A foot passenger has a right to cross a street at any point, and is not restricted to the regular crossing. Such was the ruling in *O'Laughlin v. City of Dubuque*, 52 Iowa 746, which modified an apparent holding to the contrary in the case when previously before the court. See 42 Iowa 539. Here, there is no showing that there was a street crossing other than the ordinary pavement, or that it was different at the intersection than where the plaintiff undertook to cross. Plaintiff had the same right to use the street at one point as the other, though, possibly, greater vigilance on her part might be required at points other than at the street intersection, and where people ordinarily cross. In the *O'Laughlin* case, the defect was in the street at a point other than at the crossing, and the contention was that, inasmuch as the city had afforded a safe way, the plaintiff ought not to recover, if injured in crossing the street elsewhere. The court held that, in the circumstances disclosed, the issue as to whether the plaintiff therein was negligent, was an issue appropriate for submission to the jury. Here, no such crossing appears to have been provided. The pavement was continuous. The way across was as safe over one part of the pavement as over the other, save for its use by others; and the plaintiff had the same right to travel the

street as did the defendant. Each was bound to exercise ordinary care to avoid injuring or being injured. What would constitute ordinary care depended upon the use to which the street was put; and the issue as to whether either the plaintiff or defendant omitted the exercise of such care was for the jury to determine.

Nor can it be said that the pedestrian must look both ways or listen for automobiles or motorcycles before undertaking to cross a city street. *Baker v. Close*, 204 N. Y. 92 (97 N. E. 501); *Adler v. Martin*, 179 Ala. 97 (59 So. 597). A pedestrian is not bound to constantly keep a lookout for approaching vehicles. *Hennessey v. Taylor*, 189 Mass. 583 (3 L. R. A. [N. S.] 345, 4 Am. & Eng. Ann. Cas. 396); *Gerhard v. Ford Motor Co.*, 155 Mich. 618 (20 L. R. A. [N. S.] 233, and notes). All exacted from one in traveling along or across a street, at the crossing or elsewhere, is that he exercise ordinary care for his own safety; and what constitutes such care depends on the character of the street, the extent of its use by vehicles, and the kind using it, whether crossing at the regular crossing or elsewhere, and the like. Of course, one may undertake to pass over a street under circumstances such as to render the attempt negligent; as, heedlessly running in front of an approaching automobile. *Gibbs v. Dayton*, 166 Mich. 263 (131 N. W. 544); *McCormick v. Hesser*, 77 N. J. L. 173 (71 Atl. 55). Ordinarily, it is the duty of a pedestrian to take some precaution in crossing a street, either by listening or looking for passing vehicles. *Niosi v. Empire Steam Laundry*, 117 Cal. 257 (49 Pac. 185); *Evans v. Adams Express Co.*, 122 Ind. 362 (7 L. R. A. 678); 2 Elliott on Roads and Streets, Section 1123.

The rights and duties of the wayfarer and the driver of a vehicle, whether automobile or motorcycle, in the use of the streets, are reciprocal. Both may make use of the highway or street, and each must exercise ordinary care

to avoid being injured or injuring the other. *Coombs v. Purrington*, 42 Me. 332; *Belton v. Baxter*, 54 N. Y. 245 (13 Am. Rep. 578). What will amount to want of ordinary care depends, as said, on the circumstances of each particular case. As a better lookout is likely at street intersections, it would seem that greater care should be exercised by a pedestrian in crossing elsewhere; for it is elementary that the care to be exercised is necessarily commensurate with the dangers of the situation. But whether going out into the street, as plaintiff did, was careless, need not be determined. Negligence is a relative term, and it cannot be said that, as to defendant, the failure of plaintiff to look to the north, before or after leaving the sidewalk, amounted to want of ordinary care. The witnesses agree that she was out from the curbing from 5 to 10 feet, and defendant testified that the way was clear between them (plaintiff and daughter) and the curb, and that they were from 6 to 8 feet out from the curb. He was asked:

"They had gotten so far that you thought the way was clear behind them? A. I didn't think it; I saw the way clear."

He estimated his distance from them then at 30 feet, and thought he was moving 16 or 18 inches from the curbing when plaintiff was struck, and explained that she "waved" back and forth until within about four feet from the curb, when she made an effort "to make the curb." The plaintiff testified that, when struck, she was facing east, or northeast, about 6 feet from the walk, and had no occasion to turn back any, after starting to cross the street. The real issue, then, was whether plaintiff, after walking out into the street, turned or backed in front of the motorcycle, as testified to by defendant, which must have been found to constitute negligence, or whether she was struck when out in the street 6 or 8 feet, leaving ample room for the passage of the motorcycle. The evidence of the greater number of

witnesses supported the latter view, and this conclusion would exculpate plaintiff of the charge of negligence. The issue as to whether she contributed to her injury by her own fault was rightly submitted to the jury.

II. Exception is taken to the charge as a whole, for that, though it attempted to apply the law to the facts as contended by plaintiff, it failed to "apply the law as contended by defendant, notwithstanding the court was requested by the defendant repeatedly to make such applications, as shown by the record and the instructions asked by the defendant, and the exceptions taken by defendant to the court's instructions." It will be noted that no particular "omission in applying the law as contended by defendant" is alluded to. We are referred to the record, the seven instructions requested and refused, and the objections to the instructions generally, to find out as best we can. Manifestly, the error relied on for reversal is not stated as required by Rule 53 of this court. Nor is there anything in the proposition or authorities in support thereof indicating the ruling complained of, or where it is to be found. The argument following discusses six of the seven requested and refused instructions together; though, merely as an example indicating omission to apply defendant's theory of law to the facts, it quotes a part of the fourth of those refused:

"In other words, an ordinarily prudent person, in attempting to cross a place used only by pedestrians would not use the degree of care which such a person would use in attempting to cross at a place known by them to be frequented by vehicles propelled by artificial power, which cannot be instantly stopped; nor would an ordinarily prudent person apprehend as much danger in crossing a street at a regular crossing as would be encountered in crossing a street between crossings, not prepared for pedestrians."

2. APPEAL AND  
ERROR: brief  
points: insufficiency.

If it were permissible to rule on this, it might be suggested that it was not applicable to the facts; for evidence disclosed that, at the crossing, there was no "place used only by pedestrians." The pavement out in the street was not different at crossings than elsewhere. If it can be said to have been sufficient to invoke the attention of the court, it seems to have been unnecessary; for the fourth paragraph of the charge, after defining negligence and ordinary care, added:

"It is evident that the care exercised by an ordinarily prudent person is in proportion to the apparent danger involved. That is, where the apparent danger is great, greater care is required than where the danger is slight."

In other instructions, the jury was told that plaintiff was bound to exercise ordinary care in crossing the street. These, considered in connection with the instruction partly quoted, sufficiently advised the jury of the care exacted of plaintiff. We are not saying that appellant properly raised this question, but that, even if he did, error would not be apparent. We may add that the instructions do not appear to have been one-sided and unfair.

3. TRIAL: refused instructions otherwise covered.

The seventh assignment of error reads: "Because the court erred in refusing to give Instructions 1 to 7, as duly requested by defendant." These are referred to no more definitely in brief point or proposition, and they are argued *en masse*, except that the sixth instruction is set out, and it is said that "this phase of the case" is not presented in the instructions given. The difficulty is in the instruction requested and referred to in argument, which, in part, reads:

4. NEGLIGENCE: failure to give statutory signals.

"If the defendant, even though he saw the plaintiff upon the street, believed that she would pass on to his left, and, as a reasonably prudent man, had the right to believe

that he could pass her safely, and that no danger was involved by failing to warn her of his approach, the fact, if it be a fact, that he did not warn her, would not be negligence in this case."

How defendant's belief that plaintiff "would pass on to his left" would relieve or excuse him from giving the warning exacted by statute, even though he may have believed, acting in reasonable prudence, that he could pass her in safety, is not explained; and probably because of this defect, the instruction was refused. Moreover, such warning was for the benefit of others on the street, and appellant's care in other respects would not relieve him from duly obeying the law.

The eighth assignment is to "giving Instructions 1 to 12, inclusive, as a whole, and in particular, Instructions 5, 11, and 12 thereof, for all the reasons stated in defendant's objection." The brief point or proposition is equally general, though the argument centers attack on a portion of the eleventh instruction:

"However, in considering the question of whether or not the plaintiff did use ordinary care and caution for her own safety, you have a right to take into consideration the fact that, when the plaintiff attempted to cross the street on foot, at the time of the accident, she had a right to assume that any motorcycle or other motor vehicle would give timely warning of its approach, should any be approaching at such distance away as to afford an opportunity to give such warning or signal."

This would seem to go no further than saying to the jury that a person, in crossing the street, may rely upon obedience to the law on the part of others who are using it. That this is correct, appears from decisions declaring that one about to cross a railway track may rely upon trains' not exceeding the speed limit defined by a city or town ordinance. *Moore v. Chicago, St. P. & K. O. R. Co.*, 102 Iowa

595; *Case v. Chicago G. W. R. Co.*, 147 Iowa 747. To say that this might be taken into consideration does not, as seems to be assumed, mean that anything less than the exercise of ordinary care is to be exacted from one in crossing a street or highway, whatever the situation; nor is there anything in the instruction so intimating.

This much for the criticism. As will be noticed, Rule 53 of this court has not been observed. That portion relating to the preparation of the brief may as well be set out. It is to contain:

"Fifth. The errors relied upon for a reversal. Following this, the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. When textbooks are cited, the number or date of the edition must be stated, with the number of the volume and the page or section. No alleged error or point not contained in this statement of points shall be raised afterwards, either by reply brief or in oral or printed argument, or on petition for rehearing."

It will be observed that whether the error relied on has been stated, is not the test, as formerly, of whether the ruling complained of will be considered. The criterion by

which that is to be determined is whether the question appears in the point or proposition following the recital of rulings claimed to be erroneous. If not there found, the ruling is not reviewable. The point or

5. APPEAL AND  
ERROR: argu-  
ment in lieu  
of brief point  
not allowable.

proposition should state the law applicable to the particular ruling complained of, as contended by the appellant. If the number corresponds with the error relied on, the precise difference is perspicuously presented to the court

and the appellee. The advantage is not alone to the court and the opposing counsel, but the attorneys for appellant thereby are led to analyze the question involved, and, in the clearest and most forcible way, to point out their precise objection to the ruling of the *nisi prius* court. To so do is made, by the rules, essential to a review of the ruling complained of. The rule requires that appellant state the errors relied on for reversal. Sections 4136 and 4137 of the Code exacted the assignment of errors as a condition of having them reviewed, but these statutes were repealed by the thirtieth general assembly, and it enacted that:

"No assignment of errors shall be required in any case at law or in equity now pending or hereafter docketed in the Supreme Court." Section 4136, Code Supplement, 1913.

Counsel for appellant contend that the rule is in conflict with this statute, and if so, the authority of this court to adopt the same is rightly challenged. The manifest purpose of the statute was to do away with certain abuses which had grown up under the practice under the statutes repealed, sometimes as high as 400 or 500 errors being assigned in a single case, and much refinement being indulged in ascertaining whether the assignment of error complied with Section 4136, which declared that it "must clearly and specifically indicate the very error complained of." In remedying this abuse, however, the legislature had no notion of impinging upon the Constitution, which, in Section 4 of Article 5, declared that:

6. CONSTITUTIONAL LAW: right of appellate court to prescribe rules.

"The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state."



The legislature may impose restrictions, as by limiting appeals by the amounts in controversy (*Andrews & Smith v. Burdick & Goble*, 62 Iowa 714); but it may not, by the enactment of restrictions, so change the character of the court as that it shall be other, in reviewing a law action, than "a court for the correction of errors at law." It cannot be assumed that all adverse rulings are challenged as erroneous. On the contrary, they are conclusively presumed to have been correct, in so far as the particular cause is concerned, until complaint, in some manner, is lodged against them. How shall those of which complaint is raised be ascertained by the reviewing court? The rulings cannot well be reviewed unless the reviewing tribunal is informed of the particular rulings of which complaint is made. In other words, it cannot well correct a ruling without ascertaining in some manner what it is called upon to examine and, if erroneous, correct. This is inherently essential to any review of a ruling the correctness of which is challenged, and cannot be prohibited by the general assembly. Nor do we think such was its purpose in enacting Section 4136 of the Code Supplement, 1913. All intended was to dispense with the so-called assignment of errors as a separate pleading in the case, formerly included separately in the abstract and required to be served on appellee 10 days before the first day of the trial term, in the absence of showing of good cause for failure, to avoid dismissal or affirmance. Technically, an assignment of errors is a pleading, in the nature of a petition, reciting the rulings complained of and invoking the jurisdiction of the appellate court. *Lamy v. Lamy*, 4 N. M. 29 (12 Pac. 650); *Hinkle v. Shelley*, 100 Ind. 88; *Wells v. Martin*, 1 McCook (Ohio St.) 386, 388; *Powell on Appellate Proceedings*, 277; *Ditch v. Sennott*, 116 Ill. 288 (5 N. E. 395); *Associates of Jersey Co. v. Davison*, 29 N. J. L. (5 Dutch.) 415. The

statute dispenses with this formal pleading, but does not undertake to prescribe the manner of arguing errors complained of, in presenting a cause to this court.

Section 4139, Code Supplement, 1913, provides that "the parties to an appeal may be heard orally and in writing, subject to such rules as the court may prescribe;" and, thereunder, we have adopted such rules as seem essential to argument, and among them, that the question to be argued shall first be stated. This is not in conflict with Section 4136 of the Code Supplement, 1913, but merely the exaction that a brief shall be prepared in orderly fashion: that is, by first stating (1) the particular rulings complained of; (2) what such ruling should have been, as contended by appellant, with citations claimed to state the law on the subject; and (3) elaboration of any of these by way of argument. If the numbers of error point or proposition and division of argument correspond, as intended by the rules, investigation is greatly facilitated. Under the rules, however, the statement of the point or proposition only is essential to a hearing; for no litigant should be heard to complain of a ruling without stating what he contends it should have been, and this cannot be done without, in some way, pointing out what the ruling was, of which complaint is made. But it is preferable, in this respect, to follow the rules. The point, then, that this court has disregarded Section 4136 of the Code Supplement, 1913, is not well founded.

III. The objection to the fifth instruction was that "the same defines proximate cause incorrectly; and, as applied to this case, the instruction is improper and prejudicial, in that, even though the jury might find the defendant was negligent, if plaintiff herself was negligent, and it was because and on account of her negligence that she was injured, such negligence on her part would be

7 NEGLIGENCE:  
proximate  
cause: in-  
structions.

the proximate cause of the injury." The brief expands this somewhat, but only the objection as filed

8. APPEAL AND  
ERROR: "points"  
limited to ob-  
jections in  
trial court.

may be considered. In the instruction, the jury was told that, to warrant a recovery, these allegations must be established by a

preponderance of evidence "(1) that the defendant was negligent in one or more of the respects charged, and submitted to you in these instructions; (2) that such negligence was the proximate cause of plaintiff's injury, and that she was damaged thereby; (3) that plaintiff herself was not guilty of any negligence causing or contributing to such injury." If any of these were not so established, their verdict must be for defendant, and this was added:

"You are instructed that negligence is the proximate cause of an injury which follows such negligence, if it can be fairly said that, in the absence of such alleged negligence, the injury and damage complained of would not have occurred."

As applied to this case, the definition is accurate, and the third allegation required to be proven as a condition of recovery, obviated the possibility suggested in the objection. We are of opinion that defendant was accorded a fair trial.—*Affirmed.*

GAYNOR, C. J., EVANS, PRESTON, and SALINGER, JJ., concur.

A. F. YARCHO, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY COMPANY, Appellant.

**JUSTICES OF THE PEACE: Judgment Lacking in Vital Support.**

- 1 Writ of error will lie to review a judgment which is based wholly on irrelevant and incompetent testimony, or which is lacking in support *as to some vital fact*.

**EVIDENCE: Ex-Parte Affidavits, Etc.** An ex-parte affidavit, and

- 2 an unsworn and unsigned statement of account concerning alleged damages to a shipment of goods, are wholly inadmissible.

**JUSTICES OF THE PEACE: Affidavit—Sufficiency.** An affidavit

- 3 for a writ of error is too indefinite to authorize a review of rulings receiving testimony which is contained in a deposition, when such affidavit simply contains the statement "that the justice erred in refusing to sustain defendant's motion to strike certain testimony, and erred in admitting certain testimony contained in a deposition."

**APPEAL AND ERROR: Reception of Incompetent Testimony.** Prejudice from receiving incompetent testimony is not cured by admitting incompetent evidence over due objection.

- 4

**CARRIERS: Presumption From Good Condition.** Goods delivered

- 5 to a carrier in undamaged condition are presumed to remain in that condition. Claimant for damages must break this presumption by a showing of bad condition *at the time the carrier parts with the goods*, not at a time when a drayman, to whom the carrier had delivered them, parts with the goods—the damage being such that no retrospective presumptions could be indulged.

*Appeal from Bremer District Court.*—M. F. EDWARDS,  
Judge.

JUNE 24, 1918.

A justice of the peace gave the plaintiff judgment for damages to a shipment delivered by him to the defendant railroad, and which, it is alleged, reached the consignee in

bad condition. On writ of error, the district court affirmed the judgment of the justice, and defendant appeals.—*Reversed and remanded.*

*F. W. Sargent, Dawson & Wehrmacher, and J. H. Johnson, for appellant.*

*Sager & Sweet, for appellee.*

SALINGER, J.—I. An ex-parte affidavit, tending to show that the eggs shipped were in damaged condition when they reached their destination, and an unsigned statement of account sent by the consignee to the shipper, which also contains a recital that the shipment was damaged on arrival, were admitted, despite apt objection, and the ruling duly excepted to.

The main argument of appellee is that the reception of these may not be reviewed on writ of error, because of the rule that a conclusion of a justice of the peace on the facts may not be reviewed on writ of error. We admit the rule, but deny its relevancy at this point. Though there will be no review on writ of error where the ultimate decision does no more than solve a question of fact, it does not follow the writ will not lie to investigate whether there was error in taking testimony upon which the ultimate decision rests. We may not review a verdict which has any evidence to sustain it. *Harter v. Harter*, 181 Iowa 1181. But no one will claim we may not review whether there was error in taking testimony upon which the verdict was reached. The limitation upon the right to review a fact finding is not a limitation upon inquiring into the competency of testimony upon which such finding rests. If the rule invoked by appellee gives him absolution for having adduced improper testimony, the erroneous dealing with testimony could never be reviewed by writ of error, though all agree that such review is a function of this writ. For,

1. JUSTICES OF  
THE PEACE:  
judgment lack-  
ing in vital  
support.

if the testimony taken or excluded were immaterial, review would be denied because there was no prejudice. And if it were so material as to be the whole basis of judgment, there would still be no review, because the final conclusion of the justice on the facts is not reviewable on the writ. Suffice it to say, at this time, that, though a conclusion of fact on part of the justice may be reviewed on appeal only, such rule does not block review, on writ of error, of whether there was error in making up the foundation for his conclusion.

II. Coming now to whether error was committed, we find that no justification of this action of the justice of the peace is attempted, beyond pointing out that plaintiff testifies these papers were "records" which

2. EVIDENCE: he had "received on the shipment," and that  
     ex-parte  
     affidavits, etc. these papers were turned over to the "railroad company." It is not suggested to us

why this case presents an exception to the rule that affidavits may not be received because no opportunity for cross-examination is afforded. This affidavit is no more admissible than would be a statement by a witness that affiant had said to the witness what this affidavit recites. The unsworn and unsigned statement of account sent by the consignee to the shipper is manifestly in no better case than is said affidavit. The only justification attempted for its reception is by testimony of plaintiff: (1) That, after the egg buyers would receive the eggs at New York, "they would check up with the firm, and if there was any damage to that shipment, it would be reported to the dealer." (2) That Van Ronk testified by deposition, "I could give you the exact way they were signed for at the railroad," and added, in effect, that there was done as to this particular shipment what is sanctioned by a custom which he describes as follows: "We send down for a shipment of eggs, and anything that shows external damages is opened

and looked at with our man and the inspector employed by the railroad." Van Ronk admits he was not present if a representative of the consignee had a conference with any representative of the carrier regarding this shipment—and no agent of the carrier had a conference with witness regarding this shipment. There is also testimony that the consignee and the shipper have, by their conduct, agreed on how much the shipment was damaged. Despite all this, both exhibits were incompetent and wholly inadmissible. Unless the record exhibits some curing of this error, the district court should have sustained the writ of error.

2-a.

If it is cured, it is by the deposition of Van Ronk, which was before the district court. The appellee contends that any testimony in such deposition which might be claimed

3. JUSTICES OF  
THE PEACE:  
affidavit:  
sufficiency.

to cure the error in receiving the affidavit and the statement of account cannot be reviewed here, because "no sufficient assignment of error was made in the affidavit for the writ to warrant a review of such question by the district court." So far as sustaining the writ of error because of erroneous reception of testimony found in this deposition is concerned, we must hold, with the appellee, that the application for the writ of error is too indefinite to warrant such review. All there is, is a statement that the justice of the peace "erred in refusing to sustain the defendant's motion to strike as to certain parts of the testimony offered by the plaintiff \* \* \* also erred in matters of law in the admission of certain testimony of Eugene H. Van Ronk, said testimony being in the form of a deposition; also erred

4. APPEAL AND  
ERROR: recep-  
tion of incom-  
petent testi-  
mony.

in overruling defendant's motion to strike out certain parts of the testimony" of said Van Ronk. But error is presumed from the erroneous reception of said affidavit and said statement of account. While we may not review the rul-

ings on the reception of testimony found in said deposition, it is our duty to investigate the record, to determine whether the error was cured. *Heiman v. Felder*, 178 Iowa 740; *Jacobs v. City of Cedar Rapids*, 181 Iowa 407. If the only testimony in the deposition which can have a tendency to cure the error in receiving said other papers is incompetent, and was taken though properly objected to, then, though writ of error will not be sustained because of such rulings, such incompetent testimony will not accomplish that the reception of the affidavit and the statement of account was without prejudice. In other words, prejudice from receiving improper testimony is not cured by admitting incompetent evidence duly objected to, even though no affirmative relief may be had on account of the reception of said incompetent matter. We think the "cure" is in that condition. It consists of testimony of Van Ronk which, as a whole, shows clearly that he is not speaking from personal knowledge, and relies on some "record" made by his shipping clerk; that, though some of the language of Van Ronk seems to assert personal knowledge, the whole of his testimony makes clear that he is, in fact, speaking to inference and deduction from said "record" made by his clerk, and from the alleged custom, to which reference has heretofore been made in this opinion. The error in receiving said two papers is not shown to have been without prejudice.

III. But there is a question in the case on which the rule which appellee invokes is relevant. The writ of error complains the justice erred in overruling the motion of defendant to dismiss plaintiff's suit, because

5. CARRIERS: pre-  
sumption  
from good  
condition. there was an entire absence of evidence to support such suit. The concrete point is, there is no evidence that the eggs were damaged when the carrier delivered same to the consignee. We are constrained to agree there is no such evidence. The shipment was delivered by the terminal carrier to a dray-



man in the employ of consignee. Even if the affidavit and the statement of account and the deposition are assumed to show damage at some time, and if it be assumed there is testimony that the eggs were broken and damaged when the drayman delivered them to his employer, still there is no evidence of their condition when delivery was made to the drayman. An application of the presumption of continuity has made a rule that, if goods are shipped in sound condition, and the carrier delivers them in a damaged state, that something done during transit has caused the damage. But the presumption that a state of things once shown to exist continues, is equally available to the carrier. *Stone v. Chicago, R. I. & P. R. Co.*, 149 Iowa 240. The application of this presumption for the carrier brings about that goods shipped in sound condition remained sound at the time when the carrier delivered them. Wherefore, some evidence that the shipment was damaged when delivered is absolutely essential to a recovery here. Assume that, when the drayman delivered, the eggs were cracked, broken, and stained, and it furnishes nothing to overcome the presumption that the eggs were sound at the time when delivered to the drayman; for presumptions are ordinarily not retrospective. Cases may be imagined wherein the finding of stains would operate retrospectively, because some time was necessary to create such stain. But that is not available here. The only stain upon eggs that could be due to the negligence of anyone would be made by cracking the shells, and we have no right to assume for the party having the burden of proof that the carrier, rather than the drayman, did the cracking. There is no evidence of injury at the time when the carrier delivered. The sole question remaining is, then, whether the judgment of a justice of the peace, awarding the plaintiff damages though the evidence is in this condition, can be reviewed on appeal, only. We are of opinion that this case presents a judgment which is with-

out support in a vital matter; that here is, in effect, a case of "no evidence." In *Spahn & Rose Lbr. Co. v. Chicago, R. I. & P. R. Co.*, 183 Iowa 1141, we plainly imply that, though sufficiency of evidence may not be inquired into upon the writ, this has no application to a case where the record exhibits an entire lack of evidence to support the judgment. And the law certainly recognizes no difference between a case of literal absence of testimony, and evidence consisting wholly of what the prevailing party has no right to have. Surely, if plaintiff made claim before a justice of the peace that defendant owed him on oral agreement to repay money loaned, and defendant made default, and plaintiff offered *no* evidence, judgment for the plaintiff would be reviewable on writ of error. It would not be a case of erroneous weighing of evidence, but would present the law question whether the law gave right to *any* judgment for plaintiff. Now, surely, if, instead of judgment without any evidence, the judgment rest wholly on testimony that plaintiff had red hair, giving judgment would be just as much an error of law as to give it without any evidence. As it seems to us *Doolittle & Co. v. Porter*, 145 Iowa 385, is decisive for appellant. The case goes into a full review of the class of cases upon which the appellee relies, and makes clear that appeal is the sole remedy only where there is a claim that, on the weight of the evidence, or on resolving conflicts in the same, the judgment should not have been what it is; that it applies only in cases where, in truth, it is the "sufficiency" of the evidence to warrant judgment of the justice that is presented on writ of error. It holds further that, where the only question is what judgment should be rendered on a conceded state of the facts, or on a special finding to which no exception has been taken, then a matter of law arises, and with it a right to have review on the writ. This is but an amplification of the elementary rule that an application like a motion to direct verdict, or any

other form of demurrer to the evidence, is not a presentation of sufficiency of the evidence to sustain a verdict, but presents that one party or the other is entitled to judgment, as matter of law. Appellee asserts the *Doolittle* case turns wholly on the fact that the justice made special findings of fact to which no exceptions were taken, and because thereupon he held that defendant was liable, as matter of law. While that was the state of the record in the *Doolittle* case, its decision is not that its rule applies only where such state of the record exists. In manifest effect, the underlying principle of the case is that, whenever it appears in any way that, as matter of law, the evidence will not sustain the judgment, then review may be had on writ of error.

In the instant case, everything done before the justice was competently before the district court. To be sure, that was so in *Taylor v. Rockwell*, 10 Iowa 530, 531, and in *Lane & Wilson v. Goldsmith*, 23 Iowa 240. It is also true that, in the *Taylor* case, the claim was made that review on writ of error was due because all the record was before the district court, and exhibited no conflict. So the question now before us might well have been determined in the *Taylor* case, and possibly in the *Lane* case. But it was not done. Neither case passes upon what right to review is given because all the record is before the court and no conflict appears in evidence. And both merely affirm the general rule that appeal is the sole means of reviewing a decision of a question of fact. *Anthes v. Booser*, 112 Iowa 511, re-affirms this general rule. *Lease v. Franklin*, 84 Iowa 413, and *Simmons v. Chicago, B. & Q. R. Co.*, 128 Iowa 306, hold, in effect, that the judgment of the justice will not be reviewed on writ of error, where there is a conflict in the testimony. *Stute v. Roney*, 37 Iowa 30, is that the statutes are in such condition as that a prosecuting witness who has been adjudged by a justice to pay the costs of prosecution,

has no remedy save to appeal from such judgment in the name of the state.

None of these hold that, where testimony is erroneously received, and there is nothing but such testimony, or where plaintiff has no evidence on the vitals, the one who suffers judgment because of such testimony may not have review on writ of error. On the other hand, the case to which we have called attention rightly holds that, in a case like the one we have, such review lies.

We think the motion to dismiss presents a law question, and not the decision of a question of fact. It follows the overruling of this motion should have been reviewed, and the writ sustained on this point, also.

The judgment must be reversed, and the cause is remanded for judgment in accord with this opinion.—*Reversed and remanded.*

PRESTON, C. J., LADD and EVANS, JJ., concur.

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AMES EVENING TIMES, Appellant, v. AMES WEEKLY TRIBUNE,  
Appellee.

**APPEAL AND ERROR:** Contest In Re Official County Newspaper.

- 1 Contests *in re* official county newspapers will not be reviewed *de novo* on appeal.

**AFFIDAVITS:** When Seal Non-Essential. The seal of the clerk of

- 2 the district court is not necessary to the validity of the clerk's jurat to an affidavit.

**AFFIDAVITS:** Amendment. An affidavit is amendable by adding

- 3 to the jurat the seal of the officer before whom the oath was taken.

**EVIDENCE:** Official Signatures. Courts take judicial notice of the

- 4 official character and signature of their own clerk.

*Appeal from Story District Court.*—R. M. WRIGHT, Judge.

JUNE 27, 1918.

THE Ames Evening Times and the Ames Weekly Tribune, newspapers published in the city of Ames, Story County, Iowa, were rival candidates before the board of supervisors of said county for selection or appointment by said board as a county official newspaper, under the provisions of Code Section 441 of the Code of 1897. Each filed a list of its alleged bona-fide yearly subscribers living within the county, and each party objected to the sufficiency and good faith of the list filed by the other. On the hearing of this contest, the board of supervisors found that the Tribune's list of bona-fide yearly subscribers exceeded that of the list submitted by the Times, and gave the appointment to the former. From this finding and appointment, the Times appealed to the district court, which, upon examining the record and hearing the evidence offered by the parties, affirmed and approved the order made by the board. From said judgment, the Times appeals to this court.—*Affirmed.*

*John Y. Luke*, for appellant.

*Hadley & Langland* and *Geo. A. Underwood*, for appellee.

PER CURIAM.—The errors assigned and relied upon by appellant are as follows: (1) The judgment of the trial court is against the weight and preponderance of the evidence; (2) the court should have found the appellant entitled to the appointment; (3) the court erred in not finding the appellee's list of subscribers to be fraudulent, and in not finding that said list had been padded or enlarged by placing thereon names of others than bona-fide subscribers; and (4) the court erred in allowing the appellee to amend its affidavit to its list by supplying the seal of the clerk to the verification of said list: and to these propositions we confine our attention.

I. It will be observed that the first, second, and third assignments all relate to the sufficiency of the evidence to sustain the judgment of the district court, and we therefore consider them as one.

The argument for appellant seems to assume that this proceeding is of an equitable nature, and that fact questions in issue are triable in this court *de novo*. Appeals from the judgments and orders of boards and other inferior tribunals are always triable as ordinary proceedings, except where the statute clearly provides otherwise. The

1. APPEAL AND  
ERROR: con-  
test in re  
official county  
newspaper.

holding in *Young v. Rann*, 111 Iowa 253, announced no different rule. The ruling there was that an appeal from the board of supervisors in this class of cases brought the issue to the district court for trial after the manner of appeals from the judgment of a justice of the peace, and that it is to be heard and decided on the evidence produced on trial of the appeal; but this is very far from holding that, on appeal from the district court to this court, the issue is to be tried anew, as one in equity.

Such being the situation, the finding of the trial court upon all disputed matters of fact is binding upon us, unless we can say, from an examination of the record, that there is no evidence whatever to justify the conclusion announced by the court. The veracity of witnesses, the weight and value to be accorded to their testimony, and the preponderance of evidence, were for the decision of the trial court, and its finding is to have the force and effect of a jury verdict. Each of the assignments of error, 1, 2, and 3, simply call into question the holding of the trial court upon the facts. We think the record is not so barren of evidence in support of these findings that we can dispose of them as matters of law.

II. The other question raised arises as follows: To the list of subscribers filed by the appellee and produced

in evidence, there was attached an affidavit of verification, purporting to have been made by H. M. Guy, and to have been subscribed and sworn to before L. S. Kloster, clerk of the district court of Story County, Iowa; but it was not attested by the impression thereon of the clerk's seal. The court, thereupon, and over the objection of appellant, allowed the amendment of the verification by adding the seal thereto. This ruling is argued by appellant as reversible error.

The exception is untenable. The seal constituted no part of the oath of the affiant. Its effect is to afford prima-facie evidence of the official character of the officer properly using it, and of the regularity of the certification. If the statute creating the office and defining the duties of the officer does not require him to attest his signature by a seal, then the failure to use the seal does not affect the validity of the act. The statute which empowers the clerk of the district court to administer oaths (Code Section 393) makes no requirement that the act shall be attested by the seal of the court of which he is an officer. It is otherwise when he takes the acknowledgment of a conveyance (Code Section 2959), and where he issues the process of the court (Code Section 282.) But even if it should be held that an affidavit is insufficiently attested without a

2. AFFIDAVITS :  
when seal  
non-essential.

3 .AFFIDAVITS :  
amendment.

seal, it is within the discretion of the court to permit its amendment when offered in evidence. *Rindskoff v. Malone*, 9 Iowa 540. In the cited case, the notary had failed to attach his seal to his official signature; and the court, while saying that an objection thereto, if properly taken, would be good, further says that, if objection had been made:

"The notary would have had the right, at the time, to affix his seal, and thus every difficulty would have been obviated."

And while, in some of our earlier cases, it seems to

have been held that failure to attach the proper seal to a process of the court could not be cured by amendment (*Foss v. Isett*, 4 G. Greene 76), the later cases, perhaps under more liberal statutory provisions, have held even such defect amendable. *Murdough v. McPherrin*, 49 Iowa 479. See, also, *Hallett v. Chicago & N. W. R. Co.*, 22 Iowa 259.

Again, in the case before us, the affidavit was sworn to before the clerk of the trial court. That court will take judicial notice of the official character and signature of its clerk, without reference to whether it is attested by a seal. *Finn & Co. v. Rose*, 12 Iowa 565; *Wetmore v. Marsh*, 81 Iowa 677, 680. In our judgment, the court could well have held the affidavit sufficient even without the amendment, and the order permitting such amendment was, therefore, without prejudice to the appellee's rights in the premises.

The judgment appealed from must be—*Affirmed*.

All the justices concur.

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THOMAS BAKER, Appellant, v. HUGH MAXWELL, Appellee.

**EXEMPTIONS: Portable Saw Mill**—"Mechanic." The operator of a portable saw mill is a "mechanic;" and, if he be the owner of such mill, and employs it in an occupational way by means of his own labor and the labor of the dependent members of his family, of which he is the head, and is a resident of this state, then such mill, irrespective of its size, value, or necessity, is exempt from execution, both as a proper "tool" and as a proper "instrument" of his occupation. (Sec. 4008, Code, 1897.)

*Appeal from Plymouth District Court.*—W. D. BOIES,  
Judge.

JUNE 27, 1918.

ACTION in replevin to recover the possession of a portable mill used for sawing lumber. There was a directed ver-



dict and judgment for defendant, and the plaintiff appeals. **The material facts are stated in the opinion.—Reversed.**

*C. R. Metcalf*, for appellant.

*Hess & Hess*, for appellee.

WEAVER, J.—The plaintiff is conceded to be a married man, the head of a family, and, with his family, has been for many years a resident of the state. He has little, if any, property, except that hereinafter mentioned, and, for a **considerable period**, has been employed by others in cutting and converting native trees and logs into lumber. In this work, he owns and makes use of a portable mill, which he operates himself, with such help as is afforded him by his wife and minor son. The power used is steam, and the entire outfit is so designed as to be readily moved from place to place and from farm to farm, as may be desired by those having such work to be done; and its value is about \$800. One Rawson, having obtained a judgment against plaintiff, procured the issuance of an execution for its collection, and caused it to be levied upon said property. Plaintiff thereupon served written notice upon the sheriff that he claimed the property to be exempt from seizure on execution, and demanded that the levy be discharged. The demand was refused, and plaintiff then brought this action to recover the possession.

The defendant denied the alleged exempt character of the property, and, on trial of this issue to a jury, the court directed a verdict for the defendant, and the plaintiff appeals.

There appears to be no material fact on which there is any occasion for the consideration of the jury, and the arguments in this court are very properly directed to the legal proposition whether, under the undisputed facts, the trial court properly directed a verdict for the defendant.

Our general exemption law is found in Code Section

4008, and that portion of it which has more particular bearing upon this controversy is the clause which provides that a resident head of a family, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor, may hold exempt from execution the proper tools, instruments, and books pertaining to his occupation, and, if a physician, public officer, farmer, teamster, or other laborer, may also hold exempt the team and vehicle with which he habitually earns his living. In support of the ruling below, the appellee relies upon two propositions: First, that plaintiff is neither farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, nor professor, and therefore is not entitled to any exemption for the tools, instruments, or implements suitable to his employment or business, but is a common laborer, for whom there is no exemption except a team and vehicle, if he employs such aids in earning his living; and second, that, if it should be held that plaintiff is a mechanic, within the meaning of the statute, the portable mill is not a tool, instrument, or implement of his employment, which the law exempts.

Without at all conceding the correctness of appellee's contention that one who is a laborer, as distinguished from a mechanic, is entitled to no exemption from execution for the tools and implements suitable for his employment, our views upon the other proposition are such as to render unnecessary any discussion of that question.

It is the plaintiff's theory that, under a fair and liberal construction of the term used in the Code Section above cited, he may be classed as a mechanic; and to the question thus raised we give our first attention.

Cases may be found in which the term "mechanic" is limited to a skilled workman, employed in shaping materials such as wood, metal, or stone into some kind of a structure or machine or other object requiring the use of tools; but the prevailing tendency of modern courts, including this

court, is to broaden and enlarge the scope of the word; and this is especially true in construing and applying exemption laws. For example, in *Smith & Funk v. Osburn*, 53 Iowa 474, the question arose upon a claim of exemption for a printing press, type, and other materials used in the printing business. At that time, the statute which specifically exempts such property had not been enacted, and the claim of exemption was based on the theory that the printer was a mechanic, and that the presses and other property seized were the tools and implements of his trade. We sustained that claim, and exempted his property as the tools of a mechanic, and we defined the word "mechanic" as being applied to "one who works with machines or instruments," etc.; and, in our judgment, if the owner of and user of a printing office outfit may be classed as a mechanic, and a complicated and expensive piece of machinery like a newspaper press and equipment may be exempted as a proper tool or implement of his employment, there ought to be no hesitation in admitting a lumber sawyer and his portable mill to the same class. That very question was considered in *Gulledge v. Preddy*, 32 Ark. 433, and the owner and operator of a sawmill was there classed as a mechanic. As further illustrating the liberality of the courts in defining these terms and applying exemption laws, the word "mechanic" has been held to include a dentist (*Mason v. Perrott*, 17 Mich. 332); a civil engineer (*Amazon Irrigating Co. v. Brieson*, 1 Kan. App. 758); a painter (*Waite v. Franciola*, 90 Tenn. 191); a barber (*State v. Dielenschneider*, 44 La. Ann. 1116, *State v. Hirn*, 46 La. Ann. 1443, *Terry v. McDaniel*, 103 Tenn. 415). It must require some degree of knowledge, skill, and training to operate a sawmill, even a small, portable affair; and we entertain no doubt, under the law as heretofore recognized by this court, as well as by other courts, that the plaintiff may be classed as a mechanic,

and is entitled to be so considered in applying the exemption statute.

Assuming, then, that the plaintiff is a mechanic, within the terms of this law, we have further to inquire whether the mill which he uses is a proper tool or implement of his occupation. Both upon principle and precedent, this must be answered in the affirmative. Appellee points us to cases where the word "tool" has been held to mean only small implements, which may be held in the hand, or are operated by manual force or power alone. Such rule seems to be entirely too narrow and technical; but it is to be noted that our statute exempts, not "tools" alone, but all the debtor's proper "tools, instruments, and books." The word "instruments" is a word of much more general and inclusive import than "tools," and it has been held to include a very wide range of implements, reasonably fitted or employed as means of making their owner's labor in his chosen employment more effective. Nor does the statute require that, in order to be exempt, the tool or instrument shall be shown to be a necessity in such employment: it is enough if it is a "proper" tool or instrument. Any tool or instrument which is reasonably adapted to such use is a proper one. The statute fixes no limit upon the size or value of such instruments. For the farmer, it may properly include a gang plow, a harvester, a traction engine, and any or all of the multitude of modern farm machinery which may be useful or proper; and the fact that it costs hundreds or perhaps thousands of dollars, or is operated by steam, gas, or electricity, or may require an expert to use it successfully, will not expose it to seizure as non-exempt property, so long as it be fit and proper for the farmer's use. A piano may be an exempt tool or instrument, in the hands of a music teacher (*Amend v. Murphy*, 69 Ill. 337); a turning lathe, weighing 600 pounds is a tool, within the exemption act (*Smith v. Roads*, 29 Okla. 815); a portable saw mill is

classed as an exempt implement in *Eckman v. Poor*, 38 Colo. 200 (87 Pac. 1088); a like ruling as to a portable saw mill is sustained in *Reeves & Co. v. Bascue*, 76 Kan. 333; and a logging outfit may be an exempt instrument (*State v. Creech*, 18 Wash. 186). Even where the statute exempts only the tools "necessary for the debtor's usual occupation," it has been said that this does not mean those of absolute necessity in his work, but such as are reasonably necessary for the prosecution of it advantageously and usefully.

"It is by availing himself of new tools, often improved and better adapted to the prosecution of his labor, that improvements are made by the mechanic; and there is no reason why they should not be as much protected on their first introduction as after they have come into general use." *Healy v. Bateman*, 2 R. I. 454.

No one would deny to the worker in concrete and cement an exemption for the time-honored hoe and shovel with which he mixes his materials; and it would be most unreasonable to say that, if the man whom you employ to lay your sidewalk should use a small, modern, revolving mixer, operated by gas or electricity, to do the work of the hoe and the shovel, it may be seized upon execution, simply because it is a new or more complicated or more expensive implement. There is nothing in the statute requiring it, and the courts have no authority, and should have no desire, to impose any such limitation upon the worker's statutory right

We do not overlook the fact that, in *Meyer v. Meyer*, 23 Iowa 359, 375, this court held that a threshing machine, which required six to ten horses and a large force of men to operate it, was not exempt, as a proper tool or implement of a farmer who used it principally to thresh the grain of others than himself. We have no quarrel with the result reached in that case, and concede its authority in cases of the same or similar character; but the class does not include cases like the one at bar. If, in that case, a judgment

debtor had been a thresher by trade and occupation, and, being employed to thresh the grain of others, he laid aside the primitive flail, and used a small power thresher, operated entirely by himself and members of his dependent family, we may safely assume that the machine would have been held exempt, as a proper implement of the debtor's employment.

Without further prolonging this opinion, we have to say that, under the conceded facts, the plaintiff is entitled to be classed as a mechanic, within the meaning and purpose of the statute, and that the portable mill is to be classed as a proper tool or instrument of his employment and occupation. It follows that a verdict should not have been directed for the defendant, and that judgment should have been entered for the plaintiff, upon the agreed statement of facts, for the possession of the property, or for its value, if the possession has not been restored under the writ of replevin.

The cause will be remanded for the entry of judgment in harmony with this opinion.—*Reversed and remanded.*

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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SAMUEL BALEN, Appellee, v. COLFAX CONSOLIDATED COAL COMPANY, Appellant.

**MASTER AND SERVANT: Rejecting Master and Non-Rejecting**

- 1 **Servant—Procedure.** A servant who has, expressly or by statutory presumption, *accepted* the provisions of the Workmen's Compensation Act, and suffered injuries arising out of and in the course of the employment, must proceed against his employer, who has *rejected* the act, by and through a modified common-law action modified by depriving the employer of specified common-law defenses, and by creating, against the employer, specified presumptions relative to negligence and proximate cause. (Secs. 2477-m, 2477-m2, Code Supp., 1913.)

**MASTER AND SERVANT: Pleading.** A servant who proceeds at 2 common law against a master, makes a prima-facie case by alleging: (a) that the relation of master and servant existed; (b) that the injury arose out of and in the course of the employment; (c) that the master had, and that the servant had not, rejected the Workmen's Compensation Act; and (d) that the servant had suffered damages by reason of said injury. (Sec. 2477-m, Code Supp., 1913.)

**TRIAL: Instructions—Failure to Except.** Failure to except to 3 instructions prior to the reading to the jury precludes subsequent complaint that the instructions authorized an allowance of interest on an unliquidated claim. (Sec. 3705-a, Code Supp., 1913.)

*Appeal from Jasper District Court.*—HENRY SILWOLD,  
Judge.

JUNE 27, 1918.

**ACTION** to recover damages consequent on personal injury in defendant's mine, resulted in judgment as prayed. The defendant appeals.—*Affirmed.*

*R. and F. G. Ryan and J. E. Cross*, for appellant.

*John T. Clarkson*, for appellee.

LADD, J.—The defendant operates a coal mine, in which plaintiff was employed as a coal digger. The shaft extended down about 180 feet, and in it were two cages, operated by machinery, one ascending as the other descended. From the shaft, entries had been driven, and rooms turned off of these. Empty cars were taken from the cages on the north side, and loaded cars run on at the south side of the shaft. An entry extended 20 or 25 feet south of the shaft, and thence entries had been driven eastward and westward, and these were made use of as motor haulage ways,—that is, through these, cars were hauled by electric motors. From the south en-

1. **MASTER AND SERVANT:** rejecting master and non-rejecting servant: procedure.

try, there was a slight ascent to the westward, for a distance of about 50 feet; and beyond, the grade was descending. At the highest point, or apex, was what was denominated a "motor hole." As the motor reached this point, it was detached and run in this "motor hole," and the trip of loaded cars allowed to move on by their own momentum, until an employe, located a little farther on, stopped the cars, by putting sprags into the wheels. When the cager required them to run in the cage, they were permitted to move on around the corner to the shaft. Ordinarily, the hoisting of coal ceased at 4:15 o'clock in the afternoon, and the miners were then raised to the surface by the cages, about ten at a time. Shortly before this, the miners and their helpers collected in a sort of waiting room, a short stub entry, south of the shaft, and near where the entry turned westward, and there waited until the whistle blew, signaling that hoisting coal had ceased. In the afternoon of August 17, 1914, plaintiff arrived at the waiting room at about 4:10 o'clock, and remained there until the whistle blew. According to custom, the miners were assigned numbers as they arrived, and the cager called and loaded ten at a time, in the order of such numbers, thus: from one to ten, inclusive, in the first load; the next ten in the second load; and so on. When the whistle blew, plaintiff, with others, left the waiting room and went over nearer the shaft, as the evidence tended to show was customary; and, when 12 or 14 feet therefrom, waiting for his number, 18, to be called, a trip of cars coming from the west entry and on north ran against him and forced him into the "sump," where the cage coming down rested on him, causing the injuries complained of. It appears that a trip of cars was hauled from the west, and did not have enough momentum to carry it over the point, or apex, when the motorman detached the motor and ran it in the motor hole. A second trip coming up, the motorman was unable to move his



cars forward far enough to allow some mules worked in the mine to pass, in going to the barn; and, to afford a passageway for the mules, the second motorman attached his motor to the trip of cars ahead, pushing it over the apex and hauling those behind. As the first trip went over, four or five of the front cars became uncoupled; and, as no one was there to sprag the wheels, these moved east and north toward the shaft where the collision occurred, as stated. Plaintiff did not observe the approach of the cars until someone shouted, "The trip is loose," when he stepped to the side of the track, but, finding the space too narrow, attempted to cross to the other side, and in so doing was struck by the front car and thrown into the "sump." Recovery was sought for damages in loss of wages, expenses for medical services, and for mental and physical pain suffered and which will be suffered in the future, it being alleged that the injuries occurred "while plaintiff was an employe of defendant, engaged in the work of mining coal \* \* \* engaged in the performance of his work in the pit sump at the bottom of the shaft \* \* \* by reason of a loaded trip breaking and running into said sump where plaintiff was located." The petition also alleged that defendant had rejected the "compensation law" in the manner required by the statute and by amendment thereto; alleged that plaintiff was injured while waiting for his turn to be hoisted to the surface, and that he "had not given any notice as required or contemplated by the statutes with reference to the rejection of what is known as the Compensation Law, enacted by the thirty-fifth general assembly; that is to say, the plaintiff alleges that he had not given a written notice rejecting the law."

The defendant demurred, on the grounds: (1) That the court was without jurisdiction; (2) that, as plaintiff had not rejected the compensation law, he may not recover under its provisions; and (3) that the petition neither alleged

negligence on the part of defendant nor that plaintiff was without fault. The demurrer was overruled, and defendant pleaded the first two grounds of demurrer in his answer, and also alleged its freedom from negligence, and that plaintiff, by want of care on his part, contributed to his injury. The evidence tended to establish the facts as alleged, and the court submitted the cause to the jury on the theory that, although plaintiff, by not rejecting, is deemed to have accepted the Employers' Compensation Act, he might recover under the common law, as modified by Section 2477-m of the Code Supplement, 1913; and verdict was returned and judgment was entered for plaintiff.

I. Appellant contends that Chapter 8 of Title XII of Code Supplement, 1913, as amended by Chapter 270 of the Acts of the Thirty-seventh General Assembly, provides a special and exclusive remedy in cases like this, and that none other may be resorted to. This is true where neither employer nor employe rejects the terms, conditions, and provisions of the act, in the manner prescribed. But other situations arise and are provided for, (1) where the employer only rejects, (2) where the employe alone rejects, and (3) where both reject. Section 2477-m of the Code Supplement, 1913, deals with the first of these,—that is where the employer rejects and the employe accepts,—and declares that, though the employer rejects the terms, conditions, and provisions of the act, he “shall not escape liability for personal injury sustained by an employe of such employer when the injury sustained arises out of and in the usual course of the employment because: (1) The employe assumed the risks inherent in or incidental to or arising out of his or her employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the employer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care

in selecting reasonably competent employees in the business; (2) that the injury was caused by the negligence of the co-employee; (3) that the employee was negligent unless and except it shall appear that such negligence was wilful and with intent to cause the injury; or the result of intoxication on the part of the injured party. (4) In actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence."

Section 2477-m2 relates to the second situation, where the employee alone rejects. In the first paragraph, it declares the general rule where neither employer nor employee rejects the terms, conditions, and provisions of the act, precisely as does the first paragraph of Section 2477-m:

"The rights and remedies provided in this act for an employee on account of injury shall be exclusive of all other rights and remedies of such employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury; and all employees affected by this act shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this act until notice in writing shall have been served upon his employer, and also on the Iowa Industrial Commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer."

Following this, the alternative, in event of rejection by the employee of the terms, conditions, and provisions of the act, is stated:

"In the event such employe elects to reject the terms, conditions and provisions of this act, the rights and remedies thereof shall not apply where an employe brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his employment, except as otherwise provided by this act; and in such actions where the employe has rejected the terms of this act the employer shall have the right to plead and rely upon any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act. Provided, however, that if an employe sustains an injury as the result of the employer's failure to furnish or failure to exercise reasonable care to keep or maintain any safety device required by statute or rule, or violation of any of the statutory provisions or rules and regulations now or hereafter in force relating to safety of employes, the doctrine of assumed risk in such case growing out of the negligence of the employer shall not apply or be available as defensive matter to such offending party."

In short, the prosecution of the claim by an employe who has rejected the act, for personal injury arising out of and in the course of his employment, against his employer, will be subject to precisely the same defenses as prior to the enactment of the Compensation Act; for the exception at the end of the paragraph last quoted merely expresses the law as previously interpreted by this court. *Verlin v. United States Gypsum Co.*, 154 Iowa 723; *McCarney v. Bettendorf Axle Co.*, 156 Iowa 418.

The theory of the defendant is that Section 2477-m2 provides an exclusive remedy for the employe, in event he does not reject the terms, conditions, and provisions of the act: that is, by filing his claim with and obtaining compen-

sation for his injuries through the industrial commissioner; or at least that recovery would be measured by what that officer would be required to allow, under the law. If such were the intention of the legislature, what purpose was had in the enactment of Section 2477-m, especially that portion of it relating to procedure in a situation where the employer had, and the employe had not, rejected the terms, conditions, and provisions of the act?

In that section, the remedy provided is made exclusive as to the employer, where neither rejects the terms, conditions, and provisions of the act; and following this, an alternative is provided, where the employer alone rejects these. The facts of the case at bar, where defendant only rejected the act, bring it squarely within the procedure prescribed in this alternative; and, if defendant's theory were correct, all that portion of Section 2477-m would be nugatory, and necessarily could not be given effect. But statutes *in pari materia* must be construed together, and so construed, if possible, as to give effect to all, and avoid rejecting any as meaningless. In Section 2477-m2, the exclusive character of the remedy, where neither rejects, is again recognized, and made applicable to the employe, and an alternative is provided where he alone rejects. It does not purport to deal with a situation where the employer rejects and the employe accepts; for that situation has been covered by the preceding section. The latter section does not purport to impinge on the one preceding; and, by construing the first paragraph in each to relate to a situation where both are presumed to accept the terms, conditions, and provisions of the act, all confusion in so construing the several sections as to give effect to each disappears. The entire act proceeds on the theory that, in event either party reject its terms, conditions, and provisions, the rights and remedies provided for therein are not available; and that such rights and remedies are exclusive only when, by

not rejecting, both employe and employer have accepted the terms, conditions, and provisions of the act.

It is argued that, in order to maintain an action in court under Section 2477-m, the employe must reject the terms, conditions, and provisions of the act, so as to come within the terms of Section 2477-m4 of the Code Supplement, 1913:

"Where the employer and employe elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employe had not rejected the terms, conditions and provisions thereof."

In other words, the employe must, in order to maintain an action in court, reject statutes enacted for his benefit and with the design of promptly recompensing him for injuries suffered in the course of his employment. No purpose would be served by so doing, and to thus force the rejection of the provisions of the act by the employe, as a condition precedent to the maintenance of suit in court, would be contrary to its spirit, manifested in provisions carefully guarding the free exercise by the employe of the right of rejecting, found in Section 2477-m2. The construction adopted harmonizes the several sections, applies the doctrine running through the act that the rights and remedies provided therein are exclusive only when both employe and employer, by not rejecting, accept the terms, conditions, and provisions of the act, and clarifies the manifest intention of the legislature that the first paragraph of Section 2477-m relates to the exclusive character of the rights and remedies provided as affecting the employer, and that the first paragraph of Section 2477-m2 relates to the exclusive character of the rights and remedies therein provided as affecting the employe. Both assume the only situation in which said rights and remedies are available: i. e., where both, by not rejecting the terms, conditions, and provisions

of the act, are conclusively presumed to have accepted them. We are of opinion that there was no error in trying the cause in accordance with the procedure prescribed by Section 2477-m, and that no other was available to the plaintiff, as employee. The claim must necessarily have been asserted in court, and tried according to the procedure prescribed by Section 2477-m, quoted. This was done, and there was no error in holding that the practice and compensation prescribed for situations where both employer and employee have accepted the terms, conditions, and provisions of the act, did not obtain.

II. Exception is taken to the pleadings for that the petition did not allege plaintiff's freedom from negligence, nor that the injuries suffered were the proximate result of negligence on the part of defendant. There  
2. MASTER AND  
SERVANT :  
pleading. was alleged, however, (1) the relation of employer and employee; (2) that the injury arose out of and in the course of such employment; (3) that the employer had rejected the Employers' Compensation Act; and (4) damages in consequence of said injury; and no more than these were necessary to be proven, in order to make out a prima-facie case for recovery. Section 2477-m, Code Supplement, 1913. It is a general principle of pleading that no more need be alleged than is essential to prove in making out a case.

Though pleading specific acts or facts constituting the alleged negligence is not essential to the statement of a cause of action (*Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747, 752), yet, if the petition contains allegations which, if true, constitute negligence, there is no occasion for clinching these by assertion that they do constitute negligence. The petition was sufficient. *Mitchell v. Swan-wood Coal Co.*, 182 Iowa 1001; *Mitchell v. Phillips Mining Co.*, 181 Iowa 600.

III. A verdict for \$250.16 was returned. On motion

for new trial because of the excessiveness of this, the court reduced the amount to \$200.16, which included all damages proven, together with interest thereon at the rate of 6% per annum from the time of the injury. Complaint is made about the allowance of interest. The claim was for unliquidated damages accruing largely after the collision. Had the damages been complete at the time stated, the rule would have been as stated. *Jacobson v. United States Gypsum Co.*, 144 Iowa 1 (150 Iowa 330). Whether or not it was erroneous, however, may not be determined; for that the error, if any, was in failing to take exception to the instruction, as exacted by Section 3705-a of the Code Supplement, 1913. *Chumbley v. Courtney*, 181 Iowa 482.—*Affirmed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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G. T. BELL, Appellee, v. P. H. FISHER, Appellant.

**LANDLORD AND TENANT: Oral and Written Lease of Same**

- 1 **Premises.** The execution and delivery of a written lease between a landlord and a tenant does not necessarily negative the claim of the landlord that he had an oral lease with another party, as a joint tenant with the one mentioned in the written lease.

**TRIAL: Instructions—Non-Prejudicial Refusal.** On the issue

- 2 whether a defendant was acting solely as agent of another or as a principal, the refusal of an instruction on the subject of agency is non-prejudicial, when the court very definitely instructed that defendant was not liable unless it were found that he acted with intent to be personally bound.

*Appeal from Jefferson District Court.*—FRANCIS M. HUNTER, Judge.

JUNE 27, 1918.

ACTION on an alleged oral lease for rent. The facts are



stated in the opinion. Judgment for plaintiff, as prayed. Defendant appeals.—*Affirmed.*

*Thoma & Thoma*, for appellant.

*Hardley Bell, Jr.*, and *Ralph H. Munro*, for appellee.

STEVENS, J.—I. This is an action upon an alleged oral lease for the rent of a farm. The defendant, P. H. Fisher, appellant herein, is the father of Ray E. Fisher, who occupied and cultivated the leased premises for the season of 1915, the term for which the payment of rent is sought. Ray E. Fisher became a nonresident of the state before service of notice was had upon him, and this action is prosecuted against appellant only.

The claim of plaintiff is that he entered into an oral agreement with appellant to lease the farm to him and his son for one year, for a cash rental of \$1,150, which oral agreement was to be reduced to writing and signed by all of the parties; that a duplicate lease was prepared, and signed by plaintiff and forwarded, together with a note, to appellant, for the signature of all the parties; but that same were not returned to plaintiff. On the other hand, defendant testified that he returned the note and a signed copy of the lease to plaintiff, some weeks after he received them. Appellant's name was written in the lease, and immediately erased. Plaintiff claims that this was done at the request of appellant, who stated that he did not desire his son to know that he was to sign the papers; whereas **appellant claims that he plainly stated to plaintiff, at the time his name was written in the lease, that his son only was leasing the premises, and that he would, under no circumstances, obligate himself to pay the rent.** A copy of the written lease, signed by plaintiff and Ray E. Fisher, was offered in evidence by defendant. The theory upon

1. LANDLORD AND  
TENANT: oral  
and written  
lease of same  
premises.

which same was offered was that it conclusively negated plaintiff's claim of an oral lease.

The answer of defendant consisted of a general and specific denial, together with an affirmative plea that plaintiff leased the land to Ray E. Fisher in writing, and that appellant had nothing whatever to do with the transaction.

Counsel for appellant requested the court to instruct the jury, in substance, that, if it found from the evidence that the written lease was entered into between the plaintiff and Ray E. Fisher, and a signed copy thereof delivered to plaintiff and accepted by him, plaintiff could not recover. Instead, the court instructed the jury that the written instrument received in evidence was not conclusive against the plaintiff, but should be considered as a circumstance, together with the rest of the evidence, in determining whether or not an oral lease was entered into between plaintiff and appellant, as alleged. The instructions were objected to upon the theory of the requested instruction. No claim was made by appellant that plaintiff waived his signature to the written lease, or accepted the same signed only by Ray E. Fisher as a substitute for the alleged oral lease. The court, in plain and concise language, instructed the jury that the burden was upon the plaintiff to establish the alleged oral lease by a fair preponderance of the evidence, and that, unless same had been done, he could not recover.

No evidence was offered tending to show that plaintiff agreed to waive the oral lease with appellant, or to substitute a written lease signed only by Ray E. Fisher therefor, or understood that he was doing so. The negotiations for the leasing of the premises were carried on exclusively by appellant and plaintiff, who did not know Ray E. Fisher, and never saw him until long after he moved upon the premises.

Under the evidence, the jury may well have found that

an oral lease was entered into between plaintiff and appellant, by the terms of which the farm was leased to him, with the understanding that same was to be occupied by his son, and that a note and a written lease were to be signed by both the father and the son. The jury evidently so found.

The record did not justify the giving of the requested instruction. Proof of the return of the note and a copy of the written lease, signed only by Ray E. Fisher, did not conclusively negative plaintiff's claim of an oral contract. It may have been a persuasive circumstance, tending to meet the evidence offered on behalf of plaintiff. Under the issues and proof, it could not have been more. The rights of appellant were carefully guarded by the court in its instructions, and the issues were so plainly stated that the jury could not have misunderstood them, or been misled by the instructions complained of.

II. An instruction was requested by counsel for appellant, on the theory that the evidence disclosed that appellant was acting only as the agent of Ray E. Fisher. The refusal of the court to give the offered instruction is assigned as error. The instructions of the court could have left no doubt in the minds of the jurors that plaintiff could not recover unless the evidence showed, by a fair preponderance thereof, that an oral agreement was entered into between plaintiff and appellant, by the terms of which the latter leased the farm for himself, or jointly with Ray E. Fisher, and that he intended to bind himself personally for the payment of the rent.

Without deciding whether the requested instruction was proper under the issues or not, we are convinced that appellant could in no way have been prejudiced by the refusal of the court to give same. The record discloses no

2. TRIAL: instructions: non-prejudicial refusal.

reversible error, and the judgment of the court below is—*Affirmed.*

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

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GLENN BRIER, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al., Appellants.

**COMMERCE:** *Interstate—Preparation for Repair of Instrumentality.* An employee is engaged in interstate commerce when, on orders from his superior, and on a car furnished by the master, he is *on his way* to repair an instrumentality of interstate commerce.

**EVIDENCE:** *Hypothetical Question—Proper Form.* When nature has so far healed and repaired a physical injury that symptoms of pain are purely subjective, a medical expert (first duly informed of the nature, location, and extent of the original injury) is not limited to an opinion as to what *might* or what *could* cause the pain, but may state directly what, in his opinion, *did* or *does* cause the pain.

**TRIAL:** *Verdict—\$5,900—Excessiveness.* Verdict of \$5,900 for personal injury reduced to \$5,000. Plaintiff suffered a severe injury; but, at the time of trial, the limb was in such normal condition that all symptoms of pain were purely subjective.

*Appeal from Washington District Court.*—HENRY SILWOLD, Judge.

JUNE 27, 1918.

ACTION under the Federal Employers' Liability Act to recover on account of personal injuries. Verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed.*

*F. W. Sargent, J. G. Gamble, and Eicher & Livingston,* for appellant.

*McCoy & McCoy, C. A. Dewey, and W. H. Butterfield,* for appellee.

GAYNOR, J.—This action is brought to recover damages on account of personal injuries sustained by the plaintiff while in the employ of the defendant company and its receiver, J. M. Dickinson.

1. COMMERCE:  
interstate:  
preparation  
for repair of  
instru-  
mentality.

It is alleged that both plaintiff and defendant were, at the time plaintiff received his injuries, engaged in interstate commerce; that, in furtherance of its interstate commerce and in the operation of its interstate trains, defendant maintained and operated a line or lines of telegraph poles and wires along and on its right of way, adjoining its main line track; that the plaintiff was employed by the company as a lineman, and his duties were to repair these lines, under the direction of an agent or foreman; that he was so employed at the time he received his injury, September 21, 1915; that, under the Federal Employers' Liability Act, defendant is liable to the plaintiff for the injuries. It is alleged that the plaintiff, at the time, was on his way to assist in straightening some telegraph poles along the right of way; that he was being transported in a gasoline motor car, operated by the defendant company, under its receiver; that the car furnished and used for that purpose was defective and out of repair; was constructed with two cylinders, one of which was so out of repair that it failed to work, thus making the car run with a jumping motion; that the car was operated at a high and dangerous rate of speed; that the car was overloaded; that it was constructed to carry but three men, while four were directed and allowed to ride upon it, all of which facts were well known to the company; that, because of the defects in the car and the high speed at which it was operated, overloaded as it was, the same was derailed, resulting in the injuries to the plaintiff of which he complains. It is charged that he sustained injury to his left leg and ankle; that one of the lower bones of his left leg was broken, to wit, the fibula; that

his back was injured and several ribs were broken; that he was injured around and about his chest; that his nervous system was greatly impaired; that the injuries so received were permanent; that, as a proximate result of the injuries received, he is, and will be in the future, unable to perform manual labor,—or, at least, his ability is greatly impaired; that he has suffered great pain and anguish, and will continue to so suffer in the future.

To this claim the defendant interposed a general denial. The cause was tried to a jury, and a verdict returned in favor of the plaintiff. Judgment being entered upon the verdict, defendant appeals.

It will be noted that the plaintiff brings this action under what is known as the Federal Employers' Liability Act. To recover, therefore, the plaintiff must bring himself within the provisions of this act, and must show that both he and the defendant were, at the time of the injury, engaged in interstate commerce. The true test of employment in interstate commerce is: Was the employee, at the time of the injury, engaged in interstate transportation, or any work so closely related to it as to be practically a part of it? *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556.

The record shows that the foreman under whom plaintiff worked was instructed by the company to take this motor car to a point along the defendant's line where the telegraph poles needed straightening, and to straighten them. These were poles on which wires were strung and used by the company in directing the operation of the trains. The defendant's road was used in carrying freight and passengers between different states. Plaintiff was taken by the foreman to do the work so directed to be done, and was on his way to the place where these poles were, at the time he received his injury. He was not actually engaged in straightening the poles, at the time he received his injury, but was on his way, in company with the foreman, to

do the work of straightening them. The question arises: Was the employment of the plaintiff connected with interstate commerce, so as to bring him within the Federal Employers' Liability Act?

In *Ross v. Sheldon*, 176 Iowa 618, a question very similar to the one here under consideration was before this court. In that case, the action was brought under the state law. The defense then interposed was that decedent was engaged in interstate commerce at the time he received his injuries, and that his rights were governed by the Federal Act. In that case, as in this, the plaintiff was a line-man, and was injured. The railway was operated by electricity. The poles were along the line, and on these poles were cross-arms. Upon the cross-arms were wires. The defendant was engaged in putting additional cross-arms upon the poles. While at work in nailing cross-arms upon the poles, he was killed, by contact with a live wire. The claim of the defendant was that the poles and cross-arms and signal wires were a part of the necessary instrumentalities of defendant's interstate commerce, and that the injury to the decedent occurred while he was engaged in the work of repair and maintenance. This court said:

"The Federal Act in question laid upon the defendant, as a carrier of interstate commerce, not only the duty of mere *repair*, but the duty to maintain *sufficiency in its equipment*. The most that can be said in concession to the appellant is that the defendant was engaged in curing an 'insufficiency of equipment,' and that the decedent was engaged in work to that end. We reach the conclusion that the evidence brings the case within the operation of the Federal Act in question, and that this action, brought by the plaintiff under the state laws, was properly dismissed for that reason."

We think that case governs this. The only fact that distinguishes it at all is the fact that this plaintiff was

not, at the time of the injury, actually engaged in the repair of the instrumentality necessary to interstate traffic. This, however, we think is not a distinguishing factor.

In *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146 (57 L. Ed. 1125), it appears that the injured party, an iron worker, employed by the defendant in the alteration and repair of bridges, under the direction of a foreman, was carrying from a tool car to a bridge, some bolts or rivets which were to be used that night or very early the next morning in repairing that bridge. He had not actually begun the work of repair, but was on his way to the bridge, carrying with him these bolts or rivets to be used in making the repairs. He was run down and injured by an intrastate passenger train. It was held that the plaintiff's employment brought him within the purview of the Federal Employers' Liability Act, and he was permitted to recover. In that case, it was said:

"The point is made that the plaintiff was not, at the time of the injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done, some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer take his engine from the roundhouse to the track on which are cars he is to haul in interstate commerce."

See, also, *St. Louis, San Francisco & Texas R. Co. v. Seale*, 229 U. S. 156 (57 L. Ed. 1129). In that case, deceased was a yard clerk. His principal duties were examining incoming and outgoing trains, making records of numbers and initials on cars, inspecting seals on the doors, checking cars, and supplying conductors with lists. At



the time of his injury and death, he was on his way through the yard to meet an incoming freight train. His purpose in going to the train was to take the numbers of cars, and otherwise perform his duties in respect to them. *While so going to his work*, he was injured. It was held that his employment brought him under the Federal Employers' Liability Act, though this particular question was not discussed in the opinion.

See *North Carolina Railroad Co. v. Zachary*, 232 U. S. 246 (58 L. Ed. 591). In that case, we find the following:

"Again, it is said that, because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless appears that deceased was shortly to depart upon his run, having just prepared his engine for that purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

In the case under consideration, preparation had been made to go the place where the interstate work was to be accomplished, and plaintiff was on his way, with tools necessary for the work. The repairing of the poles upon which the wires were strung which were used by the defendant company in controlling and regulating the movement of its cars, both in intrastate and interstate commerce, was so closely related to interstate transportation, and so necessary to the proper regulation of interstate business, that it is, in the words heretofore quoted, practically a part of interstate business. He was on his way to do work closely

related to interstate traffic. He was carrying tools and instruments necessary to be used in doing the work assigned. He was injured while on his way to perform duties relating to interstate traffic. Under the holding of the above cases, his rights are regulated by the Federal Employers' Liability Act. See, also, as bearing upon this question, *Armbruster v. Chicago, R. I. & P. Co.*, 166 Iowa 155; *Collins v. Michigan Cent. R. Co.*, 193 Mich. 303 (159 N. W. 535); *Southern Pac. Co. v. Industrial Accident Com.*, 174 Cal. 16 (161 Pac. 1142); *Southern Pac. Co. v. Industrial Accident Com.*, 174 Cal. 8 (161 Pac. 1139).

The holding of the courts generally is that an employee of a railway company is engaged in interstate commerce when he is engaged in repairing or altering or reconstructing tracks or bridges over which interstate trains pass (*Pedersen v. Delaware, L. & W. R. Co.*, supra); when engaged in repairing, altering, or reconstructing a pumping house or pumping station already used in interstate commerce (*Narey v. Minneapolis & St. L. R. Co.*, 177 Iowa 606; *Clark v. Chicago G. W. R. Co.*, 170 Iowa 452); when engaged in repairing, altering, or reconstructing telegraph or telephone lines by which the operation of interstate trains is controlled and directed (*Collins v. Michigan Cent. R. Co.*, supra). Where the servant is employed and assigned to the work of repairing an instrumentality used in interstate commerce, all minor tasks which form a part of the larger one assigned are likewise interstate commerce, so much so as to bring a person so employed within the provisions of the act. For a full citation of authorities bearing upon this question, see Subdivision 7 of Note to *Lamphere v. Oregon R. & N. Co.*, 47 L. R. A. (N. S.) 52.

In *Deal v. Coal & Coke R. Co.*, 215 Fed. 285, it appears that the injured party was engaged in repairing telegraph lines owned by the railway company and used in the operation and movement of its trains. It was held that the in-

jured party was engaged in interstate commerce, and that the rights of the plaintiff in the suit were governed by the Federal Employers' Liability Act. See, also, *San Pedro, L. A. & S. L. R. Co. v. Davide*, 210 Fed. 870, in which it was said, substantially, that there was no reason why a section hand, engaged in propelling a hand car furnished him by a railroad company to convey him to his camp, as the concluding part of his daily service of ballasting a track used in traffic between states, is not, while so doing, engaged in interstate commerce.

In *Grow v. Oregon Short Line R. Co.*, 44 Utah 160 (138 Pac. 398), it was held that a servant engaged in installing an automatic block system, who was injured by a collision with a train while being carried from his work on a tricycle, was engaged in interstate commerce, and could recover under the Federal Act. See, also, *Horton v. Oregon-Washington R. & N. Co.*, 72 Wash. 503 (130 Pac. 897, 47 L. R. A. [N. S.] 8); *Lamphere v. Oregon R. & N. Co.*, 116 C. C. A. 156 (196 Fed. 336).

In *Eley v. Chicago G. W. R. Co.*, (Iowa) 166 N. W. 739, we have recently had occasion to consider this question. In this case, it is said:

"An employee, while on his way to and from his work, if employed in interstate commerce, injured by the negligence of his employer, is entitled to prosecute his action for damages under the Federal act."

Under these authorities, we have no hesitancy in saying that the facts disclosed in this record place plaintiff's case within the purview of the Federal Employers' Liability Act, and that the district court did not err in so holding.

At the conclusion of plaintiff's testimony, and again at the conclusion of all the testimony, the defendant moved for a directed verdict, on the ground that there was no showing by competent evidence that, at the time of the injury, either plaintiff or defendant was engaged in interstate

commerce. This is the first error assigned. For the reasons hereinbefore stated, we think this assignment cannot be sustained.

It is next contended that the court erred in making the record upon which the cause was submitted to the jury. This is predicated upon the assumption that the court erred

in permitting certain questions to be propounded to certain doctors who appeared in the case as experts, and in permitting answers to the questions so propounded. It is

2. EVIDENCE:  
hypothetical  
question:  
proper forum.

claimed that the questions and answers invaded the province of the jury, and that, through them, the witnesses were permitted to state some of the ultimate facts in controversy, and so to decide for the jury that which it was the province of the jury alone to determine.

The record discloses, before these witnesses were called, the following facts: That the plaintiff was 32 years of age; that the car in which he was riding was derailed while moving at a rate of speed variously estimated at from 10 to 20 miles an hour; that the car, weighing about 400 pounds, loaded with tools of the estimated weight of 100 pounds, fell on top of him, rolling him for some distance; that, when the car was taken off, his head was between his knees, and his left foot turned around; that he received a Potts fracture of the fibula; that there was a breaking or tearing away of the ligaments around the ankle, which caused hemorrhage; that there was injury of all the soft structures, muscles, nerves, blood vessels, ligaments, and tendons; that, after the fracture to the leg was reduced, the limb was placed in a cast, which was removed, after three or four days, for the purpose of dressing the wound; that thereafter the cast was reduced, and continued for about six weeks; that after that, there was massage and passive motion of the ankle; that this continued for about three months, after which he walked on crutches; that, up to that time, he was

confined in bed; that, when he first began to use crutches, his leg would swell, and become blue; that, under the advice of his physician, he used a leather brace, to strengthen his ankle; that he was wearing this brace at the time of the trial; that there was impairment of the motion of the ankle joint; that the deltoid ligament was torn off completely, and other ligaments were twisted; that, while walking, he suffered pain in the injured limb on both sides, up and down.

He claimed he was suffering pain in his side, back, right shoulder, and right arm. At the time of the trial, there was no displacement in these parts which manifested the cause of the pain. As to the cause of these pains, these doctors were examined. The symptoms were subjective, and these pains were shown by the testimony of the plaintiff. The contention of the defendant is that these doctors ought not to be permitted to say what was the cause of the pain; that they were permitted to do so; and that it was error to permit them to do so. The defendant states its contention this way:

"Now, whether the plaintiff suffered an injury at the time of this accident, resulting in pain in his chest and back, was for the jury, because it was an ultimate fact, and because the evidence with respect to such fact was in conflict, and because the case quite largely was in controversy on this very proposition of fact. If the plaintiff suffered pain in his back, on the morning before the accident, it might be there was reason for the existence of such pain, independent of the accident; and if this is true, of course, there could be no responsibility on the part of the defendant therefor, because it is only for an injury resulting from the act of negligence that recovery could be sustained."

The doctors testified that they were unable, on examination, to discover any misplaced vertebrae, or any condition to which the claimed pain might properly be attrib-

uted; that, therefore, there was raised a question for the jury to determine, as to whether, in fact, the plaintiff suffered such pain as a result of the injury sustained at the time of the accident. The questions objected to were substantially as follows:

"Q. State whether, in your opinion, and what, in your opinion, would those pains come from, or from what are they caused? What would you say was the cause of the present condition or ailment, supposing these facts to be true? A. The injury he sustained at the time was the cause of that. Q. Now, Doctor, assuming the fact to be true, as set forth in the hypothetical question just propounded by me to you, what would you say was the cause of the pain he experienced some thirteen months after the original injury? A. If he were in good health before, I would think, due to the accident."

We may assume, for the purposes of this case, that, under the rule laid down by this court, and followed with a persistency that would suggest that it ought to rest upon a sound basis of reasoning, an expert witness ought not to be permitted to state, as an ultimate fact, that about which there is controversy, where that fact is deducible only as a conclusion from other facts shown. *Sever v. Minneapolis & St. L. R. Co.*, 156 Iowa 664; *Kirby v. Chicago, R. I. & P. R. Co.*, 173 Iowa 144; *Martin v. Des Moines Edison Light Co.*, 131 Iowa 724, 739. In this last case, it is said:

"It is an accepted rule that, while experts may testify as to what in their opinion may or may not have been the cause of a given result or condition, it is not permissible for them to give their opinion as to the ultimate fact which the jury is organized to determine."

In the case at bar, the evidence disclosed just how the plaintiff was injured, and the character and extent of the injury, so far as ascertainable from a physical examination of the body. All the wounds and injuries which the plain-

tiff received, that could be determined from an examination of his body, were laid before the jury. The cause of these hurts and injuries, just how he was injured, and all the hurts resulting from the injury that could be told from an examination of the body, were laid before the jury. The plaintiff, however, complained that he was suffering pain. Whether he suffered pain or not could not be ascertained from an examination of the body. Whether the condition disclosed would produce the pain depended, naturally, on the location of the sensitive nerves, and whether they were involved in the injuries. A knowledge of the location of the injury and of the sensitive nerves, and of the effect of the injury upon the sensitive nerves, is essential to any correct idea as to whether the injury caused pain or not. This involved a knowledge of anatomy,—a knowledge of the relative location of sensitive nerves and the part injured,—whether sensitive nerves were involved in the injury. Unless sensitive nerves are involved in an injury, either directly or indirectly, no pain is manifest. The questions complained of were addressed peculiarly to the larger experience and knowledge possessed by these physicians. They called for that which the jury could not know or determine on their own initiative. The only questions that are now complained of are those questions touching the cause of the pain from which plaintiff claimed to suffer. The questions were so framed as to place before the jury the character and extent of the injuries, and the location of the pain complained of, and they were asked whether or not the pain which the plaintiff claimed to suffer was caused or was traceable to these injuries, and the answers were to the effect that the pain was traceable to these injuries. It is said that whether the plaintiff suffered pain or not was an ultimate fact, and the witnesses should have been asked as to what, in their opinion, might or might not have caused the pain; that it was error to ask them what





It was also said:

"As applied to a case resulting in death, when the cause of death is necessary to be established, and is in dispute, whether it be in a civil or in a criminal action, we are satisfied that it is a correct and often necessary rule that, from the results of a personal examination, or in answer to a hypothetical question based upon such results, a physician whose qualifications entitle him to speak as an expert may, from the conditions exhibited or stated to him, give his opinion as to the cause of death, where such is peculiarly within the knowledge of his profession, and is not susceptible of direct proof by other means."

In *Smith v. Detroit United Ry.*, 155 Mich. 466 (119 N. W. 640), it was held that it was permissible for a doctor to state whether a cause, which it was alleged existed, would, in his opinion as a medical man, be sufficient to produce a condition which it was claimed resulted from this cause. See, also, *City of Chicago v. Didier*, 227 Ill. 571 (81 N. E. 698), in which it is said:

"The reason given for permitting a properly qualified witness to give his opinion as to what did produce certain results or consequences, and not what might have produced them, is that the fact to be established is, What did cause the conditions found to exist? Where the determination of that question involves scientific knowledge or skill, which is possessed only by those who have given the matter special study, and with which jurors and others engaged in the ordinary avocations of life are unfamiliar, a witness possessing the necessary qualifications may be asked for his opinion as to what did cause the conditions described. Such an opinion is not conclusive, and is subject to be contradicted by other evidence. It is for the jury to determine the weight and value of such opinions, when considered in connection with all the evidence in the case."

The same rule was laid down in *Hunt v. Lowell Gas*

*Light Co.*, 8 Allen (Mass.) 169 (85 Am. Dec. 697). In that case, it was claimed that injury resulted from inhaling gas escaping from pipes. It appears that the plaintiff had offered testimony touching the condition of his health, and that it was good before the escape of the gas into his house; that soon thereafter, he became ill. Physicians were asked what, in their opinion, caused the sickness, and they answered that it was caused by breathing gas. It was held by the court that this was proper to go to the jury, because the question required the expression of an opinion based upon scientific knowledge.

We are content to let this case rest on the rule laid down in *State v. Hessianus*, supra, which is recognized in *Kirby v. Chicago, R. I. & P. R. Co.*, supra, and in *State v. Brackey*, 175 Iowa 599.

It is next contended that the verdict is excessive. The jury returned a verdict for \$5,900. While we are not inclined to interfere with the verdicts returned by jurors in personal injury cases, yet a careful reading of this record leads us to the conclusion that the verdict is excessive, and that a fair compensation for the injuries received does not exceed \$5,000. The amount of recovery is, therefore, ordered reduced to \$5,000, with interest at 6 per cent from the date of the rendition of the judgment. With this modification, the judgment is—*Affirmed*.

3. TRIAL: ver-  
dict: \$5,900:  
excessiveness.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

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CHAS. N. CARPENTER, Appellee, v. SECURITY FIRE INSURANCE COMPANY, Appellant.

TRIAL: Hostile Theories—Proximate Cause. A jury question is necessarily presented on the issue of the proximate cause of an injury whenever the record reveals, to a reasonable certainty,

that such injury resulted from *one* or the *other* of two hostile causes,—i. e., one which permits recovery and one which denies recovery,—and the record is such that the jury may fairly find therefrom that one cause is more *probable* than the other.

PRINCIPLE APPLIED: Plaintiff sought to recover the value of a mare which was insured against death by lightning. The mare was 14 years of age, weighed 1,400 pounds, and had never been sick. She, with other animals, had been placed in a 28-acre pasture, on May 16th. Up to July 16th following, when she was last seen alive, she appeared at all times to be in perfect health and condition. In the afternoon of the next day, two storms, with little rain, but accompanied by severe thunder and lightning, occurred in the apparent vicinity of this pasture. On Wednesday morning following, the mare, much bloated, and with her legs sticking straight out from the body, was found dead in the pasture, and about 4 rods or less from a wire fence. Eggs, but no maggots, were noticed in her mouth. This, ordinarily, would be the condition of a horse that had been dead from 24 to 36 hours. The jury could have found that, when she was found, she had been dead about that length of time. Absolutely no indication of lightning was found on or about the mare, the fence, the trees, or the ground. Indication of a struggle on the part of the mare was wholly absent. It was shown that a horse seldom, if ever, dies from disease without violent struggle. No wound appeared on the body. It was shown that animals are oftentimes killed by lightning without showing any indications of the lightning or of a struggle after the stroke. *Held*, a jury question was presented on the issue whether the mare was killed by lightning.

*Appeal from Greene District Court.*—E. G. ALBERT, Judge.

JUNE 27, 1918.

ACTION on a policy of insurance against death by lightning, to recover for the death of a horse alleged to have been killed by lightning. Cause tried to a jury. Verdict for the plaintiff. Judgment on the verdict. Defendant appeals.—*Affirmed*.

*Church & McCully*, for appellant.

*E. B. Wilson* and *Howard & Sayers*, for appellee.

GAYNOR, J.—This is an action to recover the value of a mare, alleged to have been killed by lightning. The action is based on an insurance policy indemnifying plaintiff against loss or damage by lightning on certain personal property. The mare in question was covered by the policy. The cause was tried to a jury. At the conclusion of all the evidence, the defendant, by proper motion, requested the court to instruct the jury to return a verdict for the defendant, on the sole ground that the evidence was wholly insufficient to sustain a verdict for the plaintiff. This motion was overruled, the cause submitted to the jury, and a verdict returned for the plaintiff. From this, defendant appeals, and on this appeal, alleges that the verdict is without support in the evidence.

This mare, with other animals, was placed and kept in a pasture containing about 28 acres, and was found dead in the pasture on the afternoon of July 19, 1916, about 1 P. M. She was about 14 years of age, and was owned and raised by the plaintiff. She weighed, at the time, about 1,400 pounds, and had never been sick. She was placed in the pasture on the 16th day of May preceding, and, during all the time, and up to July 16th, appeared to be perfectly sound, and showed no signs of disorder or anything that indicated that she was not in perfect health. She was last seen alive on Sunday, the 16th of July, and was then apparently well. On Wednesday morning, the 19th, she was found dead in the pasture. On Monday afternoon, July 17th, there was an electric storm, with very little rain, and some severe lightning, with thunder. It was in the neighborhood of this pasture. The lightning appeared to be in the vicinity of the pasture. When the mare was found, she was lying dead, about four rods from a barbed wire fence, and looked as though she had been dead for several hours,—the witnesses say, from 24 to 36 hours. There were several witnesses called who visited the mare on the afternoon of the

19th, and their testimony shows substantially the following facts:

W. E. Piatt testified that the mare was placed in his pasture on the 16th day of May, 1916; that he visited the pasture frequently, every two or three days. He testified:

"She weighed about 1,400 pounds,—a good work mare. She appeared to be sound. Had some of my own horses there. This mare never showed any signs of disorder, or anything that indicated that she was not in perfect health, from the 15th of May down to and including the 16th day of July, the last day I saw her. I saw her alive on the 16th of July. That was on Sunday. I next discovered her in the pasture, dead. This was on Wednesday morning, the 19th of July. On the afternoon of Monday, July 17th, there were two storms, with severe lightning and thunder. It was lightning high up, and thundering. It seemed to be in the vicinity of this pasture where the mare was found. When I found the mare, she was lying about a rod from the fence. It was a four-barb-wire fence. When I found her, she was swelled, and looked as though she had been dead 24 hours or more, and there were eggs about her mouth. There were no maggots. Having observed animals prior to that time that laid about 24 hours, the eggs, as compared, were about the same as found on this mare. I observed the ground, the surface of the ground around where the mare was lying, and at the point where she was lying. There was no evidence of any struggle. There was no tearing up of the grass at the place where she was lying. I have handled horses ever since I was old enough. When suffering from a disease, they always struggle a great deal, and make a lot of marks. There was nothing to indicate a struggle there. I went with the appraisers to look the mare over, about 1 P. M. on Wednesday, the 19th. The electrical storm on the 17th occurred about 3 o'clock in the afternoon. I was about three quarters of a

mile from this field. I had horses in the same pasture. I didn't think it severe enough to see if any of my horses had been struck. When I was examining this mare, I didn't see any evidence of lightning on the fence; didn't see any evidence of lightning on the posts. I didn't see any evidence of lightning having struck the ground. I didn't see any evidence of lightning on the horse. We looked to see if there were any marks of lightning. We were close enough to the ground to see, and we couldn't see any marks on the mare. I was then in company with the appraisers. This electrical storm I am speaking of was simply a cloud or two that passed over the sky at that time. There was just a little sprinkle of rain. There was not more than enough to lay the dust. I don't know whether you could have told, 30 minutes afterwards, whether there had been any rain or not. The sun shone part of the time. There were 26 head of horses in the field. The grass was eaten down pretty reasonably close. The weather about this time was pretty hot. That month was very warm. The horse was lying there on its side, and bloated, with its feet sticking straight out. Its feet were not turned up to its body or huddled up in any way. I decided, after looking the horse over, that it had been dead about 24 hours. I talked the matter over with the appraisers. We agreed that, in our judgment, the horse had been dead about 24 hours. I have seen animals die from lock bowels and colic. I have never seen them die of anything without a struggle. Mr. Harry Munch's horse got sick in that pasture; was troubled with lock bowels; lived about three days."

Another witness, who acted as one of the appraisers, testified:

"I saw the mare on Wednesday, July 19th, about 1 o'clock. The pasture was dry. We walked up and looked at the mare; looked her over. We were near enough to see the fence. I did not see any indication of the horse having been

struck by lightning. I did not see any signs of lightning around the ground about the horse. I did not see any marks of lightning on the trees close. I did not see any lightning, visible effects of lightning, on the horse itself. The weather was pretty hot. I did not notice the hair slipping any. We were there about half an hour. We agreed that the horse had been dead about 24 hours. That is my best judgment. It may have been 36 hours."

Frank Tiffany, another of the appraisers, testified substantially the same.

Dr. Smith, who qualified as a veterinary, testified:

"I have had experience in the examination of animals after they have been found dead from different causes. I have treated them when sick. There is usually signs of struggle in all diseases. There might be the possibility of an animal dying without struggling. Animals usually struggle when they die. There is very seldom external physical signs when an animal is struck by lightning. It is an impossibility to be definite as to the cause of the death. We have certain lesions which we look for in lightning strokes, and often animals are killed by lightning which show no indications."

He was then asked this question:

"Assuming the mare in controversy was 14 years of age; that she had always been healthy; that she had worked in the field during the spring work, and was then placed in the pasture about the 15th day of May; that she continued in said pasture until the 16th day of July, the weather being warm, and the mare at all times appearing to be in perfect condition, the mare never, at any time, having shown, from the time she was a colt, any evidence of any illness or sickness of any kind; and assuming further, Doctor, that the mare was in a healthy condition on Sunday night; that she had been accustomed to running in an open pasture from the 15th of May to the 16th of July, that being Sunday evening;

and assuming further that an electrical storm had occurred in that vicinity on the afternoon of the day following, which would be Monday, and assuming further that, on Wednesday morning of the same week, the mare was found dead in the pasture, without any evidence whatever of any struggle, and without the grass or the ground showing that it had been disturbed, on account of any struggle at the point where she was lying,—what would you say, Doctor, from your experience as veterinarian, was the probable cause of the death of the animal under such circumstances? A. I cannot answer.”

Another witness testified that, on the 19th, he examined the horse and the ground around and beneath the point where the horse was lying, and saw no signs of pawing or struggling, and saw no indication that the grass had been crushed or torn; that there was nothing to indicate that the horse had been struck by lightning; that he saw no signs of lightning on the ground around the horse; saw no marks of lightning on the trees; did not see any physical effect of lightning on the horse itself; that his thought was that the horse had been dead 24 hours or more,—maybe 36 hours. All the other witnesses testified substantially the same. This is all the evidence upon which plaintiff predicates his claim that this horse was killed by lightning.

It is conceded that, unless the horse was struck by lightning, plaintiff has no cause of action against the defendant. It is not for us to determine from this record, as an original question, whether this horse was killed by lightning or not. It is sufficient if we are able to say from this record that the evidence fairly presents a question for the jury as to whether it was killed by lightning. When questions about which there is controversy come before the court for determination, with a jury sitting as triers of the fact, it is the business of the court to take the judgment of the jury upon the facts, if, peradventure, the record is such that reasonable



minds, searching for an answer, might reasonably differ as to what the answer should be. This may be established as well, and sometimes better, by circumstantial evidence than by the direct testimony of witnesses. The ultimate question is this: Has the plaintiff sustained his contention by sufficient evidence that reasonable minds, searching for the truth in the record, are able to say from the record, with reasonable certainty, that the fact asserted is as contended? That the plaintiff is not able to make his case beyond a reasonable doubt, is not ground for denying him the right claimed. If an intelligent mind, looking over the field made by the record, is able to find a reasonable and substantial basis, in the facts proven, on which the truth of the contention made may be sustained, the matter goes to a jury. It is presumed to be an intelligent and honest searcher after the truth. When it then says that the ultimate fact is proven, this court does not interfere. Of course, plaintiff cannot recover upon a showing which does no more than disclose a possibility that his contention is true. He is bound to show that it is true, or he must fail; but he is not bound to exclude all reasonable doubt. Whenever the evidence presented in support of any contention is such that it may, when fairly and honestly weighed and considered, produce a conviction in the mind that the fact exists as contended for, it becomes a question for the determination of the legal triers of fact. Proximate cause, under all ordinary circumstances, is a question of fact; and where it depends upon circumstances from which different minds might reasonably draw different conclusions, or where all the known facts point to the claimed negligence as the cause, the submission of the question to the jury is no ground for reversal.

In *Lunde v. Cudahy Packing Co.*, 139 Iowa 688, 701, this court said:

"If there be shown any facts bearing upon the question, and they afford room for fair-minded men to conclude there-

from that one theory of the case is better supported than the other, the question cannot be properly withdrawn from the jury [citing authority]."

It often happens, in the trial of cases, that the record presents two theories, as to the cause of the injury, either one of which might have been correct. One theory precludes and the other includes liability. The jury is bound to gather the truth from the evidence. If the theory which includes liability finds support—rational and reasonable support—in the evidence, the fact that reasonable minds might differ as to which of the two theories is better supported by the evidence, does not justify the court in taking the case from the jury. The question for the court is not whether reasonable minds might differ as to which theory was better supported by the evidence, but whether the theory adopted, upon which liability is predicated, is so sustained by the record that a fair controversy exists as to whether or not it is, in fact, the true theory. When that condition arises in the record, the jury alone has the right to determine, and their judgment, having support in the evidence, is conclusive upon the parties and the court.

That the horse in question died some time between the 16th and the 19th of July, is not disputed. The cause of its death is a matter of controversy. The plaintiff claims that it was killed by a stroke of lightning. The defendant simply says, "Prove it. Prove your claim." This is what the plaintiff undertook to do. The record develops two theories, either one of which may account for the death of the horse. First, it may have been struck by lightning, and so killed. Second, it may have died from natural causes. One theory sustains plaintiff's claim. The other is against plaintiff's claim. The burden is upon the plaintiff to show that it was killed by lightning. No burden is upon the defendant to show that it did die a natural death. In establishing the charge that it was killed by lightning, the plaintiff is met

by the suggestion that the record makes it no clearer that it was killed by a stroke of lightning than that it died from natural causes. This was the shadow cast between the plaintiff and the jury, at the time the motion for a directed verdict was filed. To clear this shadow, the court turned to the record. The facts were all disclosed, surrounding the death of this horse, so far as known. The determination of the question involves a balancing of the probabilities, and the question arose: Could the jury, from the record, say that the mare died from lightning, rather than from natural causes? The policy insured the plaintiff against death from lightning. Therefore, the record must present a state of facts from which the jury could honestly say that it affirmatively appeared in the record that the horse was killed by lightning. The record here shows that the mare in question was 14 years of age; that she had never been sick; that she appeared to be in perfect health from the 16th day of May to the 16th day of July; that she had been in this open pasture, exposed to the elements, during all that time; that, when last seen, on the 16th day of July, she was apparently well; that, on the 17th day of July, an electrical storm passed over the pasture in which she was confined; that, on Wednesday, she was found dead in the pasture. The jury might well find that she died 36 hours before she was found. This would establish her death as occurring at the very time that this storm passed over the pasture. There was no evidence of any struggle, no marks upon the ground beneath her body, or around the place where she was lying, indicating a struggle. There is evidence that horses rarely die from natural causes without giving evidence of some struggle. The jury might well find that lightning does not always leave its mark; that death from lightning is instantaneous, or usually so; that no struggle would follow a death from a stroke of lightning. The jury might well say that, had the death been from natural causes, there would be evidences up-

on the ground of death struggle at the place where she was found, and that the absence of this precluded the thought of death from natural causes. The action of the elements is a matter of common observation. The record shows that, in striking animals, lightning often leaves no mark upon the body. The jury were entitled to bring to their aid, in the solution of this question, a consideration of facts which are commonly known to men—the fact that the action of lightning is dependent largely upon atmospheric conditions. It had direct evidence of facts which negatived conclusions that might be drawn, prejudicial to plaintiff's contention. We think there was a fair fact controversy in this case, and that it was properly left to the jury, and that their verdict is binding upon us, and that the court was right in submitting the case to the jury upon the record made. There being no reversible error, the cause is—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

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CEDAR-RAPIDS SASH & DOOR COMPANY, Appellant, v. A. B. HEINBAUGH et al., Appellees.

**MECHANICS' LIEN:** Subcontractor's Failure to File Claim within  
 1 30 Days. Failure of the subcontractor to file his claim for a  
 lien within 30 days following the furnishing of the last item  
 of labor or material, opens the door to *unrestricted* settlement  
 between the owner and principal contractor, irrespective of the  
 owner's prior knowledge that the subcontractor had not been  
 paid,—a door which remains open until closed by the filing of a  
 claim, with written notice thereof to the owner. If, in the mean-  
 time, and after said 30 days, the owner has settled with the  
 principal contractor, then the belated filing by the subcontractor  
 is futile. (Sec. 3093, Code Supp., 1913; Sec. 3094, Code Suppl.  
 Supp., 1915.)

**MECHANICS' LIEN:** Non-Permissive Payments. The fact that,  
 2 during the progress of an improvement, the owner had full no-  
 tice that a subcontractor was furnishing labor or material, and

had not been paid, and the further fact that, during such time, the owner made payments to the principal contractor which were *then* non-permissible, become wholly immaterial to said subcontractor when the owner fully settles with the principal contractor after the lapse of 30 days from the subcontractor's last item of labor or material, and at a time when the subcontractor had filed no claims for a lien. (Sec. 3093, Code, 1897.)

**MECHANICS' LIEN: Failure to File Claim—Estoppel.** An owner  
3 who induces a subcontractor to refrain from filing a claim for a lien within the time provided by law, under a promise that the claim will be paid by the owner, will not, thereafter, be permitted to plead that the claim was filed too late. Evidence held insufficient to establish an estoppel.

**APPEAL AND ERROR: Finding of Trial Court in Equity Cause.**  
4 The findings of fact by the trial court in an equity cause are persuasive with the appellate court on hearing *de novo*.

*Appeal from Linn District Court.*—JOHN T. MOFFIT, Judge.

JUNE 27, 1918.

ACTION to foreclose a mechanics' lien. Decree dismissing plaintiff's petition. Plaintiff appeals.—*Affirmed*.

C. W. Bingham, for appellant.

Tourtellot, Donnelly & Swab, for appellees.

GAYNOR, J.—I. The defendant Nehls entered into a contract with the defendant Heinbaugh to erect for him a building on a certain lot owned by Nehls. The building was constructed by Heinbaugh under the contract.

1. **MECHANICS' LIEN:** subcontractor's failure to file claim within 30 days. Material was purchased by Heinbaugh from the plaintiff, and used in the building. This was never paid for, and plaintiff brings this action against Heinbaugh to recover the amount due for the material so furnished, and to establish and foreclose a lien on the lot and on the building so erected. The amount due plaintiff for the material is not in dispute. The last item was furnished on August 11, 1916.

No claim for lien was filed until the 23d day of October, 1916, nor was any written notice of plaintiff's claim served on the defendant Nehls, prior to that time. The defendant Nehls settled with Heinbaugh and paid him in full, on the 18th of September, 1916. During the time intervening between August 11th and September 18th, defendant Nehls had more than enough money due Heinbaugh, under the contract, to satisfy all claims against the building. More than 30 days elapsed between the furnishing of the last of the material and the time when Nehls settled with Heinbaugh, and more than a month passed after Nehls had settled with Heinbaugh before plaintiff filed his claim for a mechanics' lien, and before he served on Nehls any *written* notice of the filing. If nothing further appeared, plaintiff clearly has lost his right, as a subcontractor, to enforce his claim against the owner and his property. It is claimed, however, and admitted, that defendant Nehls had actual notice of the fact that plaintiff was furnishing material for the building, on credit, during the time it was being furnished; and knew, after it had been furnished, and before he settled with Heinbaugh, that it had not been paid for. Does this fact change the situation, it appearing that no statement for a lien was filed, and no notice served upon the owner within 30 days from the date of the last item?

The statute provides (Section 3089, Code, 1897) :

"Every person who shall \* \* \* furnish any materials \* \* \* for any building, \* \* \* upon complying with the provisions of this chapter, shall have for his labor done, or material \* \* \* furnished, a lien upon such building \* \* \* and upon the land belonging to such owner on which the same is situated."

Under this statute, the lien is dependent upon a compliance with the statute.

Section 3092 of the Code provides :

"Every person, whether contractor or subcontractor, who wishes to avail himself of the provisions of this chapter, shall file with the clerk of the district court of the county in which the building \* \* \* to be charged with the lien is situated a verified statement \* \* \* of the demand due him, \* \* \* setting forth the time when such material was furnished, \* \* \* and when completed, and containing a correct description of the property to be charged with the lien."

By the terms of this statute, this statement must be filed by a subcontractor within 30 days from the date on which the last of the material was furnished. But a failure to file the same within that period does not defeat the lien, except as against purchasers or incumbrancers in good faith, without notice, whose rights accrued after the 30 or 90 days, and before any claim for the lien was filed.

Section 3093, Code, 1897, provides that, to preserve his lien against the owner, and to prevent payments by the latter to the principal contractor, or to intermediate subcontractors, but for no other purpose, the subcontractor *must*, after commencing such labor or furnishing such material, and within 30 days after the completion thereof, serve upon such owner a *written* notice of the filing of such claim.

From these statutes it is apparent that one who furnishes material for any building is entitled to a lien for the material so furnished. This lien in favor of the principal contractor continues for 90 days, and in favor of the subcontractor, for 30 days, without any filing and without any notice. After the expiration of the 90 or 30 days, as the case may be, the lien is not available to him against purchasers or incumbrancers in good faith, without notice, unless he has filed a statement for a lien, as provided in Section 3092. If the principal contractor fails to file his claim for a lien, as provided, then his lien as against innocent purchasers, etc., is not enforceable. In the case of a subcontractor, if he fails to file a statement for a lien, as provided in the above sec-

tion, he, too, loses his lien as against innocent purchasers. etc. So, in either case, a failure to file the statement for a lien subordinates any lien to the rights of innocent purchasers whose rights accrued after 30 or 90 days, as the case may be. The lien is given for 90 and 30 days, respectively, without any action, and is protected by the statute; and after that time, some action is necessary in order to preserve the lien as against certain other people.

Section 3093 suggests another condition in case of subcontractors. The lien being preserved by the statute for 30 days, the owner, if he would protect himself against the lien, must reserve sufficient of the contract price to discharge the lien. After 30 days, he is at liberty to pay the sums agreed to be paid for the construction of the building to those who are entitled to receive the same, without regard to any claims of subcontractors, unless the subcontractors take the steps necessary to preserve their lien beyond that period; and to this end, they are required to serve a written notice upon the owner. This written notice serves a double purpose. It continues the lien of the subcontractor, and at the same time enables the owner to protect himself against the lien by withholding from the principal contractor sufficient of the contract money to discharge the lien. Therefore, it would seem that, after the 30 days, no written notice having been served upon the owner, as required by Section 3093, the owner is at liberty to settle with the principal contractor, or to dispose of the contract money in any lawful way, without regard to the claims of the subcontractor. He is justified in assuming that the subcontractor does not desire to preserve his lien further against the property, and has elected to look to some other source for the satisfaction of his claim. So the law has made this just provision that, to preserve the subcontractor's lien, he must serve the owner, within 30 days after the completion of the work, with notice in writing that he has filed a lien, and will insist upon a lien against the prop-



erty. This is a warning to the owner not to pay any more money to the principal contractor until this debt is settled; otherwise, the property will be holden for it. If the owner does then pay the principal contractor the balance due, or any sum of money, the owner's property may be subjected to the payment of the claim. Now, in this case, the plaintiff did not serve this written notice. After 30 days, settlement was made with the principal contractor. Not having had any notice in writing, such as the statute contemplates,—no statement for a lien having been filed,—the owner was justified in assuming that the subcontractor did not desire to preserve his lien against the building; that he was looking to some other source for the satisfaction of his claim. If nothing further appeared in this record, the failure to serve this notice would defeat plaintiff in his claim, because it is conceded that he did not file his claim or serve his notice until long after the expiration of the 30 days. He did, however, file his claim on October 23d, and did then serve the notice the statute requires. It was too late then to preserve his original lien in all its fullness. However, the statute comes to the relief of subcontractors, even then, and Section 3094 of the Supplemental Supplement to the Code, 1915, provides that a subcontractor may, at any time after the expiration of said 30 days, file his claim for a lien, and give written notice thereof to the owner; and, when this is done, his lien shall have the same force and effect as if filed within the 30 days, but can be enforced against the property only to the extent of the balance due from the owner to the contractor at the time of the service of such notice upon him.

So it follows that if, after the expiration of the 30 days originally given in which to file the statement for a lien and serve the notice, and before the actual filing and the service of the notice, the owner settles with the contractor, there is nothing then available to the subcontractor, under this method of procedure. He sinned away his day of grace,

as it were, and is left without remedy against the property. That is the situation here. At the expiration of 30 days from the furnishing of the last material by the plaintiff in this suit, and during that 30 days, the defendant Nehls had money due the principal contractor, with which to discharge the obligation. No lien was filed by the plaintiff at the expiration of the 30 days, and no written notice served on the owner, Nehls. Nehls was justified in assuming that plaintiff was looking to some other source for the satisfaction of his claim, and was justified in settling, then, with the principal contractor, without regard to plaintiff's claim.

The statute requires that the subcontractor serve the owner with written notice. This is explicit. Oral notice or constructive notice cannot be substituted for the plain requirements of the statute. This, undoubtedly, was for the purpose of making certain the status of the parties, and to avoid frauds and perjury.

There seems to be an impression among some that the holdings of this court are to the effect that, though no written notice is given, if the owner knew that the material was being furnished for the building and was not paid for, he could not settle with the principal contractor without protecting the subcontractor so furnishing material. These cases, when analyzed, will be found to say simply that the owner who has made a contract with the principal contractor to pay stipulated sums at stipulated times, cannot even do this, if he knows that the subcontractor is furnishing for the building material that is not paid for, provided the subcontractor thereafter completes his lien in accordance with the statute; or, in other words, that the fact that the owner pays according to his contract will not relieve him against one who furnishes material and subsequently complies with all the requirements of the statute to effectuate a lien, if he knows, before the payments are made, that the material is

2. MECHANICS'  
LIEN: non-  
permissive  
payments.

being furnished for which a lien may be subsequently claimed, and is claimed.

In *Chicago Lbr. & Coal Co. v. Garner*, 132 Iowa 282, the payments were made in accordance with the terms of the contract. The owner, at the time he made the payments,—though in accordance with his contract,—had knowledge that plaintiff was furnishing material. It is said in that case:

“If she [the owner] was aware of this, the law seems to be well settled that payment to the contractor will not constitute a defense.”

This means a defense against one who subsequently complies with all the statutory requirements, and preserves his lien against the property.

It will be noticed, in those cases in which such expressions as the above are used, that the subcontractor did comply with the statute. This is also true in *Nancolas & Howard v. Hitaffer & Prouty*, 136 Iowa 341. In this *Nancolas* case, the claim and affidavit were filed within the time required by the statute, and the question was whether or not payments made strictly in accordance with the requirements of the contract would protect the owner against the claims of the subcontractor so preserved. In that case, it is said:

“It appears from the record that Bartlett [the owner] knew, very soon after the work on this building commenced, that the hardware was being furnished by these plaintiffs; and, this being true, he had no right to pay out the reserve funds which he held in his hands on other claims for which no lien had been filed; and, having done so, he is liable for the plaintiff's claim.”

The basis of this statement is that the plaintiff had complied subsequently with all the requirements of the statute entitling him to a lien; and until his right to do so had expired, the owner, knowing that he was furnishing material,

could not protect himself by simply showing that he paid in accordance with his contract.

Turning back, in the history of litigation on this subject, to our early cases, we find *Lounsbury v. Iowa, M. & N. P. R. Co.*, 49 Iowa 255. At the time this case was decided, the statute provided, speaking of subcontractors, that:

"To preserve his lien as against the owner, and to prevent payments by the latter to the principal contractor, \* \* \* but for no other purpose, the subcontractor must, within the 30 days as provided in Section 6, serve upon such owner \* \* \* a written notice of the filing of said claim.' \* \* \* It will be seen that a 'written notice of the filing of the claim' must be given the owner. That is to say, the owner must be notified that a claim has been filed in the clerk's office. When he receives such a notice, the owner may examine the claim filed, and determine its sufficiency; but whether he does so or not, all after payments are made at his peril. The opportunity, however, must be given him to determine whether he can safely pay or not. This is a statutory right, that cannot be omitted. As this is a statutory lien, it matters not what notice or knowledge the owner may have, if the required notice is not given, at least in substance. No such thing as constructive notice is known to, or recognized by, the statute. Now the only notice given the defendant was the original notice, served when the action was commenced. We have looked in vain for any statement therein that a claim for a lien had been filed in the clerk's office or elsewhere."

In *Chicago Lumber Co. v. Woodside*, 71 Iowa 359, an action establishing and foreclosing a submechanics' lien, the last item appears to have been furnished on October 8, 1885. Within 30 days therefrom, the subcontractor filed a statement for a lien and served notice, as required by the statute. Before this notice was served, however, the owner

had notice that the material was being furnished. It was held that, where the owner knows that subcontractors are furnishing materials for his building, he should not be excused in paying the principal contractor, until the time expired in which the lien for the material so furnished might be perfected by the filing of statement for the lien and service of notice, and it was said:

"Nor is it any hardship upon him to require that he shall withhold payment during the time which the law allows the subcontractor to perfect his lien."

In that case, the subcontractor did perfect his lien within the time, and the owner was held, notwithstanding he had made payment, we may assume, strictly in accordance with the terms of his contract prior to the filing of the lien.

*Frost v. Rawson*, 91 Iowa 553, was an action by a subcontractor to enforce a mechanics' lien. The statute then was, in respect to the matter under consideration, substantially as now. It was said:

"When the different sections and provisions of the law are considered, the proper construction seems clear. The notice to preserve the lien is a *written* one, served on the owner. It is not a verbal notice that a claim has been filed, as was done in this case."

In *Merritt & Allen v. Hopkins*, 96 Iowa 652, an action by a subcontractor to enforce his lien, the plaintiff filed his statement for the lien within the time, but did not serve written notice upon the owner of the filing of the claim. However, on the next day after it was filed, and within the 30 days, he commenced an action to establish and foreclose his lien. An original notice was served. It was claimed that the service of the original notice was sufficient compliance with the statute requiring written notice of the filing of the lien to be served upon the owner. The court said:

"The original notice was in the usual form in such cases. It stated the amount claimed, and described the property upon which the lien was sought, but made no reference to the filing of the claim for a lien."

Then, citing the statute as it then was, substantially the same as the statute now under consideration, the court said:

"In *Lounsberry v. Railroad Company*, 49 Iowa 255, it was held that the failure to serve written notice on the owner that a lien had been filed, defeats the lien of a subcontractor. \* \* \* In that case, as in this, an action was commenced in which an original notice was served; but, as that did not state that a lien was filed, it was held that it could not be regarded as a written notice of the filing of the lien. \* \* \* This seems to be conclusive against the establishment of the liens of Merritt & Allen."

See, also, *Wheelock v. Hull*, 124 Iowa 752.

In *Page & Son v. Grant*, 127 Iowa 249, the defendant insisted that he had paid the purchase price in full, in strict accord with the terms of his contract, and could not be made liable to subcontractors for any further or greater sum. He admitted, however, that, during the process of the work, and before he had made full payment in accordance with the terms of his contract, he acquired knowledge from certain subcontractors that they were furnishing material for his building that had not been paid for, and, as to one of them, before the last two payments were made, and as to the other, before the last payment was made. This court said:

"As to these, the owner was not, under our more recent holdings, as well as some of the earlier ones, justified in paying the principal contractor, even in strict accord with the terms of the contract [citing authority]. If the owner observes the law, he cannot, of course, be made liable to subcontractors in such a way or to such an amount as to increase or add to the contract price of the building. But by

failing to observe his original contract as to time of payment, or to follow the law as to the rights of subcontractors, he may become liable for more than the original contract price."

In this case, the statute which the owner failed to observe, and to which reference is made in the opinion, is that which gives to a subcontractor a lien for 30 days after the furnishing of the last item of material, without any statement, and the right to continue his lien by filing a statement and by serving notice in writing upon the owner of that fact. In this case, the last item in Page & Sons' account was on October 28, 1901, and it was found that the notice required by the statute was served within the statutory time. The court said:

"Going to the record, we find that the objection is not that no notice was, in fact, given, or to the form thereof, but to the proofs of service thereof."

The court held that no proper objection was urged to the proof, and that the proof should be held sufficient, and that it showed service in time. So the holding of this case simply is that payment by the owner to the principal contractor, when he knows the subcontractors are furnishing material, though the payments are made strictly in accordance with the terms of his contract, will not protect him against a subcontractor who, within the statutory period, perfects his lien by filing a claim for a lien and serving the written notice required by the statute.

*Johnson & Sons v. Des Moines, I. F. & N. R. Co.*, 129 Iowa 281, holds simply, so far as this point under consideration is concerned, that, if the owner is indebted to the principal contractor at the time the subcontractor commenced his action to enforce his lien, the service of the 30 days' notice is immaterial, because the owner had in his hands funds sufficient to meet the demands of the subcontractor at the time suit was commenced. In this case, the claim for a lien was filed after the 30 days

had expired, and the subcontractor was only entitled to a claim against so much of the fund as was in the hands of the owner at the time; and sufficient was then in his hands.

In *Simonson Bros. Mfg. Co. v. Citizens St. Bank*, 105 Iowa 264, it is held that the statement for a lien was filed within 30 days of the time of delivering the last of the material, and that, on that day, plaintiff served written notice of its claim. It was said:

"It is not denied that, prior to this time, the bank had knowledge of the fact that Lofgren was purchasing material from plaintiff. Defendant claims to have paid Lofgren in full."

It was also said that the payments were made in accordance with the terms of the contract. This was its defense, and it was held that defendant had no right to settle with Lofgren in full, under the circumstances disclosed in the record. The case of *Epeneter v. Montgomery County*, 98 Iowa 159, is distinguished.

We think that, in recognition of the justice of the doctrine announced in these cases, the legislature enacted the following:

"No owner of any building \* \* \* upon which a subcontractor's mechanics' lien may be filed under the provisions of Section 3092 of the Code shall be liable to an action by the original contractor for compensation for work done or materials \* \* \* furnished for any building \* \* \* until the expiration of 30 days from the completion of said building \* \* \* unless the original contractor shall furnish to the owner of said building \* \* \* receipts and waivers of claims for mechanics' liens, signed by all persons who performed any labor or furnished any material \* \* \* for said building, \* \* \* or unless the original contractor shall furnish to the owner a good and sufficient bond to be approved by said owner, conditioned that said owner shall be held harmless from any loss which he may sustain by reason of the filing of sub-



contractor's mechanics' liens." Section 3093, Supplement to the Code, 1913 (Chapter 267, Acts of the Thirty fifth General Assembly, Sec. 1.)

This statute is intended to serve a double purpose: To protect submechanic lien holders, and to preserve the funds in the hands of the owner to the satisfaction of such liens as may be properly preserved; and second, to protect the owner from double liability. It is true, in the case under consideration, that the record does not directly show when this building was completed; but we must assume that it was completed at least as early as the 18th day of September. The plaintiff did not file his claim or serve his notice until the 23d of October, which was more than 60 days after it had completed furnishing material for the building, and more than 30 days after the building itself was completed. At the time the lien was filed and the notice given, no funds belonging to the principal contractor, or out of which liens could be paid, were in the hands of the owner. It followed, therefore, that the plaintiff has no ground for insisting upon any lien against the property, unless he is protected by the matters further pleaded by him, to the consideration of which we now turn our attention.

II. It is claimed, however, that the defendant is estopped from insisting that the claim was not filed and notice served in conformity with the statute. The facts urged upon which the estoppel is predicated are stated in this language:

That, soon after the last of the materials were furnished, under the contract, and within the 30 days, the plaintiff presented its account to the defendant Nehls for payment. The plaintiff then told the defendant that the account would have to be settled, or it would file a statement for a mechanics' lien against the building. The defendant informed the plaintiff that he need not file any statement for a mechanics' lien, for the reason that the principal contract-

3. MECHANICS' LIEN: failure to file claim: estoppel.

or had given a bond of indemnity, which bond was for the purpose of paying plaintiff's claim, with other claims for material and labor entering into the erection of the building, and the defendant would see that the plaintiff's bill was paid. The plaintiff, a second time, and within the period given for filing a statement for a lien, presented its account to this defendant, and was informed that a bond had been filed by the principal contractor; that said bond was for the payment of all claims for materials that were used in the building, and that plaintiff's claim would be paid; that it wasn't necessary to file a statement for a mechanics' lien. Relying upon the word of defendant, and believing it to be true, plaintiff did not file its claim within the statutory period. It would have done so, except for the assurance given by the defendant. Therefore, defendant is now estopped from insisting that plaintiff should be defeated because of its failure to file a statement for a lien, and to serve the notice within the statutory period.

We are inclined to believe that this plea would be good, if sustained by the evidence. It appears without question that, before the plaintiff had completed furnishing the material, it sent one of its agents to the defendant to see what provision was made for the payment of the claim. This was before all the material was delivered. Three visits seem to have been made. There is controversy as to what transpired at these several visits. The burden is on the plaintiff to sustain his alleged estoppel. It is claimed that this agent informed the defendant that the principal contractor had not paid, and that it would have to hold the owner responsible; that the defendant owner then said:

"I have taken out a bond to be sure that everything is paid, and I will see that it is paid. I will take it up with the factory [meaning the plaintiff]. I don't want the lien filed, as it would hurt the property." To this the agent responded, "We want somebody to pay this bill." The de-

fendant said: "It isn't up yet. Let it go for a few days and see if the principal contractor, Heinbaugh, won't settle." Defendant then said he would see that the bond company would take care of it; that he would see that everything was taken care of; that substantially the same thing was said on the other visits, with the further statement that, since he had a bond, he wasn't going to pay twice; that the bond would have to pay it.

Plaintiff's witness further says that the reason why these visits were made was to ascertain whether the bill would be paid within the 30 days, and if not, a lien would be filed; that they did not file the lien because of the statement made by the defendant.

On cross-examination, this witness said:

"The defendant said he would see the bond company's representatives and see that we got our money. The defendant did not promise to pay the bill, but said he would see that the bond company would pay; that he had a bond and would see that the bond company would pay it. He didn't say at any time that he would pay the bill. No request was made by us to see the bond, and the conditions of the bond are not known. Defendant said, in these conversations, he thought Heinbaugh would pay the bill. This was about the middle of July, a trifle less than a month before we furnished the last material."

He said further, on cross-examination:

"I told him we would hold the building responsible for the bill; that we would file a lien within the time limit. In substance, I told him that we would hold him personally responsible for the bill. He told me he was protected by a bond, so far as he was concerned. He didn't want us to file a lien. He said it didn't make any difference to him financially whether we filed a lien or not; that, having a bond, it would not make any difference to him; that, so far

as he was concerned, he was protected by a bond. He told me to see Heinbaugh. I saw Heinbaugh."

Plaintiff's testimony tends to show that the defendant said that he had a bond, and that he understood that the bond would protect plaintiff's claim; that the bond company would do it. He said he had filed a claim with the bond company, and said:

"He gave me to understand in November that the bond company was to pay. He said he would do all he could to get our pay and have our bill cleaned up. He gave us then to understand that he was entirely protected by the bond, so that he would not have to pay anything."

The defendant's testimony contradicts the plaintiff's. Defendant admits having conversations with Pettis, plaintiff's agent, and that Pettis told him that his company was furnishing millwork for the house, and that it had not received its money for the millwork, and was thinking of putting a lien on to protect itself. Defendant says that he then said to Pettis:

"If you want to put a lien on, I couldn't stop you; and further, I don't care if you put a dozen liens on. I am protected by a bond. I did not tell him, in that conversation or in any conversation, that I didn't want him to file a lien, or that I would see that the bond company would pay the bill. I asked him if he had seen Heinbaugh, and he said, 'No.' I told him Heinbaugh might pay the bill if he was seen. I said, 'You are using the man rather rough to do this behind his back. You better see him.' He said he would."

Defendant further said that he called Heinbaugh up, the next morning, and told him what the plaintiff's representative had said. The next morning, Heinbaugh came to defendant's house, and they again discussed what plaintiff's representative had said; and Heinbaugh said that he had just come from the mill, and had satisfied the mill people.

Defendant further said that he never told Pettis that he would see the bonding company, or that he would see that the bonding company paid plaintiff. He never said that, if plaintiff didn't file a lien, he would see that the bill was taken care of. After Heinbaugh told him he had satisfied the mill people, Nehls dropped the matter, and, on the 18th day of September, settled with Heinbaugh. Nehls further testified that neither the plaintiff nor any of its agents told him, after they had seen Heinbaugh, whether Heinbaugh had satisfied them or not. He said, "I supposed that Heinbaugh had satisfied the mill in some way before I made the settlement."

Heinbaugh testified for the defendant Nehls and said that, after Nehls called him up, and informed him of the conversation with plaintiff's representative, he called on the plaintiff, and the plaintiff told him they were going to file a lien; and he told the plaintiff that, if they would be a little easy, they would have their money in a few days.

"They agreed to wait a few days,—ten days I believe I asked them for. So they agreed to that. During that time, I gave them \$300. I don't know which job it was applied to. I had other jobs. When I paid them the \$300, they said they ought to have all of it, and I told them I couldn't raise it all then; that I could, probably, in a few days; and they didn't say anything more about the lien. I then saw the defendant. He asked me whether I had seen the Sash & Door Company. I said 'Yes.' He asked how I came out. I said I had satisfied them. I don't remember the exact words. He said 'Good.' It was after this that I settled with the defendant."

The witnesses who gave this testimony were before the trial judge. He had an opportunity to judge of their credibility and undoubtedly did so. In reaching his conclusion,

he found against plaintiff's claim of estoppel.

4. APPEAL AND  
ERROR: finding  
of trial court  
in equity cause.

Of course, this case is triable *de novo* here, and it is our duty to pass upon the record as made, as an original proposition. But we cannot relieve ourselves of the feeling that the district court was in much better position to judge of the credibility of these witnesses than it is possible for us to be. Moreover, when we consider the reasonableness of the stories told, upon which the estoppel is predicated, we are not inclined to adopt plaintiff's contention. This record discloses no motive on the part of the defendant to avoid the payment of this claim. He had the money in his hands, out of which the claim could be paid, and relieve his property and himself from any double liability. It occurs to us that, after Heinbaugh had come to this plaintiff and had made some adjustment,—paid them \$300—it doesn't matter where that was applied,—and they agreed to some extension, no matter for how long, they should have notified the defendant of that fact. Instead of that, they never communicated with the defendant again, until long after the time for filing the claim had expired, and defendant had paid the principal contractor in full. It may be noted, as a fact of common observation, that materialmen stand in peculiar relationship to these contractors and builders. Through them, much of the material is sold. A motive not to offend by hasty requirements of settlement is disclosed. It seems to have been the thought here. At least, the suggestion is in some manner explanatory of plaintiff's delay, rather than the statements claimed to have been made by the defendant. However, as the burden rested on the defendant to establish the facts upon which the estoppel rests, he cannot succeed in this case until he has shown, by at least a fair preponderance of the evidence, that the facts are as he claims them to be. This we think he has not done.

The fact that the district court, with these witnesses

before it, so concluded, gives additional weight to the thought that comes to us upon a reading of the record. The estoppel not having been sustained by sufficient evidence, and the plaintiff having failed to file his lien, as required by the statute, we think the court was right in denying him the relief prayed for, and the case is, therefore,—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

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LAURA CLINE, Appellant, v. C. P. CLINE, Appellee.

LAURA STRICKEL, Appellant, v. HARRY W. HILL et al.,  
Appellees.

**DIVORCE: Unsupported Conditions.** A modifying order in divorce

- 1 proceeding which requires the defendant father to support an immature child, who was not born at the time of the original decree of divorce, may not, *in the absence of evidence of the mother's unfitness*, be made conditional upon the mother's surrendering the custody of the child to persons other than the defendant father, nor conditional upon the court's selecting the proper school for the child's education. (Sec. 3180, Code, 1897.)

**EXECUTORS AND ADMINISTRATORS: Allowance to Surviving**

- 2 **Wife—Divorced Wife—Right to Allowance.** Concede, *arguendo*, the right of a divorced wife, under Sec. 3314, Code, 1897, upon the death of the unsuccessful defendant in divorce proceedings, to an allowance, out of the defendant's estate, for a year's support for defendant's child, who was unborn at the time the original divorce decree was entered, yet such right is effectively foreclosed by a former modifying order of the divorce decree wherein said defendant was required to support said child.

**DIVORCE: Supplemental Proceedings—Attorney Fees.** Concede,

- 3 *arguendo*, that the court has power to allow attorney fees in supplemental proceedings to obtain modifications of a divorce decree, yet such allowance is largely a matter of discretion with the trial court. (Sec. 3177, Code, 1897.)

*Appeal from Polk District Court.*—W. S. AYRES, Judge.

*Appeal from Madison District Court.*—LORIN N. HAYS,  
Judge.

MARCH 12, 1918.

REHEARING DENIED JUNE 27, 1918.

C. P. Cline (now deceased) and Laura Cline were formerly husband and wife. On April 10, 1909, in an action then pending in the district court of Polk County, the wife was granted a divorce from her said husband, with an allowance of alimony in the sum of \$10,000, and \$500 for counsel fees. This decree has never been reversed or set aside; but, by some subsequent arrangement, the recovery of permanent alimony was adjusted and settled, by payment to plaintiff of \$6,000. There was also a modification of the decree respecting the custody of a daughter, who has since become of age—a matter having no bearing upon the present controversy. Since then, the plaintiff has remarried. On January 22, 1916, plaintiff petitioned the district court for a modification of the divorce decree, alleging that, at the date of its rendition, she was pregnant, and that a child of her marriage with defendant was thereafter born to her; that the divorce decree made no provision for its care or support; that defendant has never contributed anything for that purpose; that she has sustained financial losses, and is without means to care for and educate such child, while defendant is amply able to do so; and she asks that the decree be so modified as to require defendant to contribute equitably to that purpose. The defendant resisted the application. Upon trial to the court, it was ordered that the decree of divorce be so modified as to charge the defendant with the support of the child, Gladys Cline, during her minority; but there was annexed to such order a condition, as follows: That the legal custody of said child be committed to her sister, Mrs. Bilz; and that she be placed in a school or institution of learning



to be designated by the court; and that the expense of her maintenance and ~~education~~ be paid by the defendant, to an amount not exceeding \$40 per month; and, if plaintiff elected not to surrender the child, in accordance with these provisions, then the defendant should "not be bound by the decree." The plaintiff, declining to comply with this condition, has appealed. Pending the appeal, an order was entered by this court, requiring the defendant to pay plaintiff, for the support of the child, the sum of \$30 per month, until the final determination of the cause upon its merits. Soon after the appeal was perfected, the defendant died, testate; and, his will having been probated in Madison County, Harry W. Hill and Pearl Bilz duly qualified as executors thereof, and have been substituted as defendants herein. Thereafter, plaintiff applied to the district court of Madison County for an allowance of \$500 for the support of the child, Gladys, for one year from the death of the testator, relying therefor upon the provisions of Code Section 3314, as authority for such claim. The claim was opposed by the executors, who, among other things, offered in evidence the modification of the divorce decree, charging the defendant with the support of the child. The trial court, expressing the view that plaintiff would be entitled to the allowance asked, were it not that the support of the child had been provided for by the order modifying the divorce decree, overruled the application; and from this ruling, plaintiff has appealed. The two appeals have been submitted together, and will be disposed of in a single opinion.—*Modified, affirmed, and remanded, on first appeal; affirmed on second appeal.*

*E. J. Kelly*, for appellant.

*John A. Guiher* and *J. W. Rhode*, for appellees.

WEAVER, J.—I. The defendant did not appeal from the order so modifying the divorce decree as to charge him with liability for the support of the child, Gladys, and plaintiff

1. DIVORCE: un-  
supported con-  
ditions.

appeals therefrom only because of the condition attached thereto, requiring her to surrender the legal custody of her child to Mrs. Bilz, and to commit the temporary custody of the child to some school, to be designated by the court. We shall, therefore, confine our attention to this feature of the controversy. There is little or nothing disclosed in the record to indicate the reason for taking this child of six or seven years of age from the custody and care of her mother and natural guardian. To supply this apparent lack, reference is made in argument to the allegations made and evidence offered by defendant in the original divorce case, attacking the woman's character, and to the declarations by the defendant denying or questioning the paternity of the child. It is sufficient to say, in this respect, that the trial court, upon consideration of the merits of the original case, found the plaintiff entitled to a divorce, and dismissed the defendant's cross-petition; and, in the absence of any later showing of any unfitness of this mother to have the care and custody of her infant daughter, we must assume that she has not forfeited her parental rights. It may be that, had the defendant expressed a desire or willingness to support and care for the child, and had asked that she be given into his custody, an order for that purpose might have been reasonable; but no such suggestion appears to have been made by him. On the contrary, it would seem that he repudiated all liability for her support, if not, also, the fact of his parental relation, and that he maintained this attitude to the end of his life, and by his will excluded her from any share in his estate, thus indicating an entire lack of parental interest and affection on his part. Such being the case, it should require a remarkably strong showing of circumstances to sustain a decree which, while finding the defendant liable for the child's support, makes his performance of that duty depend upon the consent of the mother to the sur-

render of her natural and legal right to the custody and society of her infant daughter. That the court has power to make such order, in a proper case, is not to be denied; but, in the absence of a clear showing of the moral unfitness of the mother, or some other extraordinary condition affecting the best interests of the child, it is not to be justified. No attempt appears to have been made to prove or establish any such defense to the modification of the decree. The answer filed, resisting the application, in no manner challenges the right or fitness of the plaintiff to the custody of her child, but rests the defense solely upon the proposition that the defendant's obligation had been determined by the original decree, which he had duly performed, and that there had been no such change in the financial circumstances of the parties as would justify any modification of the provisions for alimony. We are of the opinion, therefore, that the order adjudging the defendant's liability to contribute to the support of the child, Gladys, should be modified by eliminating therefrom the condition which made the performance of that duty depend upon plaintiff's consent to relinquish the custody of said child to another, or to permit its commitment to a school, to be determined by the court. In view, however, of the fact that the order fixing the liability for support at \$40 per month contemplated a somewhat enlarged expenditure, by reason of the provision for the child's commitment to some school,—a provision which, we hold, should be eliminated,—it is, perhaps, but just that the monthly allowance be reduced from \$40 per month to \$30 per month, to correspond with the *ad interim* or temporary allowance provided by the order of this court for the child's support pending the litigation. The order modifying the decree of divorce will, therefore, be modified by reducing the plaintiff's recovery for the care and support of the minor child, Gladys Cline, to \$30 per month, and also by eliminating the further provisions by which the payment of said allowance is conditioned

upon the plaintiff's relinquishment of her right to the custody of said child. As the record before us does not disclose how much, if anything, has been paid to the plaintiff in discharge of the allowance made her by this court, the cause will be remanded to the district court of Polk County for its ascertainment, and for the entry of judgment allowing plaintiff's claim as a charge upon the estate of C. P. Cline, at the rate of \$30 per month from July 15, 1916, less the payments, if any, since made thereon, and for future payments at the same rate at quarterly periods during the minority of such child.

II. Referring now to the appeal from the order of the district court of Madison County, denying plaintiff's motion for an allowance for a year's support for her child, we ex-

press no opinion at this time, upon the question whether plaintiff, as the divorced wife of the deceased Cline, has any standing, under any circumstances, to claim an allowance pursuant to the provisions of Code Section 3314. It is enough, at this time, to say that if, under some conditions, such right may exist, we think the trial court did not err in holding that the allowance already granted in the modification of the divorce decree for the support of the child, satisfies the requirement of the law; and that the application for additional relief in that line was properly overruled.

It should also be said that, in the proceeding to modify the divorce decree, plaintiff asked an allowance for the payment of her attorney's fees; but the court refused the request, and of this ruling complaint is also made. There is, perhaps, room for doubt whether the law authorizing the allowance of counsel fees in divorce proceedings is broad enough to justify the taxation of such fees in proceedings of a supplementary character, after the divorce has been

2. EXECUTORS AND  
ADMINISTRATORS:  
allow-  
ance to sur-  
viving wife:  
divorced wife:  
right to allow-  
ance.

3. DIVORCE: sup-  
plemental pro-  
ceedings: at-  
torney fees.

granted and the alimony and the fees taxed therein have been paid. But, assuming that appellant is correct in the proposition that such authority exists, we hold to the view that the taxation of such fees is largely a matter of discretion, and that, under all the circumstances, this discretion was not improperly exercised by the trial court. It follows that the motion for the taxation of attorney fees in this cause must be, and is, denied.

Further discussion is unnecessary. The order of the district court of Polk County, requiring defendant to contribute to the support of the child, will be modified, as herein indicated, and, as thus amended, is affirmed; and the ruling of the district court of Madison County, denying plaintiff's application for allowance against the Cline estate, is affirmed, without modification. The costs upon the first appeal will be taxed to the executors, who have been substituted as defendants, and the costs upon the second appeal will be taxed to the plaintiff.—*Modified, affirmed, and remanded, on first appeal; affirmed on second appeal.*

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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DES MOINES CITY RAILWAY COMPANY, Appellee, v. CITY OF  
DES MOINES, Appellant.

**MUNICIPAL CORPORATIONS: Assessments—Railroad Right of**

- 1 **Way as Abutting Property.** A strip of land extending along the center of a public street, but which is *no part of the street*, because owned in *fee* by a street railway company which occupies it with its tracks, the public being wholly excluded from all right therein, except at intersecting street crossings, is "abutting property," within the meaning of Sec. 792 *et seq.*, Code Supp., 1913, and consequently subject to special assessment for public improvements on the street.

**DEEDS: Fee (?) or Easement (?)—Railway Right of Way. A**

- 2 deed which "sells and quitclaims to the grantee all the right,

title, and interest" of the grantor, carries a *fee*, and not a mere easement, even though coupled with an agreement that grantee will use the land for the construction and operation of a street railway.

**DEEDS: Estates in Fee—Possibility of Reverter.** An estate in *fee* 3 is not deprived of such characteristic by a clause in the deed providing for a "possible reverter."

**RAILROADS: Eminent Domain—Non-Existence of Right.** Lands 4 may not be condemned for street railway right of way, for the reason that the Eminent Domain Act does not so provide.

**TAXATION: Exemptions—Railway Right of Way—Special Assess-**  
5 **ments.** Taxation is the rule; exemption, the exception. And courts will not create the exception. So held where it was urged that a street railway right of way, owned in fee, ought, by reason of its use *as a right of way only*, to be held exempt from special assessments for paving.

**MUNICIPAL CORPORATIONS: Assessments—Railway Right of**  
6 **Way Abutting on Street.** The statute (Sec. 834, Code, 1897), which imposes the duty upon all railways to pave between the rails of their tracks and one foot outside, does not apply to a railway right of way which is owned by the company in fee, and which is no part of the street, but which abuts on a street.

**MUNICIPAL CORPORATIONS: Assessments—Railway Right of**  
7 **Way.** The term "railroad," as employed in Sec. 791-1, Code Supp., 1913 (authorizing special assessments for public improvements against railroad right of ways fronting or abutting on public streets, etc.), includes a *street* railroad.

**MUNICIPAL CORPORATIONS: Assessments—Railway Right of**  
8 **Way—Street Railway Defined.** Conceding, *arguendo*, that Sec. 791-1, Code Supp., 1913 (authorizing assessments against railroad right of ways for paving, etc.), is not applicable to "street railways," yet such section is applicable to a railway which, along the center of a public street, occupies with its tracks a strip of ground which it owns in fee, which is no part of the street, and in which the public has no interest, except at street crossings. Such a railway is not a *street* railway.

*Appeal from Polk District Court.*—W. H. McHENRY, Judge.

SEPTEMBER 30, 1916.

SUPPLEMENTAL OPINION ON REHEARING, DECEMBER 20, 1917.

REHEARING DENIED JUNE 27, 1918.

THE plaintiff's property having been assessed for the expense of paving and curbing Ingersoll Avenue in the City of Des Moines, appealed therefrom to the district court, where the assessments were held to be invalid, and set aside. From that decision, the defendant city appeals.—*Reversed*.

*H. W. Byers, Guy A. Miller, Thomas Watters, Jr., and Earl M. Steer, for appellant.*

*Parker, Parrish & Miller, for appellee.*

WEAVER, J.—There is very little controversy as to the essential facts involved in this litigation. The plaintiff claims to own and operate a system of street railways in the

1. MUNICIPAL  
CORPORATIONS:  
assessments:  
railroad right  
of way as abut-  
ting property.

city of Des Moines, and to own and occupy a right of way for its road 20 feet wide, extending from Twenty-eighth Street on the east to Forty-second Street on the west, in that city. The nature and extent of the title by which this right of way is held is the subject of much argument by counsel, and will be more particularly considered in the course of this opinion. Originally, the corporate limits of the city of Des Moines did not extend west of a point between Thirty-seventh and Thirty-eighth Streets. Westward from this point, the property under consideration was within the limits of the incorporated town of Greenwood Park, which has since been absorbed by or incorporated into the city of Des Moines. In the year 1888, the town of Greenwood Park, by ordinance, granted to plaintiff's grantor, the Des Moines Rapid Transit Company, the right to construct its railway upon a 65-foot street, running east and west through said incorporated town, and to operate the same by steam, cable, or electric motor, but not for general

railway purposes. Included in said ordinance was a provision as follows:

"Sec. 3. That if said Rapid Transit Company shall procure said street running east and west, as aforesaid, to be increased in width so that its entire width shall be 100 feet, it shall have the right to appropriate a strip thereof 10 feet wide on each side of the center line thereof for its exclusive right of way, and shall not in such case be compelled to pave said 20-foot right of way except at street crossings, but shall curb the same whenever said street shall be ordered to be paved, with such material as shall be ordered by said town council, and maintain said curbing."

Availing itself of the benefits thus offered, the Transit Company obtained from the abutting property owners deeds or agreements to dedicate to the public for street purposes a strip of land  $17\frac{1}{2}$  feet wide on either side of the original street, and a waiver of their rights, if any, to recover damages because of the location and construction of the railway. Having thus complied with the condition of the grant from the city, the company did appropriate the strip to its exclusive use, and has ever since maintained possession thereof. Each dedicator to the additional land also agreed that the company should have exclusive right to the 20-foot strip, while the company agreed to "confine the use of said right of way to the transfer of passengers and small freight traffic." Eastward from the border of Greenwood Park, as we infer from the record, there was not, at that date, any street or highway yet established on this line into the city of Des Moines; and the company's right of way in that direction to Twenty-eighth Street was procured as follows: The owners of the intervening tracts of land were Washington Miller, A. H. Murphy, John H. Mullin, Nellie L. Harding, John A. Garver, and Walter McCain. These proprietors conveyed to the company a continuous strip of land, 20 feet wide, across their respective lots, and by the same instru-



ment undertook to dedicate and open for public use through such lot "a street or roadway 40 feet wide on either side and abutting upon said 20-foot strip." By the terms of each conveyance, the grantors undertook to "sell and quitclaim unto the Des Moines Rapid Transit Company, its successors and assigns, all our interest" in the 20-foot strip of land. In some of the conveyances, the expression is, "do bargain, sell and quitclaim to said company and to its successors and assigns forever, all our right, title and interest, estate, claim and demand both in law and in equity as well in possession as in expectancy." In each deed, it is also provided that the strip so conveyed is to be used for the construction and operation of a street railway thereon. In five of the six deeds, there is the further provision that, in the event of the abandonment of the use of the 20-foot strip for street railway purposes, "it shall revert to the grantors." In the other deed, it is provided that, in the event of such abandonment, "it shall revert to the public as a part of said highway." The public way through which this right of way extends is now known as Ingersoll Avenue, and all the rights of the Rapid Transit Company under the ordinance of the town of Greenwood Park, as well as under the various written agreements and conveyances by the property owners, are now vested in the plaintiff, the Des Moines City Railway Company. The 20-foot strip, except as it is crossed by intersecting streets, has, at no time since its acquirement by the railway company, been occupied, used, or claimed as a part of the public street, but has been used and controlled exclusively by the railway company. It is separated by a curb from the street on either side; and, though the public ways are paved, there is no paving upon the strip, save at the crossings above mentioned. Passengers upon the cars are received and discharged at the crossings.

Under proper proceedings, therefore, the city of Des Moines, by its council, ordered the paving and curbing of

the roadway bordering upon this strip, at the expense of the property abutting thereon; and, upon the theory that such strip was abutting property, liable to contribute to such expense, made the assessments which are here in controversy. At the proper time, the plaintiff appeared before the city council, and made objection to these assessments. Of the objections so filed, reliance in this court is placed upon the following:

(1) That the 20-foot strip is not, within the meaning of the statute or of the ordinance, "abutting property," and is in no manner liable to such special assessment.

(2) That the statute providing for special assessments upon railroad right of ways for street improvements has no application to street railways, and that there is no statute giving the city or its council power or authority to charge a street railway company, or its property, with a burden of that nature.

On trial of the appeal, the district court sustained the assessment, so far as it related to the cost of paving between the rails and one foot on either side thereof, where the track crossed the intersecting streets, but held that the right of way was not abutting property, within the meaning of the law, and ordered the cancellation of the assessment which had been made thereon. From this part of the decree, the defendant city appeals.

I. The first proposition on which appellee relies to sustain the decree, is that the company is not the owner of the property embraced in the 20-foot strip, and that its interest

therein is a mere easement, the title to the land being in the persons or parties granting the easement. It is then argued that the land in question, being used as a mere right of way, is not subject to assessment for street paving. It seems clear, however, that the appellee's title is something more than an easement. The conveyances under which it

2. DEEDS: fee  
(?) or ease-  
ment (?):  
railway right  
of way.

occupies and exercises dominion over the 20-foot strip do not limit their legal effect to a right of way only. No mention of a right of way, either in terms or by words of necessarily equivalent meaning, is to be found in any of the deeds. In each, the owners of the tract convey, sell and quitclaim to the grantee all their right, title, and interest in the *land*, and not merely in the right of way. It is not denied that the grantors owned and had the right to convey the land; and their deeds, in form and in substance, were sufficient to vest a fee in the grantee. This is none the less true because each deed embodied a statement that the land is to be used for the construction and operation of a street railway, and provides that if, in the future, it shall be abandoned for that purpose, it shall revert to the grantor or to the public.

3. **DEEDS: estates in fee: possibility of reverter.** A condition in a deed by which the property is to revert to the grantor, upon an event which may or may never occur, gives rise to what the books call the "possibility of reverter," and serves, in some degree, to qualify the fee created by the conveyance. But it remains true that an estate so conveyed is, nevertheless, a fee; and the grantee thereof is the owner, so long as the estate continues, and until the reverter takes place. 4 Kent's Commentaries 10; *State v. Brown*, 27 N. J. L. 13; *Whiting v. Whiting*, 4 Conn. 179; Tiedeman on Real Property, Sec. 271. Speaking of the passing of title to land, subject to a possibility of reverter in the grantor, the Massachusetts court has said:

"Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen." *Brattle Square Church v. Grant*, 3 Gray (Mass.) 142, 150.

See, also, *Breckinridge v. Delaware, L. & W. R. Co.*, (N. J. Eq.) 33 Atl. 800; *New Jersey Zinc & Iron Co. v. Morris Canal Co.*, 44 N. J. Eq. 398 (15 Atl. 227). In the *Breckinridge* case, the court, construing the effect of a deed to railway company with "power to take and use the same in all lawful ways for the purpose of the extension of the railroad and as part of the route thereof," and reserving a right of crossing to the grantor, held that it passed a fee, but qualified by the provisions contained in the instrument. In *New Jersey Zinc & Iron Co. v. Morris Canal Co.*, supra, the court had occasion to speak of the difference between a right of way taken by virtue of the power of eminent domain and one obtained by deed from the owner, as follows:

"The difference in the legal effect which must be attributed to the conveyance of an estate in fee, whether absolute or qualified, and the right which the defendants acquired by simply taking possession of land for a right of way, or condemning it for a like purpose, is wide and vital. Under a conveyance, even though it be only of a qualified fee, the defendants have, while their estate continues, by the plain terms of their grant an absolute right to the exclusive possession of the land conveyed; and any attempt by their grantor to exercise any sort of possession over the land, or to use any part of it as a means of advantage or profit to himself, would be in plain derogation of his grant, and a clear violation of defendants' rights. The defendants, under a deed conveying a qualified fee, would, while their title continued, have the same right to the exclusive use and enjoyment of the land \* \* \* as though they held it in fee simple absolute. \* \* \* But the defendants' right in land acquired by any other means than by grant, stands on an entirely different foundation."

An estate which may last forever is a fee. If it may end on the happening of a merely possible event, it is a determinable, or qualified, fee. *First Universalist Society v. Bo-*

land, 155 Mass. 237. In the decision of *Chicago, R. I. & P. R. Co. v. City of Ottumwa*, 112 Iowa 300, cited by appellee, this court, holding, under the statutes then in force, that the plaintiff's abutting right of way was not subject to special assessment for paving emphasized the distinction between a mere right of way acquired by condemnation, and one where title to the right of way was acquired by purchase and conveyance from the owner, and reconciles its conclusion with its former holding in *City of Muscatine v. Chicago, R. I. & P. R. Co.*, 79 Iowa 645, by pointing out that, in the latter case, the company had acquired title by grant or purchase. It expressly states the concrete question to be, "Is a railroad right of way acquired by condemnation proceedings either a lot or parcel of land subject to assessment?" This question, a majority of the court answered in the negative, and it may be conceded to be an authoritative exposition of the law of this state as it then stood. Authorities are cited by appellee, to the effect that a conveyance of a mere right of way vests in the grantee no more than an easement, such as might have been acquired by condemnation. It will be found, on examination, that practically every case of this kind involves the construction and effect of deeds to railway companies conveying, in terms, a mere right of way, and not a conveyance of the title to the land. *Chicago, R. I. & P. R. Co. v. City of Ottumwa*, 112 Iowa 300; *Brown v. Young*, 69 Iowa 625; *Vermilya v. Chicago, M. & St. P. R. Co.*, 66 Iowa 606; *Ottumwa, C. F. & St. P. R. Co. v. McWilliams*, 71 Iowa 164, 166. On the contrary, as we shall see, it has been explicitly held by us that, where the language of the conveyance, construed in its ordinary and usually accepted sense, operates to convey a fee, it vests the grantee with more than a mere right of way. For example, in the comparatively recent case of *Watkins v. Iowa Cent. R. Co.*, 123 Iowa 390, the company took an ordinary deed of bargain and sale for a strip of ground upon which it erected and operated

its road; and a question arose as to whether the title so acquired had been lost by abandonment. Among other questions discussed, the court there said:

"It is contended that defendant took no greater title through its deed from Mock than it would have acquired by condemnation proceedings under the statute whereby it receives simply an easement in the land for railway purposes. \* \* \* There is no doubt that the deed from Mock to the defendant conveyed a fee-simple title to the strip of land."

In the same connection, we again said:

"There can be no doubt that Mock parted with the fee simple title to this strip of land, and that defendant, a corporation duly organized, received that fee. \* \* \* When a corporation is authorized to hold real estate for some purposes, or to a limited extent, a deed to it is not void, although the lands were for other purposes or beyond the limit allowed. As between the parties, the deed passes title, and the state alone can inquire into the matter by direct proceedings."

To the same effect is *Askew v. Smith*, 109 Wis. 532. The writer of this opinion would hesitate to go quite so far as to say that a title so conveyed to a railroad company conveys, in all cases, an absolute title in fee simple, a term which ordinarily imports an indefeasible title. If the deed itself contains a provision by which the title so conveyed is subject to a possible forfeiture or reverter, or if the statute under which the corporation exists, limits its authority to take and hold title, except for special uses and purposes, the title so passed is still a fee, but a fee which is liable to divestment when the use of the land becomes inconsistent with the limitation expressed in the deed or imposed by the statute. Directly in point on this proposition is *Polebitzki v. John Week Lbr. Co.*, 157 Wis. 377 (147 N. W. 703). There, an owner deeded, by ordinary conveyance, a strip of land on a river bank, for the purpose of rafting and booming logs.

This was held to pass a qualified fee title. The court says:

"An easement is something quite different from a fee or a limited fee. In the one case, title does not pass, but only a right of use or privilege in the land of another. In the other case, the title does pass, even though the use be limited."

The rule is, perhaps, nowhere more clearly stated than in *State v. Brown*, 27 N. J. L. 13. The deed in that case conveyed land on which to construct a canal, and was limited by the words "so long as used for a canal;" and it was held that such a conveyance to a corporation, restricting the owner of the land, had the effect to vest the fee in the grantee; and that, although such grantee may have no right to use the land for any purpose other than that named in the deed, yet it has the right to prevent any other persons from using it for any purpose whatever. But the question here suggested is one on which we need not now undertake to pass. But, irrespective of what may have been held elsewhere, we think it clear that, under our own statute and prior holdings, it is settled that a distinction exists between a conveyance of title to land and a conveyance of a mere right of way or easement over land, even though the deed provides that the title is conveyed for the purpose of enabling the grantee to use it for the building and operation of a railway.

Another thought suggests itself in this connection. There can be, in this case, no holding that the deeds of conveyance are the equivalent, in effect, of a condemnation, for

the sufficient reason that a street railway company is vested by statute with no right of eminent domain, and it could not have condemned this 20-foot strip, even if it had

4. RAILROADS:  
eminent domain:  
non-existence of  
right.

so desired. *Thompson-Houston Elec. Co. v. Simon*, 20 Ore. 60; *Heilman v. Lebanon & A. St. R. Co.*, 180 Pa. St. 627. It acquired its title by the only means open to it, and that is by municipal grant, where it occupies the streets,

and by conveyance from the property owners, where it departs from the public way. The conveyances which it obtained, vested it with a qualified fee, and not a mere right of way; and the assessment against it cannot be avoided on the theory that its interest in the property is that of a holder of a mere easement.

Exemption from taxation, or from an assessment which is spread over other lands within the assessment district, is something which the law will not uphold, except when clearly

5. TAXATION: exemptions: railway right of way: special assessments.

ly required by some legal or statutory rule. Where the law authorizes a special assessment on lands, without providing any exception because of the use to which such

property is put, it is beyond the proper province of the court to create such an exception. This and other conclusions above expressed find support in principles recognized in *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674 (91 Pac. 244); *Louisville & N. R. Co. v. Barber Asphalt P. Co.*, 197 U. S. 430; *Northern Ind. R. Co. v. Connelley*, 10 Ohio 159, 164; *In re New York*, 11 Johns. (N. Y.) 77; *Chicago & Alton R. Co. v. City of Joliet*, 153 Ill. 649; *Peru & I. R. Co. v. Hanna*, 68 Ind. 562; *State, Paterson, etc., R. Co. v. City of Passaic*, 54 N. J. L. 340 (23 Atl. 945); *Lake Shore & M. S. R. Co. v. City of Grand Rapids*, 102 Mich. 374; *Chicago & N. W. R. Co. v. People*, 120 Ill. 104; *City of Ottawa v. Church*, 20 Ill. 423; *Burlington & M. R. R. Co. v. Spearman*, 12 Iowa 112, 117; *Chicago, R. I. & P. R. Co. v. City of Centerville*, 172 Iowa 444; *Heman Const. Co. v. Wabash R. Co.*, 206 Mo. 172; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 148 Wis. 39 (133 N. W. 1120); *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190; *Atchison, T. & S. F. R. Co. v. Peterson*, 58 Kan. 818; *New York Cent. & H. R. R. Co. v. Aldridge*, 135 N. Y. 83; *Vail v. Long Island R. Co.*, 106 N. Y. 283; *Stevens v. Galveston, H. & S. A. R. Co.*, (Tex.) 169 S. W. 644; *City of Shreveport v. Shreveport Traction Co.*, 134 La. 568; Penn-



*sylvania Hort. Society v. Craig*, 240 Pa. St. 137; *Matter of City of Buffalo*, 206 N. Y. 319 (99 N. E. 850); *Georgia R. & B. Co. v. Decatur*, 137 Ga. 537.

II. The further contention of appellee that the city is without inherent power to levy special assessments for street improvements, and that such authority, if it exists at all,

must have its origin in some statute providing therefor, is sound. The question then arises whether we have any such statute. As is familiarly known, Chapter 7, Title V, of the Code, with its subsequent amend-

6. MUNICIPAL  
CORPORATIONS:  
assessments:  
railway right  
of way abut-  
ting on street.

ments, expressly vests cities with power to improve streets by paving and curbing, and to assess the cost thereof upon abutting and adjacent property, and prescribes the procedure by which such authority can be made effective. It provides and fixes the portion of the paving expense which shall be charged upon street railways which occupy any part of a paved street (Code Section 834), but does not specifically mention such railways, or railway companies of any kind, in speaking of abutting or adjacent property. It does, however, provide for assessment upon abutting and adjacent property, in general terms, without any discrimination between owners thereof, and without exempting any property because of the manner of its use or occupation. The words employed are "abutting property," and not abutting "lots" or "blocks;" and, while it may be admitted that this has reference to real property only, the use of the broadly general term is significant of a legislative purpose to include within the liability to special assessment all real property within the prescribed limits, without discrimination. If the term "abutting property" fairly includes a railway right of way bordering upon the street improved, then the power and authority to charge it with an assessment cannot be doubted, even though railways and street railways are not mentioned by name in the statute.

By Section 791-i, Code Supplement, 1913, "the right of way of any railroad company fronting or abutting upon" a city street is expressly made liable to special assessment for street improvements, and the assessment is made collectible by suit at law, as a money demand. But counsel seek to avoid the effect of this provision by urging that the term "railroad," as there employed, should be interpreted as applicable to commercial railroads only, and as having no reference to street railways. It cannot be denied that, in many, and perhaps most, instances in which the word railroad or railway is used, without any term of qualification, it is to be given this restricted meaning; but this is by no means universal. For example, a statute providing for redress of injuries arising from the neglect of "railroad companies" has been held to apply to railroads of any and all kinds. *Johnson's Admr. v. Louisville City R. Co.*, 73 Ky. 231, 232. An act "to enable railroad companies to borrow money" applies to street railways. *City of Chicago v. Evans*, 24 Ill. 52, 55. In *Massachusetts L. & T. Co. v. Hamilton*, 32 C. C. A. 46, it was said that "railroad" has no such fixed definition as to enable a court to determine, from that word alone, whether it applies to street railways or not. See, also, *Savannah, T. & I. of H. R. Co. v. Williams*, 117 Ga. 414. It may be used, in a broad sense, to include railways of whatever kind, or however operated, or, in its technical sense, as not applicable to street railways. In some cases, the circumstances have been such that the word "railroads" has been held to apply to street railroads only. *People v. Craycroft*, 111 Cal. 544. Of a similar bearing are *Central C. R. Co. v. Twenty-third St. R. Co.*, 54 How. Pr. (N. Y.) 168, 185; *Hestonville, M. & F. P. R. Co. v. City of Philadelphia*, 89 Pa. St. 210, 219; *Montgomery's Appeal*, 136 Pa. St. 96; *Price v. State*, 74 Ga. 378; *Freiday v. Sioux City R. T. Co.*, 92 Iowa 191. It is very difficult to

7. MUNICIPAL  
CORPORATIONS:  
assessments:  
railway right  
of way.

suggest any good reason for applying the statute above cited to a commercial railway, which is not equally pertinent in the case of a street railway.

But, even if we were to hold with appellee that this statute, Code Supplement Section 791-i, is not applicable to street railways, we must then consider whether the company

8. MUNICIPAL  
CORPORATIONS:  
assessments:  
railway right  
of way: street  
railway defined.

is, under the admitted circumstances, entitled to immunity, in this case from assessment as a street railway. In the *Freiday* case, *supra*, the railway company in question was elevated above the street, and performed

all the ordinary functions of a street railway; but it was still held to be a railway, in the ordinary sense, and included in the statute governing railways generally. This conclusion was reached upon the theory that a street railway, within the meaning of the law, is one built upon the surface of a street, the track conforming to the street grade, and so constructed as not of necessity to exclude the public from the use of the part of the street so occupied. In short, a street railway is part of the public street. The company uses the street in common with other members of the public, having no exclusive right to the way it occupies. A street railway is a railway laid down upon streets for the purpose of carrying passengers. *Montgomery v. Santa Anna W. R. Co.*, 104 Cal. 186. It is a railway in a street. *Philadelphia v. McManes*, 175 Pa. St. 28. They must conform to the grades of the street they occupy. *Rahn Trcp. v. Tamaqua St. R. Co.*, 167 Pa. St. 84. It has no exclusive privilege in the use of the street or part of the street it occupies. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475; *Canastota Knife Co. v. Newington T. Co.*, 69 Conn. 146; *Heilman v. Railway Co.*, 180 Pa. St. 627. Even though operated like street railways, they are not such if not built upon or not occupying streets. *Baltimore v. Baltimore, C. & E. M. P. R. Co.*, 84 Md. 1. A street railway lies along and upon the streets of a city or

town. *Thompson-Houston Elec. Co. v. Simon*, 20 Ore. 60. The appellee's railroad, so far at least as pertains to that portion in controversy, is not laid in or upon the public street. It is laid in and upon its own premises, acquired by purchase and deeds of conveyance. Of those premises it has and exercises exclusive use and possession. It does not necessarily conform its grade (except, perhaps, at street crossings) to the grade of the street or public way on either side of it. The public neither occupies nor uses it in common with the company or otherwise, or, if such use exists at any point, it is not grounded upon any public right. It is separated from the street by a curb, and is unpaved. It is conceded that the railway is used for the carrying of certain classes of freight. Such a railway does not accord with any of the accepted definitions of a street railway. In the *Freiday* case, having found that an elevated railway is not a street railway, within the meaning of the law, we said, "If it is not a 'street railway,' within the statutory meaning, then it is a 'railway,' within the meaning of Code Section 464," which was then under consideration. Following the line of reasoning there adopted, as this railway, in its ownership and operation over the line described, is not a street railway, it is a railway, in the general sense, as used in the statute making railway right of ways subject to local assessments for street improvements. To hold to the contrary, and sustain the plaintiff's contention, is to make it possible in every city for a corporation, ostensibly as a street railway company, to acquire, by the aid of the city council or otherwise, title to a strip of convenient width along any street or boulevard of sufficient width to permit it, and on this strip to build and operate its road, exclude the public from the common enjoyment and use thereof, and at the same time escape all liability for the expense of street improvement. It would be an impeachment of legislative intelligence to assume or believe that any such result was intended. It is not

necessitated by the language of any statute or by any rule or principle of law to which our attention has been called. That such property, whether held by an absolute title or defeasible title, is real estate, is too clear for successful contradiction. *Newark, etc., Traction Co. v. North Arlington*, 65 N. J. L. 150 (46 Atl. 568); *People v. Cassity*, 46 N. Y. 46; *People v. Commissioners of Taxes*, 82 N. Y. 459; *People v. Commissioners of Taxes*, 101 N. Y. 322; *City of New Haven v. Fair Haven & Westville R. Co.*, 38 Conn. 422.

If real estate, does it "abut" upon the street improved? If the railway was laid upon the surface of the street, it would not, of course, be liable to assessment as abutting property. In such case, however, it would come within the statute which provides for assessing against a street railway company the cost of paving between its rails and for an additional one foot on either side. But the strip of land assessed and the railway thereon are neither in nor on the street; it has never been dedicated to the public nor established as a street by the public authorities; and the fact that a public street or way extends along either side of such land, and that both such ways are designated and known by one common name, cannot do away with the other patent fact that such land abuts upon the improved street by which it is bounded. The situation may be aptly illustrated as follows: A, B, and C own city lots adjoining in the order named. The outer lots, owned by A and C, are each 40 feet wide, while B's lot is 20 feet wide. A and C unite in dedicating their lots to the public for street purposes, but B declines to unite therein. The dedication is accepted, and the two 40-foot ways are, by proper proceedings, ordered paved. Would C be permitted to escape liability to assessment on the plea that his land is not abutting property? No one would argue in support of such proposition, and we see no better reason for such a holding in the case now before us. The case is not at all parallel to the case of a street or boule-

ward along the middle of which is left an unpaved parking space, as counsel argue. In such case, the parking space is public property, the title to which is in the city. It is still a part of the street, though, like the parking on either side of the paved way, it is withdrawn from public travel and made use of for ornamental purposes. In the case at bar, as we have already noted, the strip of land held by appellee is not a part of the street, either by dedication or otherwise, and we discover no reason for exempting it from liability to the same extent proportionally as other lands within the assessment district. Very directly in point, in this respect, is *City of Shreveport v. Shreveport Traction Co.*, 134 La. 568 (64 So. 414), where a 20-foot strip of land along the middle of a street was owned and occupied by a railway company, and held to be abutting property, liable to special assessment for street improvements.

It follows that the judgment and order appealed from must be set aside, and the cause remanded, with directions to the court below to confirm the special assessments as made.—*Reversed.*

EVANS, C. J., DEEMER and PRESTON, JJ., concur.

#### SUPPLEMENTAL OPINION.

PER CURIAM.—The opinion, in so far as it determines that the strip of ground on which plaintiff's tracks are laid is assessable for the improvement made, is adhered to. The trial court, in decreeing otherwise, did not pass upon the validity of the assessment as made by the city council, and to enable it so to do, and to enter such a decree with reference thereto as the law requires, the cause is remanded to the district court, with leave to either party, if so disposed, to introduce additional evidence.

The order in the last sentence is so modified, and the petition for rehearing overruled.

L. E. ELLIS, Administrator, Appellee, v. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, Appellant.

**INSURANCE: Accidental Injuries—Insurer as Final Arbitrator.** A

1 policy which provides that the insurer shall not be liable for injuries from the discharge of firearms unless the accidental character of the discharge shall be established by at least one eyewitness of the event, other than the insured, "provided \* \* \* the directors may waive this limitation when they are satisfied that said discharge was accidental," simply means that there shall be no liability if the directors, as *reasonable* men, and acting *reasonably*, find that the accidental nature of the discharge has not been established. And the insurer may not constitute himself the *supreme arbiter* of this fact question.

**INSURANCE: Accident—Res Gestae, Etc.** The *res gestae* attend-

2 ing an injury and the condition of matters and things relating thereto, without any direct evidence as to what took place at the very instant of time when the injury was received, may be sufficient to establish, to a reasonable certainty, the accidental character of the injury.

PRINCIPLE APPLIED: An automobile was out of repair. Deceased went to the garage to work upon it. Soon thereafter, he returned to his house for dinner. His conduct was not unusual. After dinner, he returned to the garage. Within two or three minutes, he, dressed in his overalls and with a wrench in his hand, hurriedly returned to the house, hurriedly called to his wife, and said: "I am hurt. I feel as if something hit me. I was reaching on the shelf for the grease gun, when something knocked me over. I think it must have been the 22. I didn't know it was there. Examine my side. I feel faint. I thought it was an electric shock, at first. I saw some smoking rags, the end of the rifle sticking out." The rifle in question was hammerless, was very easily discharged, was at once found in the garage on a shelf, under an aggregation of rags and tools, and with the muzzle angling outward and beyond the edge of the shelf. A rag, with a hole burned therein, was looped over the end of the barrel. A grease gun was present with the rags. There was no evidence tending to show suicidal purpose or predisposition to suicide. *Held* sufficient to establish the accidental discharge of the gun.

**INSURANCE: "Eyewitness" Requirement.** An "*eyewitness*," with-

3 in the meaning of a policy which provides for non-liability in

case of injury from the discharge of firearms unless the accidental character of the discharge be established by an "eyewitness" of the event other than the insured, is (a) one who, having been present at or near the scene of the injury, testifies to the *operating cause* of the injury as then observed by him, or (b) one who, having been so present, testifies to the existence of an operating cause, as then observed by him, to which the accident may fairly be attributed, and who testifies, in at least a general way, to the nature and working of such operating cause.

**PRINCIPLE APPLIED:** See No. 2. *Held*, the accidental nature of the discharge of the gun was established by an "eyewitness."

*Appeal from Polk District Court.*—THOMAS J. GUTHRIE, Judge.

JUNE 27, 1918.

ACTION at law, to recover upon a policy of accident insurance. There was a judgment for plaintiff, and defendant appeals.—*Affirmed*.

*R. M. Haines*, General Counsel, and *Dunshee, Haines, & Brody*, for appellant.

*Carr, Carr & Evans*, for appellee.

WEAVER, J.—It is conceded of record that the plaintiff's intestate died March 14, 1916; that his death resulted from a gunshot wound, without any other concurring or contributing cause; and that, at the time of his death, he held a valid policy of accident insurance in the defendant association. Suit being brought on the policy, the defendant answered, denying liability on the theory that, although the death of the insured is shown to have been caused solely by external and violent means, proof of its accidental character is not established in the manner stipulated in the policy. It pleads that the deceased, in applying for membership in the association and for a policy of insurance therein, entered into the following agreement:

1. INSURANCE: accidental injuries: insurer as final arbiter.



"I hereby agree that I will accept the certificate of membership which may be issued to me, subject to all the provisions, conditions, and limitations contained in the articles of incorporation and by-laws of said association as the same now are or as they may be legally amended and changed; and I agree to comply with all the provisions thereof."

The answer further alleges that, among the provisions of the articles and by-laws of the association to which the deceased thus subscribed, are the following:

"The right of any member or person, claiming by, through and under any certificate issued to any member to claim weekly benefits or indemnity from the association shall be fixed and established by the provisions of the articles of incorporation and of the by-laws in force at the time the accident occurred or sickness commenced out of which any claim arises." Section 15 of Article V.

"The contract between the association and its members shall consist of the articles of incorporation and by-laws and the application." Section 3 of Article I.

"This association shall not be liable for the payment of benefits or indemnity on account of disability or death resulting from a bodily injury caused by the discharge of firearms, unless the member, or person claiming by, through or under any certificate issued to such member, shall establish the accidental character of such discharge by the testimony of at least one person, other than the member, who was an eyewitness of the event; *provided that the board of directors may waive this limitation when they are satisfied that said discharge was accidental.*" Section 5 of Article IV.

The accidental character of Larson's death is denied, and the sole contention of the defendant in the court below and in this court is that plaintiff has failed to establish that fact in the manner or by the testimony prescribed in Section 5, Article 4, last above quoted.

The testimony, in addition to the conceded facts already mentioned, is very brief. It tends to show that deceased and his wife had been out in an automobile, which did not appear to be working well, and they came home about four o'clock in the afternoon. The wife went into the house and deceased went to work on the car. A little later, deceased came in to dinner, after which he returned to the garage. Of what followed, the wife, testifying as a witness, says that, within two or three minutes after he went out, she heard him come rapidly into the kitchen; and as he entered, he called to her, "Come here, Nita, quick. I am hurt." Going to him, she found him standing in the room. He was dressed in his overalls, and had a monkey wrench in his hand. To her inquiry, "How are you hurt?" he said:

"I feel as if something hit me. I was reaching on the shelf for the grease gun, when something knocked me over. I think it must have been the twenty-two. I didn't know it was there."

Then, sitting down, he asked his wife to examine his side, and added that he was feeling faint. To the doctor, who soon arrived, he repeated his story, substantially as before. The wife, referring to the rifle, says it was a hammerless gun, which she had herself often used, and that the trigger pull was extremely light. The safety device was operated by slipping it to the side, and it would "slip with the slightest touch." In connection with the statement made by the injured man to the doctor, he said:

"I thought it was an electric shock, at first. It knocked me down. I got up, and saw some smoking rags or something of the sort; the end of the rifle sticking out."

This witness also examined the situation at the garage and says:

"There is shelving along the north wall, occupying the east portion of the north wall, in the northeast corner of the garage. We found a twenty-two rifle lying on one of the

shelves. The butt end was against the east end of the shelf, and the rifle lying at an angle across the shelf. The muzzle stuck over the edge of the shelf two or three inches. The rifle was covered with some rags, and there was a tire pump lying on top of the gun, and some rags under the tire pump. There was a grease gun lying there, mixed up among the rags. The muzzle was sticking out, as you looked towards the shelves, and the wire plunger, with a loop for a handle, was in the debris on the shelf. These rags were apparently rags which had been used for wiping the car. There was a rag over the muzzle of the gun, with a hole burned through. The charred hole was two or three inches in diameter, and it allowed the rag to drop so that the muzzle of the gun stuck through the hole."

One other witness gives practically the same description.

The only evidence offered on the part of defendant was the several provisions of the articles and by-laws of the association, and the concession by plaintiff that they were in force and effect at the time of the injury and death of the insured.

At the close of the evidence, both parties moved for a directed verdict. The defendant's motion being overruled, its counsel said to the court, "That leaves nothing, I take it, but to direct a verdict for plaintiff;" and a ruling was entered accordingly. From the judgment on the directed verdict, the defendant has appealed.

I. The first question presented is the construction of the contract of insurance, with special reference to the effect upon such contract of Section 5, Article 4, of appellant's articles of incorporation, which section we have already quoted in full.

The appellant's position is that the case before us is, in all essential respects, the parallel of *Roeh v. Business Men's Assn.*, 164 Iowa 199, and that the rule there approved and

applied requires a reversal of the judgment entered in the trial court. We think, however, that there is a very clear and important distinction between the contract in the *Roeh* case and the one now to be considered. True, Section 5, Article 4, down to the beginning of the final clause, does follow the very language of the article in the *Roeh* case, but adds thereto the provision which we have italicized in the quotation, "*provided that the board of directors may waive this limitation when they are satisfied that said discharge was accidental.*" Reading the entire article in connection with this final provision, it seems very clear that it was not intended to exempt the association from all liability for the death of a member from a gunshot wound where there is no eyewitness of the occurrence, but to limit such exemption to cases where the proof of the accidental character of the injury is not established by the evidence to the satisfaction of the directors. If this be not its meaning, what effect shall we give it? It must be presumed that the proviso means something, and surely it is not to be dismissed as a mere reservation by the insurer of a right to make the beneficiary of the policy a gift, if the board of directors shall be so charitably inclined. The language of the contract in this respect has been chosen by the insurer, and, under familiar principles, it is to be given the most favorable construction of which it is reasonably capable in support of the plaintiff's claim. It is well settled, also, that an insurer cannot constitute itself the final judge or arbiter of the merits of a claim made against it, by inserting in its policy a provision that any claim thereunder must be established by proof to its satisfaction. For example, in *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782, an English case, the policy provided that before payment of the indemnity, proof satisfactory to the board of directors of the accidental character of the injury must be furnished; and it was there held that this must be

interpreted as meaning no more than that the proof must be reasonably satisfactory, and that the board could not deprive the plaintiff of his right to recover, by unreasonably refusing to be satisfied. See, also, *Traiser v. Commercial Trav. E. Acc. Assn.*, 202 Mass. 292 (88 N. E. 901); *Insurance Co. v. Rodel*, 95 U. S. 232, 237; *Buffalo L., T. & S. D. Co. v. K. T., etc., Assn.*, 126 N. Y. 450; *Reynolds v. Equitable Acc. Assn.*, 59 Hun 13; *Insurance Co. v. Bennett*, 90 Tenn. 256; *Noyes v. Commercial Trav. E. Acc. Assn.*, 190 Mass. 171 (76 N. E. 665). In the *Noyes* case, the Massachusetts court quoted the *Braunstein* case approvingly, and says:

"There is an implication that the directors will act reasonably, and the requirement is the same as if the words 'acting reasonably' were inserted, in connection with the words 'said board.'"

Speaking upon the same subject, the court, in the *Traiser* case, after holding that, upon the proofs offered, the jury might find that the death was accidental, adds:

"If the jury should so find, we are of opinion they would have also the right to say the same fair preponderance of the evidence which had convinced their judgments ought to have produced the same conviction in the minds of other reasonable men. It would be an anomaly for us to decide otherwise. It cannot be said, as a matter of law, that reasonable men were bound to come to only one conclusion. It is not for the defendant, in a case of contradictory evidence, finally and decisively to pass upon the rights of the insured, if such a condition as this has been reasonably complied with."

In *Buffalo, etc., v. Association*, supra, it is said that a requirement of "satisfactory proof" entitled the association to demand that the fact "should be shown with reasonable definiteness and certainty." The rule of these precedents is without exception in the cases, so far as we have been able to discover. As suggested in the *Traiser* case, it would be

contrary to all reason and all sound principle to hold it competent for an insurer in a contract to clothe himself with power or authority "to pass finally and decisively upon the rights of the insured." The courts cannot thus be ousted of their jurisdiction to settle and adjudicate disputes involving rights of persons and property. *Lewis v. Brotherhood*, 194 Mass. 1; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545; *Fidelity & Cas. Co. v. Crays*, 76 Minn. 450; *Fidelity & Cas. Co. v. Eickoof*, 63 Minn. 170.

II. Construing the contract as indicated in the preceding paragraph, we have, then, to inquire whether, upon the evidence produced, the jury could properly find that the ac-

2. INSURANCE:  
accident: *res*  
*gestae*, etc.

cidental character of Larson's death had been established by proofs which "ought to satisfy reasonable men, acting reasonably."

This question must be answered in the affirmative. The entire *res gestae* developed by the testimony tends strongly to show that the gun was accidentally discharged. There is not only an entire absence of evidence tending to show suicidal purpose or predisposition on part of the deceased, but practically every circumstance shown is consistent with and gives support to the opposite conclusion. That he had been engaged in working about his car is shown by the testimony of his wife, by the condition of things in and about the garage immediately after his injury, and by the fact that he had clothed himself in his overalls, or working suit. He had come into the house to his dinner; and, so far as appears, there was nothing in his conduct to excite the special notice or alarm of his wife. Dinner over, he returned to his work, but almost immediately,—in two or three minutes, the witness says,—he came back, in a hurried manner, carrying a monkey wrench in his hand, and calling his wife to come quickly, for he was hurt. His explanation given at the moment is clearly admissible evidence, and, if true, indicates that, in reaching for or taking down the "grease gun," with

which to lubricate some part of the car, he had moved the rifle lying upon the shelf, in such manner as to cause its discharge. His immediate and hurried return to the house, his prompt call for help from his wife and for medical aid, are quite inconsistent with an attempt at suicide. The fact that the rifle was found lying on the shelf or bench, with the muzzle angling outward, the delicate character of its trigger action, its being under a more or less confused aggregation of rags and implements used in caring for the car, and the further significant fact that the load appeared to have been discharged through a rag lying over its muzzle, all corroborate the story told by him as to the manner of his injury. That the proved facts and circumstances as a whole would justify a finding that the alleged accidental discharge of the gun was established to a reasonable certainty, and that the board of directors, as reasonable men, acting reasonably, should have so found, is scarcely open to doubt.

III. The foregoing considerations are sufficient to require an affirmance of the judgment below, without entering into any discussion as to whether, if we were to ignore the

<p>3. INSURANCE: "eyewitness" requirement.</p>	<p>effect of the last clause of Section 5, Article 4, of the defendant's articles of incorporation, such judgment could be sustained. It</p>
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is perhaps proper, however, to point out that the opinion in *Roch v. Association*, supra, does not hold that, to satisfy the provision for "eyewitnesses" of the accident, some witness must be produced who actually saw the discharge of the gun which caused the injury. The rule or principle there approved is stated in these words:

"The event referred to in the by-law relied upon is manifestly death resulting from a bodily injury caused by the discharge of firearms, and provides that the independent testimony should come from one who was an eyewitness of that event. \* \* \* Not only is the beneficiary to prove the operating cause of death, as that it was from a gunshot wound,

but he must prove, by eyewitnesses of the event, that the gun was accidentally discharged. It is not enough that he prove that it might have been so committed. His proof must be stronger than that, and fairly preponderate in favor of the proposition that the gun was accidentally discharged.

\* \* \* In the case at bar, the event,—that is to say, the accidental character of the discharge of firearms resulting in death,—must be established by at least one person other than the insured, and 'who was an eyewitness' does not necessarily mean that the witness should have seen the exact manner of the discharge; but it seems to us that it does comprehend the presence of the witness at or near the scene, and his direct observation of such facts and circumstances connected with the immediate transaction as, of themselves, and without any aid from presumption or inference arising from love of life, or the instincts of self-preservation, indicate that the shooting was accidental."

Following this statement of the proposition, the opinion then quotes and adopts, as expressing the views of this court, an extract from *Lewis v. Brotherhood Accident Co.* 194 Mass. 1.

"An eyewitness is a person who testifies to what he has seen. By the terms of this policy, the facts and circumstances of the accident and injury are to be established by those who saw them. Not only are the facts and circumstances of the injury to be established by an eyewitness, but also those of the accident; that is, the operating cause of the injury. Enough must be testified to by eyewitnesses to show the operating cause of the injury, or at least to show that at the time of the injury, there was an operating cause to which the accident may fairly be attributed, and to indicate in a general way the nature of that cause and the manner of its working."

As will be readily seen, this statement of the rule is much less rigid and inflexible than the one contended for by



appellant. Perhaps no better illustration is needed than a statement of the facts in the *Lewis* case, in which the court announced the above rule, and permitted the plaintiff to recover upon a policy containing a requirement of an eyewitness of the event. One Lewis, being insured against accident, was drowned. The policy which he held contained a provision that, in case the insured died by drowning or by shooting, there could be no recovery against the insurer except upon proof of the facts and circumstances of the accident and injury, by the testimony of an actual eyewitness. It was shown that Lewis and a young lady were seen on the river in a canoe which Lewis was paddling. A little later, the empty canoe was found floating upon the river, and the dead bodies of Lewis and his companion were thereafter found in the river. No one saw the canoe upset, or saw Lewis or the young lady struggling or alive in the water. In other words, there was no living eyewitness of the immediate facts of the drowning. There were, however, two witnesses who were on the river about five minutes before four o'clock in the afternoon of that day, and met Lewis and the lady going in the opposite direction. They appeared to be chatting and in good spirits, nothing unusual in their manner, or in the appearance or action of the canoe. One of these witnesses testified, also, that, three or four minutes after this meeting, and after a point of land had intervened, shutting the canoe and its occupants from his view, he heard a cry or scream of some kind, but did not return to see what, if anything, was the matter. Another witness, with a friend, was on the river "about 4 o'clock" and, as they rounded a bend, they came upon the upturned canoe, and discovered articles of clothing floating on the surface. Close examination of the witness seems to have developed the time of this discovery to have been 10 or 15 minutes after four. The owner of the canoe testified that Lewis was a good boatman; that the canoe was what he would call medium safe; but

that a person would have to be more careful with it than with a larger one. These facts, the court held, sufficiently satisfied the provision in the insurance contract requiring proof by eyewitnesses. The views expressed on this point constitute an illuminating example of the practical application of the abstract rule or principle which that court elsewhere expresses, and which is approved by us in the *Rock* case, and upon which the appellant largely relies. The opinion proceeds as follows:

“The jury might have found, on the evidence of actual eyewitnesses, that, shortly before the time when the accident happened, Lewis and Miss Hurley were upon the river in what might be called a ‘cranky canoe,’ liable to overturn at any moment, unless unusual care was exercised both by Lewis and his companion; that, within five (perhaps fewer) minutes of the time when they were last seen alive, the canoe was overturned, and the bodies were under water. Here, then, is shown, upon the testimony of eyewitnesses, an operating cause—namely, the imminent liability of the capsizing of the boat by reason of its cranky nature, taken in connection with the fact that it had two occupants, of whom one was a young woman, not shown to have been experienced in aiding to keep the canoe in balance. It is not the case of a boat which is of such size and construction as to be not liable to be upset by the movements of persons in it, but it is the case of a cranky canoe, having two persons in it, where a not unusual movement, even of one of them, may result in the capsizing of it. An operating cause for disaster is ever present under such circumstances, and that cause is disclosed by the testimony of eyewitnesses. Moreover, upon the evidence the jury might have found that the movements of the canoe and its occupants were shown by eyewitnesses, up to a time within three or four minutes of the accident; and that every operating cause of the accident, except the one above shown to have been present, was fairly excluded by the tes-

timony of these same eyewitnesses. It must be held that, in the case before us, the facts and circumstances of the accident and injury were established by eyewitnesses, within the meaning of the policy."

In other words, if the eyewitnesses testify to personal observation of the "operating cause," it is not required that they shall have seen that cause in actual operation.

If the rule and reasoning here made use of by the Massachusetts court in the *Lewis* case, and adopted and approved by us in the *Roeh* case, are sound, and we think they are, it seems hardly open to question that the judgment for plaintiff in the present case is fairly sustainable. If a "cranky canoe" is an ever-present cause of accident to those riding therein, is it not equally clear that a loaded gun, with very delicate trigger action, in a position where it may be disturbed by a careless or thoughtless movement, is an ever-present operating cause of peril to those who may be employed within its reach? And if the tracing of the movements of the occupants of the canoe may stop anywhere from 5 to 15 minutes short of the final catastrophe, and still the testimony be that of "eyewitnesses, within the meaning of the policy," it will require very considerable ingenuity to find reason for saying, in this case, that the 2 or 3 minutes intervening between Larson's leaving the house, and his hasty reappearance, exclaiming he was hurt, is such a break or hiatus in the history of the case by eyewitnesses as will defeat an action on the policy. To repeat once more the statement of the principle announced in the opinion from which we have quoted so extensively:

"Enough must be testified to by eyewitnesses to show the operating cause of the injury, or at least to show that, at the time of the injury, there was an operating cause to which the accident may fairly be attributed, and to indicate in a general way the nature of that cause and the manner of its working."

The record in the case at bar fairly fills the measure of this requirement.

No reversible error is shown, and the judgment of the district court is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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ED ERICKSON, Appellee, v. MAPLE BLOCK COAL COMPANY,  
Appellant.

**MASTER AND SERVANT:** “Working Place” of Miner. A miner  
1 must keep his “working place” safe, and is negligent if he does  
not. The mine owner must keep the rest of the mine safe, and  
is negligent if he does not. A miner’s “working place” is his  
*immediate* place of work—not necessarily the entire room in  
which he is working. So held where the miner was injured by  
the falling of an insecurely propped room, at a point some 13  
feet from the miner’s immediate working place. (Sec. 2489-13a,  
Code Supp., 1913.)

**TRIAL:** Verdicts in Disregard of Instructions. Verdicts in disre-  
2 gard of *incorrect* instructions will be set aside.

**MASTER AND SERVANT:** Statutory Duty Non-Avoidable by Con-  
3 tract. A mine owner’s statutory duty to keep safe that part of  
his mine outside the miner’s “working place” may not be con-  
trolled by contract with the miner. So held where the con-  
tract called for double-timbering the roof only in case the miner  
called for such double-timbering. (Sec. 2489-13a, Code Supp.,  
1913.)

*Appeal from Polk District Court.*—THOS. J. GUTHRIE, Judge.

APRIL 4, 1918.

REHEARING DENIED JUNE 27, 1918.

ACTION to recover damages for personal injury. The  
opinion states the facts. Judgment for the plaintiff. The  
defendant appeals.—*Reversed*.

*Stipp, Perry, Bannister & Starzinger*, for appellant.

*John T. Clarkson*, for appellee.

GAYNOR, J.—I. This action is to recover damages for personal injury alleged to have been sustained by the plaintiff while employed in the defendant's mine as a coal miner.

1. MASTER AND  
SERVANT:  
"working  
place" of  
miner.

The allegations on which plaintiff predicates his right to recover are that he was injured by a fall of slate from the roof of the mine in which he was working; that the de-

fendant was not operating under the Iowa Workmen's Compensation Law.

The answer of the defendant was that plaintiff was injured in his working place, and where it was his duty to inspect the roof and to make the same safe; and that the defendant was in no manner negligent.

The cause was submitted to the jury, and a verdict returned for the plaintiff. Defendant appeals, and submits but two questions: (1) The court erred in overruling defendant's motion to direct a verdict, made at the close of the testimony; (2) that the verdict is contrary to the law, as given in the instructions of the court.

The mine in question was operated by a shaft. The mouth of the room in which plaintiff was working was about 9 feet deep and 8 feet wide. Then it opened, from 22 to 25 feet wide. The room, at the time of the accident, had been driven in about 40 feet from the outside corner of the entry. The track on one side was about 4 feet from the left rib of the room. There were two rows of props, one on the rib side and one on the other side, called the gob row. These rows of props were from 6 to 8 inches from the track on either side, leaving room for a car to pass between them. At the time of the accident, the end of the track was about 15 feet from the working face of the coal.

Plaintiff was paid for mining coal at a stipulated price

per ton, and, in addition, received compensation for "brushing," according to the thickness he was required to take up. The roof was a slate roof. The plaintiff had experienced trouble in keeping the roof propped. His testimony was that it was not a very good working piece of coal; that he had spoken to the foreman with reference to the roof, and had told him that it was in a dangerous and treacherous condition, and asked him for another place, saying that he could not properly work there and make anything and keep the place secure. He showed him the dangerous condition, the rock and rock spar that ran a little angling across the roadway, and the lower slate between the boulders, and asked for another place to work; and he testifies that the foreman said he would give him another place, within a few days. Plaintiff says that this was three or more weeks before the accident; that the foreman repeated this promise, a day or two before the accident. He further testified that, if there had been cross-bars or planking over the roadway, it would have held the portion of the roof that fell and caught him.

On this particular morning, plaintiff went to work at about 8 o'clock, and had been in the room about thirty minutes when he was injured. He had gone into the room, and had gone back to the entry to get his tools, and was returning to his working place, and was about two feet from the end of the rails toward the face of the mine, when the roof fell and caught him.

The rules of the mine and the written contract between the company and its employees, under which the mine was operated, are as follows:

"Responsibilities, Timbering, and Care of Places.

"(a) In accordance with the state law, the company shall furnish all necessary timbers, and the miner shall keep his room securely propped. If a miner working in a room fails to securely prop the same, or neglects to prop as di-

rected by the pit foreman, or carelessly shoots down the props or timbers, and a fall of slate occurs through such failure, neglect, or carelessness, he shall immediately clear his roadway of such falls of slate and do all necessary retimbering, and in case of his neglect to do so, the company may do such work and charge the expense thereof to such miner.

"(b) In case the room has been properly timbered, as above set forth, and the roof, from any cause, becomes so heavy as to require double timbering, the company shall, when notified by the miner, do the necessary work to protect the roadway."

It appears that the plaintiff propped this room, and that props were placed in the usual manner, as the work of removing the coal progressed; that these props supported the roof while the work progressed.

Chapter 8-A, Part I, Section 2477-m, in Subdivision d, Supplement to the Code, 1913, provides:

"In actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence."

Section 2489-16a provides:

"It shall be the duty of each employee to examine his working place upon entering the same and shall not commence to mine or load coal or other mineral until it is made safe. Each miner or other employee employed in a mine shall securely prop and timber the roof of his working place therein and shall obey any order or orders given by the superintendent or mine foreman relating to the width of the working place and to the security of the mine in the part

thereof where he is at work. \* \* \* When draw-slate or other like material is over the coal, he shall see to it that proper timbers are placed thereunder for his safety before working under the same."

Section 2489-13a of the same statute provides:

"It shall be the duty of the mine foreman or pit boss in charge of any mine or part thereof to make careful inspection of the mine from day to day \* \* \* and at such other times as in his judgment conditions may require."

It will be noted that the duty rests upon the employee to examine his working place,—the place in which he is engaged in his work; that it is his duty not to commence to mine coal in his working place or load the coal until that place is made safe; and to this end, it is made his duty to prop and timber the roof of his working place. The room comes as a natural and proximate result of the work of the miner in removing the coal. The coal is removed by the company from the room as it is gotten in readiness by the miner, for moving. As the coal is mined and removed, the room enlarges. Tracks are then laid in the room, running towards the face of the mine to the place where the miner is engaged in mining the coal. On these tracks cars are run, into which the coal is loaded after it is mined. These tracks may be several feet long, depending upon the extent to which the miner has carried his work. The actual working place of the miner moves forward with his work. The tracks follow towards the face of the mine at which the miner is working. The working place of the miner does not necessarily include the whole room. The working place is the place where he is engaged in his work. While engaged in his work, it is his duty to timber and make safe the place where he is working. But as he passes on in his work, and the company assumes to occupy the room with its tracks and its mules and its cars, the duty to continue the support of the roof back of the working place rests



upon the company. It is then no longer the working place of the miner, in the sense in which these terms are used in the statute. Experience shows that, though the roof may be properly secured at the time the work is in progress, it may become defective and unsafe, and the props which made it safe for the miner in removing the coal no longer make it safe for those who use or traverse the room; so it is made the duty of the company, through its foreman or pick boss, to inspect these roofs and see that they are kept in reasonably safe condition. The slate that fell and injured this plaintiff fell from the roof of this mine over the roadway, and not in the working place of the miner. True, he was 2 or 2½ feet beyond the rail, at the time he was injured; but the cause of the injury was the falling of the slate from the roof of the mine, and not over the miner's working place. As we understand the record, he was going to his working place, at the time he was injured. The foreman had been warned by this plaintiff of the dangerous condition of the roof over the roadway. The plaintiff had requested that he be assigned to some other place to work, because of the dangerous condition of the roof over this roadway, and had been promised another place to work. He testified that he had spoken to the mine foreman with reference to the roof, and told him that it was dangerous and in a treacherous condition, and asked him for another place, telling him that the conditions were such that he could not properly work there and make anything, and keep the place secure. He testified that he showed the foreman the dangerous condition; and this, three or more weeks before the accident, and again, a day or two before the accident. He further testified that, if there had been cross-timbers or planking over this roadway, the roof would not have fallen and caught him.

In view of what was said by us in *Mitchell v. Swanwood Coal Co.*, 182 Iowa 1001, we think there was a fair fact

question for the jury in this record, and that the court did not err in overruling defendant's motion for a directed verdict. We would not, however, be able to say this if the law were as laid down in the sixth instruction given by the court to the jury. This instruction is not a correct exposition of the law of the case, as we will hereafter attempt to show.

II. The second contention of the defendant on this appeal is that the verdict is against the law, as laid down by the court in its instructions to the jury.

We think this contention must be sustained. The court, in its sixth instruction to the jury, said:

2. TRIAL: ver-  
dicts in disre-  
gard of in-  
structions.  
"To find the defendant guilty of negligence, you should not determine that question as a matter of mere speculation, but should determine it from the evidence; and in this case, the only question of negligence for you to determine, under the evidence and law, is whether or not the defendant company should have placed double timbers or cross-bars over the roadway. On this question, you are instructed that, under the evidence in this case, the duty to place cross-bars or timbers to protect the roadway of a room in a mine only arises on notification or request therefor on the part of the miner; and, if you find from the evidence that no such notification or request was given to the defendant by the plaintiff, then said duty did not arise, and you should inquire no further, but return your verdict for the defendant. However, if you find such request or notification was given, then you should determine whether the accident happened at such a place as that, if the roadway had been double-timbered, as notified or requested, it would have prevented the happening of the accident; and if you find the accident happened at a place not within the roadway, then you should inquire no further, but return your verdict for the defendant."

This instruction—which is the law of the case—said to the jury that, if the defendant company was not notified or requested by the plaintiff to double-timber or place cross-bars or timbers over the roadway to protect the employees rightfully using the roadway, there could be no recovery in the case. The instruction assumes that, no matter how negligent the company might have been in allowing the roof over the roadway to become dangerous, no matter how dangerous the room might become from such conditions, no duty rested upon the company to timber the roof or make it safe, until notified or requested to do so by the plaintiff; that, even though the defendant were negligent in allowing the roof over the roadway to become in a condition rendering it unsafe for the employees using the room, no liability would attach for a failure to repair or remedy the same, until the company was notified or requested by this plaintiff to repair or remedy the same. Negligence presupposes a duty. If there is no duty to do a thing, there can be no liability predicated on a failure to do it; and this instruction plainly said to the jury that there was no duty to place cross-bars or timbers to protect the roadway of the room, until the miner (plaintiff in this case) notified, or requested that it be repaired. There is no evidence that plaintiff notified the company or requested the company to place cross-bars or timbers to protect this roadway. Under this instruction, then, there was but one thing for the jury to do: that is, to return a verdict for the defendant.

It has been frequently held that the instructions given by the court are the law of the case, whether right or wrong, and the jury are bound to follow them, and if they do not follow them, their verdict cannot be sustained. As said in *Baird v. C. R. I. & P. R. Co.*, 35 Iowa 121, 124:

“So far as this appeal is concerned, this instruction embodies the law of the case, which it was the duty of the

3. MASTER AND  
SERVANT:  
statutory duty  
non-avoidable  
by contract.

jury to follow; and, if the general verdict is not in harmony with this instruction, it should have been set aside."

In *Savery v. Busick*, 11 Iowa 487, the court said:

"Whatever may be our view of the law of this case, it is impossible for us to express it, or consider the questions presented, without going behind the action of the jury in trampling upon the authority of the court, and thereby giving some countenance to their assumption. This we are unwilling to do, even by the slightest implication. It is no more competent for the jury to usurp the powers of the court than it is for the court to interfere with their province in the ascertainment of facts."

Under the law as laid down in this case in the instruction referred to, the jury could not find a verdict for the plaintiff and support it by the evidence offered. The case must, therefore, be reversed; and this though we think the court was wrong in saying that no duty rested upon the defendant to timber this roadway until notified or requested by the plaintiff to do so. For the error pointed out, the case is—*Reversed*.

PRESTON, C. J., LADD and STEVENS, JJ., concur.

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HARVEY FLEAGLE, Appellant, v. PAUL H. DOWNING, Appellee.

**LIBEL AND SLANDER: Fraudulent Procurement of Pension.** A

1 published charge that plaintiff had procured the allowance to himself of a pension from the government by the false pretense that he had been injured while in the military service, is actionable *per se*.

**LIBEL AND SLANDER: Libel and Slander of the Dead.** A son

2 may not recover damages for a libel or for a slander of his father, published or spoken after the father's death.

**LIBEL AND SLANDER: Privileged Communications.** Privilege will

3 never be presumed.

**LIBEL AND SLANDER:** Innuendoes. Innuendo may not enlarge  
4 the meaning of published or spoken words.

*Appeal from Cedar District Court.*—**MILO P. SMITH** and  
**F. O. ELLISON**, Judges.

JUNE 27, 1918.

**ACTION** for libel and slander. Demurrer to petition. Demurrer sustained. Plaintiff filed an amended and substituted petition. Motion to strike amended and substituted petition on the ground that it was simply a repetition of the cause of action alleged in the original petition. Sustained. Amended and substituted petition stricken. Defendant properly preserved exceptions to both rulings, stood upon his pleadings, and appealed.—*Reversed.*

*John C. Higgins* and *Sharon & Harrison*, for appellant.

*J. C. France* and *C. O. Boling*, for appellee.

**GAYNOR, J.**—This action is brought to recover damages for an alleged slander and libel. The action was brought in two counts. The first count in the original petition alleged that, in the month of May, 1915, the defendant published and circulated, in writing and verbally, of and concerning the father of the plaintiff, that plaintiff's father was considered very disagreeable, not stable, went to extremes in conversation, and that he died in the poor farm. It is alleged that this blackened and vilified the memory of plaintiff's father, and scandalized and provoked the plaintiff; that these statements were falsely made, and with a malicious intent to injure, scandalize, and provoke the plaintiff. The second count alleged that plaintiff, at the commencement of the Spanish-American War, enlisted as a private; that, while in service, he received injuries from sunstroke; that this affected his nervous system, and indirectly, his mind; that, on account of the injuries so

1. **LIBEL AND  
SLANDER:**  
fraudulent pro-  
curement of  
pension.

received, the United States government paid him a pension of \$24 a month; that, at the time of the happening of the matters complained of, the plaintiff was receiving a pension from the government on account of such disability; that the defendant, with the malicious intent and purpose of injuring the plaintiff and of depriving him of the pension, verbally and in writing said, published, and circulated that plaintiff was not injured in the service of the United States, that his mental condition was the same as it was before he entered the service, that his mind was no different than it was thirty years ago, that he was not considered unbalanced, but had a disagreeable disposition, and made himself disagreeable, that he did not appear to be physically disabled, and had no physical disability; and said:

"I would like to be as strong physically as I believe him to be. All that can be seen is that he is easy to get into an argument and disagreeable to get along with, the same as when he was a boy and young man, and the same as his father was,"—thereby intending to charge, and charging, that the plaintiff falsely, and by the use of fraudulent evidence as to his mental and nervous condition, obtained and was receiving a pension from the government, and for the purposes of having it understood and believed that plaintiff had fraudulently obtained a pension, and was fraudulently cheating the government of the United States out of money paid to him under the pension certificate. It is further alleged that the statements so made were untrue, and known by the defendant to be untrue. Plaintiff further alleged that he was obliged to carry on correspondence with the government and with other parties, and to make trips to distant cities, at great expense, to disprove defendant's statements, and that he was denied the credit which he had received and was able to obtain on account of the pension, and he was scandalized and humiliated before the community in which he lived, and provoked to wrath.

To this petition and each count thereof, the defendant filed a demurrer. The demurrer was sustained, and the plaintiff given ten days in which to amend. Within the ten days, the plaintiff filed an amended and substituted petition, in which he charged more fully and particularly the matters alleged in the original petition. In addition to the matters hereinbefore set out, he alleged that defendant, both verbally and in writing, published of and concerning him that his alleged injury of heart and brain was not the result of any injury sustained in the service of the United States; that he was not entitled to the pension he was receiving; that he was not physically disabled,—thereby accusing the plaintiff of the crime of obtaining a pension by fraud and perjury, without any basis therefor in fact, and on perjured testimony; and that, by reason thereof, plaintiff was exposed to public hatred, contempt, and ridicule, and was deprived of the benefits of public confidence and social intercourse; that he has spent time and money in seeking to expose the falseness of the statements made by the defendant; that he was compelled to obtain other testimony at Davenport, Cedar Rapids, and Iowa City, and many other places, at much expense, to show the falsity of the charges made by the defendant, and was deprived of \$12 per month as pension by the United States government from and after January 1, 1916.

Upon the filing of this amended and substituted petition, the defendant moved to strike it from the records, on the ground that it was simply a repetition of the allegations of the petition to which the demurrer had been sustained. The court sustained this motion. The plaintiff elected to stand on his pleadings, and his petition was dismissed. From this he appeals.

Due exceptions were taken to the ruling on the demurrer, and exceptions also preserved to the action of the court in striking the amended and substituted petition.

The correctness of both rulings is before this court, under the rule laid down in *Wisner v. Nichols*, 165 Iowa 15.

As to the ruling on the demurrer to the first count, we think the court was correct. We need not discuss this further than to call attention to what was said by this court in *Bradt v. New Nonpareil Co.*, 108 Iowa 449.

The matters complained of in the second count of the petition, if believed to be true, would lead the mind to the conclusion that the plaintiff, knowing he had suffered no disability while in the service of his country in the Spanish-American War, had fraudulently procured a pension from the government for disabilities not sustained,—clearly charging the plaintiff with defrauding the government, and with obtaining property by false pretenses, a criminal offense which lays the foundation of a civil action, if unfounded, untrue, and maliciously made.

Defendant claims that the communication was to a public officer, and, therefore, privileged. There is nothing in the petition to show the privilege relied upon. If it were, in fact, a privileged communication, made by the defendant in a judicial proceeding, or in any proceeding that affords him the protection of privilege, it is a matter of defense, and not to be assumed without proof. Where the charge is, on its face, slanderous or libelous, where, on its face, it imputes to one the commission of a public offense, anyone who hides behind any privilege given to him by law must allege and prove the facts and circumstances that bring him within the protection of the privilege. It is not our purpose here to enter into a discussion of what constitutes privilege. There is nothing in this record to justify the assumption that the statements were privileged, or that entitles defendant to invoke the privilege behind which he seeks shelter. We think the second count of

2. LIBEL AND  
SLANDER:  
libel and  
slander  
of the dead.

3. LIBEL AND  
SLANDER:  
privileged com-  
munications.



plaintiff's petition stated a fair cause of action for slander and libel, and that the demurrer should have been overruled. The amendment, being a more particular statement of the cause of action set out in the second count, which we hold to be good, should not have been stricken on motion.

As said in *Sheibley v. Ashton*, 130 Iowa 195:

"We should not indulge in any critical refinements to discover the intent of the writer, nor too carefully scan the language to see if there is not some technical view which will sustain the defendant's contention. Ordinarily, minds do not critically analyze and scan such publication. They give them their natural and ordinary signification; and to such interpretation we think this defendant should be held."

It is the thought expressed that does the harm. The jury could well find, if this matter came to the jury, upon proper proof of the allegation made, that the defendant charged plaintiff with procuring wrongfully a pension from the government, and with wrongfully receiving money, as a pensioner, for injury he had never sustained. Now it is apparent that, if the plaintiff had never sustained the injuries, and had applied to the government for a pension, on the theory that he had received injuries while in the service of the government, false proof of injury would have to be made; and, if the injury had never been sustained, plaintiff must have known it. His application and his proof would be false, and known to him to be false. He would, therefore, be receiving money from the government falsely and fraudulently. While innuendo cannot enlarge the meaning of the words, yet a jury could well find, from the words themselves and the circumstances under which they were spoken, that the defendant intended the very thought which the innuendo charges, and conveyed and intended to convey that thought by the words used. Words are to be construed according to the ideas they are calculated to con-

4. LIBEL AND  
SLANDER:  
innuendoes.

vey. They are to be understood in their plain and popular sense; in the sense in which fairly intelligent English-speaking people would ordinarily understand them. The question is, What idea did the defendant intend to convey, and what idea did he convey to his hearers? The words must be taken in the sense in which they are generally understood; and if they convey the idea that the plaintiff had falsely obtained a pension from the United States government, knowing that he was not entitled to the pension (and he surely would have known it, if the defendant's statements are true), then he perpetrated a fraud upon the government. To charge him with perpetrating such a fraud upon the government is actionable. We think the court was wrong, both in sustaining the demurrer and in striking the amendment to the petition from the files, and the action is, therefore,—*Reversed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

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WM. S. FOLEY et al., Appellees, v. H. C. LYMAN, Appellant.

**PRINCIPAL AND SURETY: Burden of Proof.** A gratuitous surety may stand strictly on the terms of his obligation, and the burden of proof is on the one seeking judgment, to establish every fact upon which liability depends. So held where a stockholder of a corporation was obligated as surety for the payment of money which might be borrowed to carry on the "present" business of the corporation, but liability was denied because of absence of evidence whether the money was borrowed for said purpose or for other lines of business subsequently pursued by the corporation. .

*Appeal from Osceola District Court.*—WILLIAM HUTCHINSON, Judge.

JUNE 27, 1918.

THE Grain Growers Incorporated Co-operative Associa-

tion of Melvin was organized in 1905. The articles of incorporation fixed its capital at not less than \$1,000 and not more than \$25,000, divided into shares of \$10 each, and its business was that of buying, selling, and dealing "in all kinds of farm and dairy products, cattle, swine, sheep, poultry, dry goods, boots and shoes, groceries, hardware, farm machinery, lumber, twine, drain tile, stone, brick, and all kinds of building material, grain and real estate and dealing in all kinds of merchandise and in buying and selling all such kinds of property on commission;" and its affairs were to be conducted by "a president, vice-president, secretary, treasurer, and nine directors," who might appoint a general agent to transact such business for and in the name of the association, "who shall act under the direction and control of such officers." The corporation was forbidden an indebtedness exceeding the amount of two thirds of the shares of stock actually paid up, and the private property of the shareholders was to be exempt from its indebtedness. Another article endowed the corporation with the power to borrow money from time to time, on a two-thirds vote of all its officers, not to exceed the sum of \$5,000. The corporation first purchased an elevator, and engaged in handling grain, coal, twine, and probably flour; and, later on, purchased a lumber yard; and dealt somewhat in machinery; and came near engaging in the banking business, but for the discovery of its financial condition. The capital realized from selling stock proved inadequate for the business transacted, and it was carried on with money raised by members of the board of directors, who executed their individual notes, in borrowing money for that purpose. No evidence of indebtedness or security was taken by them from the corporation. As money was realized from the business, it was applied on the notes executed by the members of the board for borrowed money. In October, 1907, these notes had reached, in the aggregate, \$28,000. The plaintiffs, who are members of the

board of directors in this action, begun January 21, 1915, alleged that, at that time, plaintiffs and defendants, with 58 other persons who were shareholders, meeting on October 26, 1907, unanimously adopted a resolution in words following: "Motion carried that the shareholders will be responsible for any money the board of directors may borrow, from time to time, to carry on the present business," that plaintiffs, constituting members of said board of directors, together with one Frank Frey, in reliance thereon borrowed \$16,000 of the First National Bank of Sibley, for the purpose of carrying on the business of said corporation, and have since paid out of the proceeds of all the property of the corporation so as to reduce the same to \$6,648; that said Frey has paid one eighth of this sum; and plaintiffs pray for judgment against defendant for his pro rata share of seven eighths of said sum, with interest thereon from March 24, 1914, for that said plaintiffs have paid said balance, and defendant, as is alleged, is liable, as aforesaid, under and by virtue of said resolution. Defendant denied: (1) That there was any such meeting of the shareholders as alleged; (2) that any such resolution was adopted; and (3) that any indebtedness accrued such as alleged; and prayed to go hence with his costs.

C. W. Pitts was appointed referee, to report to the court the facts and conclusions of law. His report was filed October 14, 1916, recommending judgment against the defendant, as prayed. Objections to said report were overruled, and judgment entered accordingly. The cause comes here on the certificate of the trial court "that said cause is one in which an appeal should be allowed to the Supreme Court of Iowa," and the defendant appealed.—*Reversed*.

*Sargent, Strong & Struble*, for appellant.

*T. E. Diamond*, for appellees.

LADD, J.—The plaintiffs were directors of the Grain

Growers Incorporated Co-operative Association of Melvin, Iowa. It was incorporated in 1905; and, as its capital was less than \$5,000, and it might not become indebted for more than two thirds of this, and in no event for more than \$5,000, the directors conceived the idea of themselves borrowing money, and operating the enterprise in large measure with money so borrowed. Whether they realized that, in so doing, they were involving the corporation in debt in excess of the limitations mentioned, does not appear; but in this way, the amount of indebtedness for money so borrowed increased, until, on October 26, 1907, it amounted to \$28,000. In the meantime, it had purchased a grain elevator, and, up to that time, had been dealing in grain, coal, twine, and possibly flour. The record contains no evidence of the corporation's having been engaged in handling anything else, or that it so did thereafter, until the fall of 1908, when the corporation, through its board of directors, purchased a lumber yard of one Freese, at the price of \$2,500 plus the invoice of the lumber on hand, which amounted to something over \$15,000. This yard was disposed of in February, 1912, at the same price, with the invoice of lumber then on hand added. No books were kept from which any notion of the business transacted can be ascertained. Whether losses had accrued prior to the adoption of the resolution or subsequent thereto, or from the business then being conducted, or that of handling of lumber, subsequently engaged in, or through speculations or selling on credit, no one is informed by this record. About all that is disclosed is that these directors, after disposing of all the property of the concern and winding up its affairs, discovered that the proceeds lacked \$6,648 of being enough to satisfy the notes they had signed, to borrow money for the use of the corporation—a sum much in excess of the indebtedness in which they might, under its articles, involve it, to themselves or others. For the purposes of the case, it

may be conceded that there was a shareholders' meeting, as alleged; that the resolution was adopted; and that defendant offered the resolution and acquiesced therein, as the referee found: and the decision may be allowed to rest solely upon whether liability has been established, under the resolution. This looked to the future. But for the explanatory evidence, the borrowing might well be construed as being that by the board of directors, as such, and representing the corporation, in which event there would be serious doubt as to its validity. See *Trustees of Free Schools v. Flint*, 13 Metc. (Mass.) 539; *Reid v. Eatonton Mfg. Co.*, (Ga.) 2 Am. Rep. 563.

Conceding, without deciding, that the directors individually were intended, however, it is to be observed that the shareholders were to be responsible only for money borrowed "to carry on the present business." What was that business? Dealing in grain, coal, twine, and possibly flour. The association was, at that time, engaged in no other business; and, by the clear language of the resolution, the responsibility assumed by the shareholders was limited to carrying on such business. Under the resolution, the obligation of the shareholders bound thereby was but that of surety, and at that, a surety inveigled into becoming such by the officers, to enable them to evade the plain prohibitions of the articles of incorporation. In these circumstances, plaintiffs are not in a situation to complain if the obligation of the surety be strictly construed, and be not extended by implication. See *Knight v. Waters*, 15 Iowa 420; *Crapo v. Brown*, 40 Iowa 487.

But resort to the doctrine of strict construction is not necessary to the conclusion that the resolution had reference to the business then being conducted, rather than to what the corporate articles authorized. The many lines of endeavor the association might engage in, emphasized designation of the "present business" as that to carry on which

money might be borrowed. Was money borrowed to carry on that business? The record is silent. Was there any loss of money borrowed to carry on such business? Again, the record is silent. Was the money borrowed to purchase the lumber yard and lumber, or was this loss consequent upon such enterprise? If so, those bound only by the resolution are not responsible therefor. The burden of proof was on the plaintiffs to show that the amount claimed to have been lost, or some of it, was money borrowed to carry on the business then being conducted, i. e., that of dealing in grain, coal, twine, and flour,—and this they wholly failed to do. Having reached this conclusion, there is no occasion to pass upon the issue as to whether the resolution, because of not being signed, is within the statute of frauds. The judgment is—*Reversed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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GEO. H. FRANCE, Appellant, v. CITY OF DES MOINES et al.,  
Appellees.

**MUNICIPAL CORPORATIONS: Bridge Bonds—Limitations.** Any indebtedness for the construction of bridges, under Sec. 758-d, Code Supp., 1913, is valid, when such indebtedness, plus all other indebtedness of the city, does not exceed 5 per centum of the actual value of the taxable property of the city. In other words, the additional power of a city under Sec. 758-d is not restrained within the  $1\frac{1}{4}$  per centum limitation provided by Sec. 1306-b, Code Supp., 1913.

SALINGER, J., dissents.

*Appeal from Polk District Court.*—LAWRENCE DE GRAFF,  
Judge.

JUNE 27, 1918.

THIS is a suit by a resident and taxpayer of the city of Des Moines, to restrain the defendants, who are the mayor, city council, and officers of said city, and William Horrabin,

contractor, from carrying out the terms of a contract between the said city and Horrabin, for the construction of a bridge across the Des Moines River at a point connecting University Avenue with North Street in said city, and to restrain the issuance and sale of bonds in the sum of \$400,000 for that purpose. The contract complained of was entered into on June 22, 1917; and on July 1st, the bid of Messrs. Bolger, Mosser & Willaman, intervenors, for the bonds, was accepted by the proper officers of said city. There is little or no conflict in the evidence, and much of the record is made up of stipulations of the parties. The court below, after a hearing on the merits, dismissed plaintiff's petition, and he appeals. Further necessary facts will be mentioned in the course of the opinion.—*Affirmed.*

*Dunshee, Haines & Brody*, for appellant.

*H. W. Byers, Guy A. Miller, D. Cole McMartin, E. J. Kelly, W. H. Bailey, and Parsons & Mills*, for appellees.

STEVENS, J.—I. Appellant's complaint is based upon the contention that, at the time the contract between the defendant city and Horrabin was entered into, the outstanding indebtedness of the city exceeded  $1\frac{1}{4}$  per centum of the actual value of the taxable property within said city, and that the contract creates an indebtedness in excess of the city's authority, and void.

The city of Des Moines is a city of the first class; and prior to the enactment of Sections 758-d and 758-e by the thirty-fourth general assembly, in the matter of bridges possessed only the authority conferred thereon by Section 758 of the Code of 1897 and Section 758-a of the 1913 Supplement thereto.

As this appeal involves a construction of Sections 758-d, 758-e, and 1306-b of the Supplement to the Code, 1913, we copy the same in full:

"Section 758-d. That cities of the first class are hereby



authorized to contract indebtedness and to issue bonds for the purpose of constructing bridges. Such bonds shall be payable in not exceeding twenty annual installments and bear interest at not exceeding five per centum per annum, and shall be made payable at such place and be of such form as the city council shall by ordinance designate. But no city shall become indebted in excess of five per centum of the actual value of the taxable property of said city as shown by the last preceding assessment roll."

"Section 758-e. This act shall be construed as granting additional power without limiting the power already existing in cities of the first class."

"Section 1306-b. No county or other political or municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in the aggregate the amount of one and one-fourth per centum of the actual value of the taxable property within such county or corporation, except that cities and incorporated towns may for the purpose of purchasing, erecting, extending or maintaining and operating waterworks, electric light and power plants, gasworks and heating plants or of building and constructing sewers, incur an indebtedness, not exceeding in the aggregate, added to all other indebtedness, five per centum of the actual value of the taxable property within such city or incorporated town. The amount of such taxable property shall be ascertained by the last state and county tax list previous to the incurring of such indebtedness."

Sections 758 of the Code and 758-a of the Supplement conferred authority upon cities to incur indebtedness, or issue bonds, for the construction of bridges within certain narrow limits only. General power to incur indebtedness and issue bonds for the purpose of constructing bridges was first conferred by the provisions of Section 758-d.

The authority of counties and cities to incur indebted-

ness, in any manner and for all purposes, is limited by Section 1306-b to  $1\frac{1}{4}$  per centum of the actual value of the taxable property thereof, except for certain designated purposes, therein fully set forth.

The contention between counsel at this point is as to whether the power conferred upon cities of the first class by Section 758-d, which, by Chapter 184 of the Acts of the Thirty-sixth General Assembly was extended to cities of the second class traversed by streams not less than 200 feet in width from shore line to shore line, must be exercised within the  $1\frac{1}{4}$  per centum limitation; or whether indebtedness therefor may be incurred, when added to all other outstanding indebtedness, under the provisions of Section 758-d, to the extent of 5 per centum of the actual value of the taxable property of such city or incorporated town.

By act of the twenty-eighth general assembly (Chapter 41), the authority of cities and towns to incur indebtedness was first limited to  $1\frac{1}{4}$  per centum of the actual value of the taxable property thereof. The thirtieth general assembly (Chapter 43) repealed the act of the twenty-eighth, and fixed the limit at  $2\frac{1}{2}$  per centum, but authorized them to purchase, or erect, waterworks and sewerage systems. This enactment was repealed by the thirty-first general assembly (Chapter 49), and the  $1\frac{1}{4}$  per centum limitation restored; but cities and incorporated towns were authorized to incur indebtedness in excess thereof "for the purpose of purchasing, erecting or maintaining and operating waterworks, electric light and power plants, gas works and heating plants or of building and constructing sewers, \* \* \* not exceeding in the aggregate, added to all other indebtedness, five per centum of the actual value of the taxable property within such city or incorporated town. The amount of such taxable property shall be ascertained by the last state and county tax list previous to the incurring of such indebtedness."

The thirty-seventh general assembly (Chapter 85) amended Section 1306-b by striking therefrom the words "or for any purpose," and inserting in lieu thereof the words "for its general or ordinary purposes." Evidently, the limitation placed by the legislature upon the power of counties and political and municipal corporations to incur indebtedness was for the purpose of preventing waste and extravagance in the expenditure of the funds belonging thereto, and for the same purpose is retained, but given a somewhat enlarged application by the amendment of the thirty-seventh general assembly (Chapter 85), referred to above. The rapid growth of cities and incorporated towns in population and industry necessitated better sanitary regulations and other improvements, such as heating, electric light and power plants, waterworks, gas works, and other public improvements of like character; but the expense of these could not be met, within the limit fixed by the legislature for cities in the matter of incurring indebtedness. Further authority to incur indebtedness was required. The 11¼ per cent limitation was retained; but, as appears from the above extract from the Acts of the Thirty-first General Assembly (Chapter 49), the authority of cities and incorporated towns to incur additional indebtedness for certain purposes was very much enlarged.

It is the contention of counsel for appellee that Sections 758-d and 758-e, *supra*, were enacted by the thirty-fourth general assembly for the purpose of enabling cities of the first class which are traversed by large streams to erect necessary and indispensable bridges for the accommodation of traffic and other necessities of modern city life; and that it was not intended that the power therein conferred should be exercised only within the narrow limitation of Section 1306-b, but, as in the case of electric light, heating and power plants, sewers, etc., in excess thereof. Section 758-e provides that Section 758-d "shall be con-

strued as granting additional power without limiting that already existing in cities of the first class."

Prior to the enactment of the above sections, cities had authority to construct bridges; but their resources for that purpose were very limited. The power conferred by Section 758-d is to contract indebtedness and issue bonds for the purpose of constructing bridges. As we understand their argument, counsel for appellant concede this, but vigorously contend that it must be exercised within the  $1\frac{1}{4}$  per centum limitation provided by Section 1306-b. The power conferred upon cities by the latter section is to contract certain indebtedness, within the  $1\frac{1}{4}$  per centum limitation therein contained, and certain other indebtedness in excess thereof. If the power to incur indebtedness for the purpose of constructing bridges is to be exercised within the limitation of Section 1306-b, then it is not additional thereto. The power to contract indebtedness for the construction of bridges is for a new and independent purpose,—one not previously existing. Unless the power thus conferred was intended by the legislature to be exercised in addition to that already existing, as is plainly declared by Section 758-e, there could have been no reason for the enactment of Section 758-d. It is true that the limitation fixed is the same as that fixed by the Constitution; but it will be observed that it is quite common for the legislature, following a grant of power to cities and municipal corporations to incur additional indebtedness, to provide that such power shall not be exercised in excess of 5 per centum of the actual value of the taxable property thereof. While the latter provision of Section 758-d is prohibitory in form, it impliedly permits cities to incur indebtedness for bridge purposes up to the 5 per centum limitation; provided, however, and as a matter of course, that all other indebtedness must be taken into consideration at the time of contracting indebtedness for bridge purposes; and the total indebtedness there-

for, when added to all other indebtedness of such city, must not exceed the statutory and constitutional limitation.

The evident purpose of the legislature was to make such provision as would enable cities traversed by streams requiring bridges which would involve the expenditure of large sums of money, to construct larger and more expensive bridges than was possible under the law as it then was. Authority had already been conferred upon them to construct and acquire waterworks, electric light and power plants, sewerage systems, and many other modern public conveniences and necessities. Further power was necessary, to enable them to provide funds with which to erect bridges. The legislature was careful, in conferring power upon them to contract indebtedness and issue bonds for that purpose, to declare the same additional to that already existing to incur indebtedness for other purposes.

It is urged by counsel for appellant that, had it been the intention of the legislature to enlarge the power of cities to contract indebtedness and issue bonds for the construction of bridges up to the full constitutional limit, it would doubtless have so specifically designated. There is no doubt that an additional word or two would have made the construction and application of these statutes clear and easy; but we have no doubt that it was the legislative purpose to confer new and additional power upon cities to incur indebtedness for the construction of bridges, in addition to that already existing to incur indebtedness for other purposes, and that the same may be exercised without reference to the provisions and limitations of Section 1306-b. The tendency of the legislature to confer power upon cities to provide necessary public improvements is further emphasized by the provisions of Chapter 85, Acts of the Thirty-seventh General Assembly, amending Section 1306-b so as to make the  $1\frac{1}{4}$  per centum limitation apply only to indebtedness incurred "for its general or ordinary purposes."

Other interesting questions are discussed by counsel; but, in view of the construction we have given to the above statutes, it is unnecessary for us to discuss or decide them. It therefore follows that the judgment of the court below is—*Affirmed*.

PRESTON, C. J., LADD, WEAVER, EVANS, and GAYNOR, JJ.  
CONCUR.

SALINGER, J. (dissenting). At one time, Section 1306-b Code Supplement, 1913, limited all municipal indebtedness to  $1\frac{1}{4}$  per cent, except as to matters specified, which do not include the building of bridges. If I understand the majority aright, its sole defense of the judgment below is that said statute was so amended by Chapter 39 of the Acts of the Thirty-fourth General Assembly (now Sections 758-d and 758-e of the Code Supplement, 1913), as to confer authority to do what defendants did. The defendant city does not fully agree with this. It asserts in its demurrer that necessary new authority was also, if not wholly, created by an act of the thirty-seventh general assembly. Indeed, it is only by inference the demurrer claims anything for the work of the thirty-fourth. Its only specific allegation as to what made the necessary change in Section 1306-b is that it was an act of the thirty-seventh. This last act did not become effective until after the doing of what appellant complains of. The act is presumed to be, and is, in fact, prospective only, and is not and does not purport to be a special or curative act. In my opinion, it is not available if, without it, the law gives no authority for what was done. And of course, if there was such authority before the thirty-seventh general assembly acted, it does not matter that its act failed to give such authority. Notwithstanding the position taken by the demurrant, I think the opinion must be treated as upholding what was done by the defendants on the sole ground that the necessary power was given by act of the thirty-fourth general assembly.

In arguing that the act of that assembly gave the necessary power, much stress is laid upon the fact that one section of the statute declares the act shall be construed "as granting additional power without limiting the power already existing in cities of the first class." It is not clear to me why this expository section is very controlling on the matter we have for decision. Had there been no such section, the act could scarcely have been construed into limiting the power of cities to go into debt for bridge building. The existing law declared, in terms, that the limit should be  $1\frac{1}{4}$  per cent for all purposes which, by the specifications as to what objects the limitations should not apply to, left the statute a prohibition to go in debt above  $1\frac{1}{4}$  per cent for many things, including bridge building. In other words, before the act of the thirty-fourth general assembly, the law, in effect, did not permit as much as a debt of  $1\frac{1}{4}$  per cent for bridge building. A further limitation upon such statute law must be something that forbids going in debt at all, or limits the power to go in debt to a point even lower than it was before. All must concede that the act of the thirty-fourth general assembly does neither of these things, and is, in truth, not an additional limitation. But how is the fact that this is so material? How does a direction that something which is, in truth, not a new limitation, shall not be construed to be such limitation, furnish evidence that a specific enlargement has been made? The act of the thirty-fourth general assembly may be such enlargement, but that must be found from words of enlargement, and not from a self-evidently correct declaration by the legislature that it has not created an additional limitation. And I am unable to see how a legislative declaration that a statute does give additional power is relevant argument to prove that some particular additional power is given by the statute in which such declaration is found, or even that such declaration proves that *any* addition to power has been made.

Whether additional powers are given by a statute may not be determined by a rider to the effect that the act shall be construed to give additional powers, and not to limit powers already possessed. If existing law authorize a city to punish fast driving by a fine of not more than \$50, and an amending statute authorize such fine in specified cases to go up to \$75, such amendment, on its own face, would be an enlargement of power, without limitation upon any already possessed. That would be so if there were no rider directing that it be so construed. And though there be such rider, it cannot in the least add anything to what the amendment does, in fact, give. In one word, the expository clause found in the act of the thirty-fourth general assembly has, it seems to me, no bearing on determining whether the act gave enlarged power as to going in debt for bridges, or, if it does, what that enlargement is.

Coming now to an examination of the act as written, it appears that no authority is granted except this: Cities of the first class are "hereby authorized to contract indebtedness and to issue bonds for the purpose of constructing bridges." Despite the declaration in the statute that this gives additional power, the fact is otherwise. Before the passage of this statute, cities were authorized to contract indebtedness and to issue bonds for the purpose of constructing bridges. See Section 758, Code of 1897, and Sections 758-a to 758-c, inclusive, Code Supplement, 1907. Again, Section 1306-b, Code Supplement, 1913, recognized there was power to go in debt for obtaining bridges, because it authorized going in debt for several purposes which, it is conceded, included the getting a bridge. One may concede, for the sake of argument, that the act of the thirty-fourth made some changes in using the power to go in debt, and in evidencing a debt "for the purpose of constructing bridges;" but it added nothing to the abstract power to contract indebtedness in some amount, and to issue bonds for the con-



struction of bridges; and surely, the naked fact that the act of the thirty-fourth authorized going in debt and issuing bonds to obtain bridges, if an additional power, is not an enlargement of the debt limit. Surely, the authority given "to contract indebtedness and to issue bonds for the purpose of constructing bridges," pretends neither to enlarge the amount of the debt that may be contracted nor to lower it. The next provision of the amendatory statute relied on is that the bonds which it authorizes shall be payable in installments, not exceeding 20, bear interest not exceeding 5 per cent, and be in such form and payable at such place as the city council shall, by ordinance, designate. Concede that this is an enlargement on the method of carrying an improvement by bonds, what is there in it that gives the slightest additional power to go in debt more than theretofore existing law permitted? Surely, a permission "to contract indebtedness," a permission to secure such indebtedness by a bond issue, and a direction as to form, rate of interest, and the like, of these bonds, gives, despite a declaration that additional powers are created, no additional power, and, for that matter, no power at all to enlarge the permitted debt. If, then, the declaration of the rider is borne out, that must be so because the statute in question provides, further, that no city "shall become indebted in excess of 5 per centum of the actual value of the taxable property of said city, as shown by the last preceding assessment roll." Notwithstanding the rider, I am unable to see how it can be held that this is not a limitation of power, but is an addition to power. Certainly, it is not a grant of power, much less of additional power, to incur indebtedness, to declare that indebtedness shall not be in excess of a limitation fixed. I agree, however, that this is not a limitation of the powers already existing. It is, instead, a restatement of a limitation that always did exist, is one fixed by the Constitution, and is, therefore, one which no legislature could

change. A statement in a statute that no city should, in any event, become indebted in excess of the amount of the debt as limited by the Constitution, does not, as I view it, have the slightest bearing on whether a statute debt limit, declaring that not more than a stated part of said 5 per cent maximum is available for a stated purpose, has been enlarged. There is much more reason for claiming that the act of the thirty-seventh general assembly made the change which all agree was necessary. Section 1306-b, Code Supplement, 1913, provided, in manifest effect, that the aggregate amount of debt to pay for getting bridges and many other things should be  $1\frac{1}{4}$  per cent. Chapter 85 of the Acts of the Thirty-seventh General Assembly so changed the law as that this limitation of  $1\frac{1}{4}$  per cent became the limitation upon debt "for general or ordinary purposes." It is, of course, true that the building of a bridge in a great city is not an expenditure for general or ordinary municipal purposes, and the act of the thirty-seventh general assembly may fairly be said to enlarge the limit of  $1\frac{1}{4}$  per cent, so far as bridge building is concerned. It is, no doubt, on this reasoning that the demurrer of the city urged the act of the thirty-seventh general assembly as an authorization. It is true, as I have said, that this act became effective too late to be available to these defendants. But that does not eliminate it as an element in construction. It indicates strongly the legislature was of opinion that, until this last act was passed, there had been no enlargement of the limitation which made bridge building a partner in an aggregate limitation of debt to  $1\frac{1}{4}$  per cent.

The majority concedes, as said, that the defendants exceeded the authority given them by law, unless Chapter 39 of the Acts of the Thirty-fourth General Assembly so amended 1306-b, Code Supplement, 1913, as to authorize thereafter what was not authorized before. I have tried to point out why, despite the fact that said Chapter 39 declares the

act shall be construed as granting additional power without limiting the power already existing, nothing in the chapter removed the debt limit theretofore existing, and that, if same was changed, it was by the act of the thirty-seventh general assembly, which became law too late to avail the appellees.

What I have said is on the assumption that the opinion is based wholly on a plain change of the statute, and I have addressed myself wholly to giving my views on whether the amendment will sustain the act of these defendants. The briefs present other points which, I take it, are material only if the amendment relied upon was insufficient. They are such arguments as that, if the act complained of was one authorized by the law, as it was when the cause was tried, an injunction should not issue though the act was illegal when done; and that the passing of bonds to innocent purchasers will deny the injunction though the issue was not authorized by law. I do not think either position is well taken. But, at most, these are avoidance arguments, and where I differ with the majority is in its holding that there is nothing to avoid. I would reverse.

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IN RE GUARDIANSHIP OF IRVING J. CASKEY.

**GUARDIAN AND WARD: Jurisdiction—Nonresidence of Ward and**  
1 **Guardian.** Guardians, duly appointed and qualified at a time when both guardian and ward are residents of this state, may make valid sales of the ward's property in this state at a time when both guardian and ward have become nonresidents. (Sec. 3206, Code, 1897.)

**PRINCIPLE APPLIED:** A father and son resided in Ida County, Iowa. The son was one year of age, and owned land in said county. On due appointment by the Ida County district court, the father duly qualified as guardian of the property of said son. Some years later, both father and son became *permanent* residents of Missouri. Some 19 years after the appoint-

ment, the said guardian, *while a resident of Missouri*, applied to said court for leave to sell said land. The request was granted. *A sale was had, in strict compliance with all formalities required by law.* Five years later, and while both guardian and ward were residents of Missouri, the ward, having attained his majority, applied to the said court for an accounting by the guardian. The guardian, in compliance with an order of said court, filed an accounting, the correctness of which appears to have been agreed to by the ward, and said accounting was duly approved by a recorded order of court. The balance due the ward was a substantial sum, and the guardian was ordered forthwith to pay the same to the ward. A few days after this last order was entered, the sureties on the guardian's sale bond intervened in said proceeding, and prayed that the accounting between the guardian and ward and the court's approval thereof be set aside, as fraudulent and void. These intervenors also pleaded that the sale of the land was null and void, because the minor was, at that time, a nonresident, and that said proceedings and all subsequent proceedings were lacking in jurisdiction. A hearing was had. The court found no fraud in the accounting, and again approved the same and the order to pay.

*Held*, the nonresidence of the guardian and the ward at the time of the sale in no wise invalidated the sale.

**GUARDIAN AND WARD:** Removal of Funds from State. Jurisdiction to compel a guardian to account for funds belonging to the ward is not lost because of the fact that the guardian has removed the funds from the state.

*Appeal from Ida District Court.*—M. E. HUTCHISON, Judge.

MARCH 18, 1918.

REHEARING DENIED JUNE 27, 1918.

**APPEAL** from an action approving guardian's report. After the approval had been entered, objections were filed to the report by certain bondsmen, who had become such in a proceeding instituted by the guardian, some years before, to sell the minor's real estate. Opinion states the facts. Objection of intervenors overruled; decree approving report affirmed. Intervenors appeal.—*Affirmed*.

*Campbell Bros. and Chas. S. Macomber, for appellants*

*Walter T. J. Rose, A. B. Walter, and Jas. C. Walter,*  
for appellees.

GAYNOR, J.—On July 12, 1892, the appellee F. L. Caskey was duly appointed by the district court of Ida County, Iowa, guardian of his co-appellee, Irving J. Caskey. Upon such appointment, letters of guardianship were duly issued. The minor, Irving J. Caskey, was, at that time, about a year old, and resided in Ida County with his guardian, who is his father. At the time of the appointment of the guardian, the minor was the owner of the undivided one third of the northeast quarter of Section 29-88-41, situated in Ida County. Some years after the appointment, the father and son (guardian and ward) moved to the state of Missouri, and have ever since resided there.

On the 21st day of January, 1911, the guardian returned to Iowa, and filed in the district court of Ida County a petition praying for leave to sell his ward's interest in the land aforesaid, alleging that it was for the best interests of the minor that the land should be sold. Due notice was served on the minor, as required by statute, with a copy of the application for the sale. Thereafter, on the 14th day of February, 1911, a guardian ad litem was appointed for said minor, who appeared and filed answer to the petition of the guardian, and a hearing was had upon said petition, which resulted in a decree or order by the court that the guardian sell the interests of the minor in said real estate at public or private sale, for not less than the appraised value, and execute a guardian's deed, conveying the same to the purchaser. Thereupon, the guardian gave a sale bond, conditioned as required by law, and these appellants became sureties upon said bond. The land was duly appraised, and thereafter, the guardian filed a report of the sale and deed with the court for approval; and an order was properly entered, approving the guardian's sale and the deed.

1. GUARDIAN  
AND WARD:  
jurisdiction:  
nonresidence  
of ward and  
guardian.

It is conceded that the sale was made in conformity with the order of the court, and that the guardian filed a bond in the office of the clerk of the court, as required by law, and said bond was duly approved; and that the real estate was sold for more than its appraised value; and that the deed executed by said guardian was in due form of law, and was approved by the court. It appears that the proceeds from said sale came into the hands of the guardian, and the same was taken by him back to his home in Missouri, and that he has never accounted to his minor son therefor.

On the 19th day of January, 1916, the minor, Irving J. Caskey, having reached his majority on the 23d day of October, 1912, appeared in the district court of Ida County, and filed his application, in which he recited that he reached his majority on October 23, 1912, and is now entitled to the possession of his inheritance, which then was and ever since has been in the possession of and wrongfully retained by his guardian, F. L. Caskey; that he has frequently made demand therefor. In this application he prayed that his guardian be required to report the condition of the estate, and that an order be made requiring the guardian to forthwith pay over to the petitioner the money that may be found due upon said account. An order was duly made, requiring the guardian to report and account for the estate in his hands belonging to the ward. On the 15th day of February, 1916, the guardian filed his final report, in which he stated that, pursuant to the order made by the district court of Ida County on the 22d day of January, 1916, directing him, as guardian, to file a final report of all money or property in his possession belonging to his ward, by the 14th day of February, 1916, he made the following report: That there is owing his ward, Caskey, which was derived from the sale of real estate to one Henning Dahlquist, the sum of \$4,537.33, with interest thereon amounting to \$1,166.29;

that there is further due and owing his ward the sum of \$592.98, on account of other moneys received as guardian, on which there is accrued interest to the amount of \$133.09, making a total sum on the credit side of \$6,429.69, against which the guardian is entitled to a credit of \$726.84, leaving a final balance due the ward, unaccounted for, of \$5,702.85. The guardian further said, in said report, that he was unable to attach vouchers to his report for the money paid out for the ward, inasmuch as his receipts had been mislaid. To the report was attached the following stipulation:

"It is hereby stipulated and agreed by and between the said F. L. Caskey, as guardian of Irving J. Caskey, a minor, that the said Irving J. Caskey is now of age, having arrived at the age of 21 years on October 23, 1912; that, in consideration of the said guardian waiving his right to claim fees as such guardian, the said Irving J. Caskey waives claim to have interest compounded on items of interest collected by said guardian, and in consideration of the waiving of the right to claim compound interest on said account, said F. L. Caskey, as guardian aforesaid, waives all claims to guardian fees in said matter. It is further stipulated that the foregoing itemized account prepared to be filed by said guardian has been submitted to the said Irving J. Caskey, and upon examination is found correct, and the method of computing interest is satisfactory, it being understood and agreed that, between the date of receiving money from real estate sale and settling the bills of expense up to April 1, 1911, is a reasonable time in which to begin charging interest on the money received from the sale of real estate. The said Irving J. Caskey hereby waives the presenting and filing by guardian of vouchers for disbursements made by him as shown in this account. Said account shows a balance due of \$5,702.85."

On the 21st day of February, 1916, the report of the

guardian was submitted to the court, and the same was duly approved by the court in the following words and figures:

"Be it remembered that, on this 21st day of February, A. D. 1916, in open court, before the Hon. E. G. Albert, presiding judge, the matter of the final report of said guardian in account and settlement with said minor, dated the 12th day of February, A. D. 1916, and filed in the clerk's office of said district court, with the stipulation of said guardian and ward attached thereto. And also the petition of said minor praying that said account of said guardian be settled, approved and allowed, and that an order be made directing said guardian to pay over to the petitioner, Irving J. Caskey, said minor, all money found due to the petitioner from said guardian on said account, coming up in its regular order for hearing and determination by the court, J. C. Walter, attorney-at-law, appearing for said guardian, and Walter T. J. Rose, attorney-at-law, appearing for said minor, and the court upon inspection of the notice to said guardian, requiring him to file said account in settlement with said minor in the clerk's office of said district court by the 14th day of February, A. D. 1916, finds that said notice is in due form of law, and that said guardian duly accepted service of said notice on the 2d day of February, A. D. 1916, and finds that his signature to said acceptance is genuine, and upon inspection of said report in account and settlement with said minor, finds that it is in due form of law, duly signed, and duly verified by said guardian, and, upon inspection of said stipulation, finds that it is in due form of law, and duly signed by said guardian and minor, and finds that their signatures thereto are genuine, and, upon inspection of said petition, finds that it is in due form of law, duly signed and verified by said Irving J. Caskey, and that the statements and allegations therein contained are true, and finds that the court has jurisdiction



over said parties, and jurisdiction of the subject-matter of said report, and account in settlement with said minor, and jurisdiction of and over the subject-matter of said stipulation, and over the subject-matter of said petition of said Irving J. Caskey, and thereupon hearing the evidence of the respective parties duly introduced according to law, as well as the stipulation of the parties hereto on file herein, and being fully advised in the premises, finds that the statements contained in said guardian's report and account are true, finds that said Irving J. Caskey, minor, arrived at the legal age on the 23d day of October, A. D. 1912, and finds that he was 21 years of age on said date, finds that said report in account and settlement shows a balance due and owing to said minor in and to the amount of \$5,702.85; finds that, by said stipulation, said minor, among other things, waives the filing of said vouchers, with said report of said guardian, and agrees in said stipulation that said report in account shows said balance of \$5,702.85. And also waives claim by said Irving J. Caskey to have interest on balance from time to time in hands of guardian compounded, and waives claim of said F. J. Caskey to have any fees as such guardian, and that a valuable and sufficient consideration pass from such to the other for the waiver by ward of compounding interest, and the waiving of fees by said guardian; finds that said report in account and settlement should be approved and confirmed, and finds that said Irving J. Caskey, minor, is entitled in and by the law to have said balance of money, as shown by said report in account, paid over to him by said guardian. The court further finds from the evidence that interest on the balances in hands of guardian from time to time since filing former reports approved December 27th, A. D. 1910, has been computed at 6% per annum, simple interest. The court finds that said Irving J. Caskey is entitled to 6% interest per annum, on the item of \$592.98, in said account charged against

said guardian from December 27, 1910, less a credit thereon of \$160 appearing on said account, dated March 11th A. D. 1911, to wit: \$133.09 as appears in said account filed; and is also entitled to 6% per annum interest on item of \$4,537.33 in said account charged against said guardian from April 1st, A. D. 1911, less credits thereon of March 4, 1911, \$106.66; \$175; \$235; \$15.56; and \$34.62 aggregating \$566.84, to wit: \$1,166.29, as appears in said account filed, that total charges against said guardian are .....\$6,429.69 and his total credits are the sum of ..... 726.84

leaving a balance due and owing the said Irving J.

Caskey of .....\$5,702.85

"It is therefore ordered and adjudged by the court that said final report and account of said guardian in settlement with said minor be, and it is hereby, approved and confirmed, and it is further ordered and decreed by the court that F. L. Caskey, as such guardian of the person and property of said Irving J. Caskey, minor, shall, by the 29th day of February, A. D. 1916, pay over in hand to said Irving J. Caskey, said sum of \$5,702.85 in lawful money of the United States, shown by said report and by law to be due and payable by said F. L. Caskey, as such guardian, to said Irving J. Caskey.

"Dated in open court this 21st day of February, A. D. 1916."

On March 31, 1916, the appellants herein, H. P. Wallace and George W. Smith, being sureties on the bond given by the guardian in the sale of his ward's land, hereinbefore referred to, filed their petition of intervention, in which they recite the facts hereinbefore set out, and say that the settlement between the guardian and his ward is bottomed in fraud, and was not had for the purpose therein stated, but for the purpose of making a foundation on which said Irving J. Caskey could bring an action against these inter

venors; deny the facts in the application made by the ward for a report; and state that there is a conspiracy between the minor and his guardian "to frame up a ground for action" against these intervenors on their bond; and they pray that the order approving the report of the guardian be set aside, and that an order be made directing the said minor and his guardian to appear in open court and submit to an examination, so that the court may know what was actually done with the proceeds derived by the guardian from the sale of the real estate.

Thereupon, the court ordered that a hearing upon the petition of intervention be set for April 17, 1916, and that the clerk issue notice of the hearing to the guardian and ward, and that they be required to appear on said day and submit to an examination touching the correctness of their report, and that further proceedings be suspended until such hearing.

On the 18th day of April following, the court made a further order, reciting that the guardian and his ward are now in court; that they shall appear before the court on the 28th day of April, for the purpose of submitting to an examination before this court with respect to the property and funds belonging to the estate; that, if they failed to appear on said date, the order of the court approving the report should be set aside.

On the 11th day of May following, these appellants filed another paper, entitled "Resistance to Final Report of Guardian," in which they recited the facts hereinbefore set out in their petition of intervention, and further alleged that the order entered, approving the report, was absolutely void, in so far as it referred to the proceeds of the sale of the minor's real estate, for the reason that the minor was a nonresident of the state, and that the court had no authority or jurisdiction in the matter, and the order was void.

On the 23d day of September, 1916, the intervenor bondsmen filed an amendment to what they termed their petition of intervention, as follows:

"Comes now your intervenors and amend their petition of intervention, and they respectfully state that the order of M. E. Hutchison, district judge of the district court of Ida County, Iowa, made on the 14th day of February, A. D. 1911 (ordering the sale of the minor's land), was and is absolutely void; that said court had no jurisdiction to make such order; that such order was for the sale of the real estate of a nonresident minor of the state of Iowa, and the court had no jurisdiction over said minor when he made such order; that the petition filed by the guardian, F. L. Caskey, and the notices served upon the said minor, did not give the said court any jurisdiction whatever, and they were all in violation of the laws of the state of Iowa. Your intervenors further state that all proceedings had under and by virtue of said order of this court are absolutely void; that the order of the Hon. E. G. Albert, approving the report of the guardian, in so far as the same refers to the sale of the minor's real estate, is and was absolutely void, and your intervenors state that the petition referred to shows that said minor was a nonresident of the state of Iowa, and that, as such nonresident, no guardian had been appointed by this court, as provided for by law, and that the court had no authority and no jurisdiction of the matter at all, and that said order is and was void, and all proceedings under it were void. Wherefore, your intervenors ask that this court refuse to approve of any act of the guardian attempting to carry out the order of the court, resting on such illegal and invalid order, and for such other relief as the matters herein show that intervenors are entitled to."

To this amendment a demurrer was filed, and rightfully sustained. That it was rightfully sustained is made ap-

parent by the record hereinbefore set out, and it needs no further comment.

On the 18th day of December, intervenors filed another paper, entitled "Amendment to Petition of Resistance to the Approving of the Final Report," in which they state the facts hereinbefore set out, and further, that no guardian was appointed for the minor in the state of Missouri, but that he and his former guardian were both residents of the state of Missouri, and that the former guardian had no right to hold possession of or to invest any money or property of his ward in the state of Missouri without authority of the minor; and further saying that the minor authorized his guardian to sell the property and invest the proceeds as he did, and that this court had no jurisdiction over the ward or his person, or over the guardian or over the money, because the money was in the state of Missouri; and they claim that the minor is now estopped from claiming that his guardian owes him anything.

To these claims, an answer was filed both by the guardian and the ward.

On the 18th day of December, 1916, a hearing was had upon these several petitions of intervention and resistance, and the testimony of both the minor and his guardian taken and submitted to the court. The court found that there was no fraud or collusion between the minor and his guardian, and framed its order, approving the final order theretofore made.

The first question urged and relied on for reversal is that the court erred in sustaining the demurrer to defendants' amendment to petition attacking the jurisdiction of the court in the proceeding instituted for the sale of the ward's interests in the land.

In that petition it was urged that the court lacked jurisdiction to make the order. The record discloses that the guardian was appointed in Ida County, Iowa; that his

letters issued from the district court of that county; that the property was situated in Ida County; that the guardian appeared in that court and filed his petition. He had never been discharged. His nonresidence might have been grounds for his removal, but he had never been removed. He was still the guardian. Due notice was served upon the minor, proper appearance made for him, a guardian ad litem appointed, and defense made by said guardian for the minor, and everything that the law requires to be done to make a perfect sale was done in that case. The mere fact that the minor was a nonresident of the state, the fact that the guardian was a nonresident of the state at the time, go only to the question of the jurisdiction of the person. The proceeding was *in rem*. The minor was properly served with notice of the proceeding. The sale was ordered made, a bond was given, as required by statute, the purchaser paid the purchase price to the guardian, the deed was executed to the purchaser, and the sale and deed were approved by the court. No reason is suggested by counsel why this court did not have jurisdiction, or why the sale was invalid, other than the fact of the nonresidence of the minor and his guardian at the time of the sale. So we say that the demurrer was rightfully sustained to this amendment. The court had jurisdiction of the subject-matter and of the parties. The proceeding was regular, and the order was final.

Further than that, to hold the sale not valid is to involve parties who are not before the court. This attack upon that proceeding is purely collateral, and, until set aside by some direct proceedings, must stand.

The next question is a fact question. This seems to rest on the thought that the minor had been doing business for himself; that whatever investments were made by the guardian, resulting in loss of the property to the ward, were made with the knowledge and consent of the minor,

and that the minor is estopped to claim anything of these bondsmen on account of any such loss. This question, as well as the contention of plaintiff that the settlement was made collusively, and for the purpose of making these bondsmen liable, was a question of fact. The court held against the appellants on this contention. An examination of the evidence discloses the correctness of the court's ruling. Though, perhaps, there is much in the record that suggests collusion, it amounts merely to a suspicion, not supported by the proof.

It is next contended that the court lost jurisdiction of the property in the hands of the guardian after it had been carried away from the state of Iowa into the state of Missouri, and that the court had no power to make any order touching the property so received by the guardian.

2. GUARDIAN  
AND WARD:  
removal of  
funds from  
state.

As said before, the guardian still remained the guardian, under his appointment received from the district court of Ida County. The minor appeared in that same court, and filed his petition for an accounting. The guardian raised no question, but appeared, filed his report, and submitted himself to the jurisdiction of the court. The order was made with full jurisdiction both of the subject-matter and of the parties. The mere statement of the proposition is sufficient. Further, it is to protect a minor against such conduct as is shown here that the law requires a guardian to give a bond. The bond is the protection which the minor has against the very act complained of. The fact that the guardian, after the sale, carried the property received from the sale outside the jurisdiction of the court, does not relieve the guardian from his personal liability to the ward for the amount so received and wrongfully, if wrongfully, appropriated. The wrongful appropriation of property, or the wrongful conversion of property by the guardian, does not affect the jurisdiction of the court

to make an order requiring him to account for the money to his ward on application therefor. The act of the guardian may be wrongful, but that act does not affect the jurisdiction of the court, or an order made with jurisdiction of the party against whom the order runs.

There seems to be a confusion of ideas in this case which we are not able to harmonize. It is true that the amount for which these bondsmen is liable is dependent upon a finding on the part of the court of the amount due from the guardian to the ward. This is the final accounting of the guardian to the ward, called for by the trust relationship created by his appointment.

Much of the argument that is injected into this case more properly belongs in the suit which, we understand, has been brought by the ward against these bondsmen (appellants), and has no place in this suit, where the only question involved is the amount due from the guardian to the ward.

The court dismissed the petition of intervention, affirmed the report of the guardian, as made, and we see no ground in this record for interfering with such order. The cause is, therefore,—*Affirmed*.

PRESTON, C. J., LADD and STEVENS, JJ., concur.

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IN RE WILL OF MARY E. KESTER.

PERRY SIMMONS, Appellee, v. WOMEN'S HOME MISSIONARY SOCIETY et al., Appellants.

**WILLS: Testamentary Capacity—Evidence—Weight and Sufficiency.**

The fact that a testatrix was, at the time of the execution of a will, in pain, and possessed impaired mental faculties, does not necessarily stamp her as one lacking testamentary capacity.

*Appeal from Humboldt District Court.—N. J. LEE, Judge.*



MAY 17, 1918.

REHEARING DENIED JUNE 27, 1918.

CONTESTANT objected to the probate of the will, on the ground of alleged undue influence and mental incapacity. The formal execution of the will was admitted. There was a trial to a jury. At the close of the evidence, contestant withdrew the issues as to the alleged undue influence. The jury found for the contestant, and proponents appeal.—*Reversed.*

*Edith Prouty, Dunshee, Haines & Brody, and Samson & Steer, for appellants.*

*L. W. Housel and Robert Healy, for appellee.*

PRESTON, C. J.—The point which appears to be most seriously argued and relied upon for a reversal is as to the sufficiency of the evidence to sustain the verdict. This question was properly raised by motions to direct a verdict, at the close of proponents' evidence and at the close of all the evidence; by motion for new trial, etc.

Other assignments of error are that the court erred in permitting witnesses to testify that deceased was of unsound mind on the day the will was executed, for the reason that the witnesses did not see deceased at that time; also in refusing to give an instruction requested by proponent.

1. We have carefully examined the record, and have come to the conclusion that, under our authorities, the evidence is not sufficient to sustain the verdict. We shall not set it out in detail, but will endeavor to set out the evidence as favorably to contestant as the record will justify, and refer to proponents' evidence in a still more general way. First, though, we may properly set out those facts about which there is little or no dispute.

The will was executed February 3, 1915. It appears that, at the time of her death, on April 21, 1915, testatrix

was a widow, about 70 years of age, and childless. Her husband had died nearly 30 years before; she never had but one child, and it died in infancy; after her husband's death, she lived with her parents on a farm, until about ten years before her death, then moved to Humboldt, as she was not strong; about 28 years ago, she was visiting a cousin in Creston; complained of her head; she went to some faith healers, an old man and woman, who claimed they could cure her by divine power; she took a few treatments of them, and a brother of deceased testifies that she told him she had agreed to deed her property to them, if they would cure her and take care of her through her life; he claims that he prevented her from doing so. After that, and some years before her death, her brother testifies that she was assisting in a revival meeting at Sheldon, where she met a man whom she married on a short acquaintance—concededly a foolish marriage. This marriage was shortly annulled, because the man had another wife or wives living. Contestant contends that this man married her for her money; and that is undoubtedly true, but he did not succeed in obtaining it. Deceased died as a result of cancer of the stomach. Some years before her death, she had a cancer of the breast, which, with a part of the muscles of her arm, was removed. Before that, she had a cancer of the lip, which was cured by treatment, without an operation. About August, 1914, she began to complain that her foot or limb bothered her, and the difficulty increased until she was not able to go to church, after about the first of December, 1914. She went to Hot Springs, February 8, 1915, a few days after the will was executed, and was then suffering from what she supposed to be rheumatism, and perhaps some other troubles; she did not go to Hot Springs to be operated upon for cancer or anything of that kind; up to the time of her going away, she had not, at any time, been confined to her

bed; she sat up in her chair most of the time,—a part of the time with her foot upon a chair.

At the time of the execution of the will, according to the testimony of her nurse, who was also the other subscribing witness to the will, deceased was thin and frail looking, and was not able to walk alone scarcely any of the time; complained of her head and limb; she was sleepless at night; her appetite was pretty good, usually; and deceased said she could not read any more; deceased asked witness to read Scriptures to her; this was the daily practice, twice every day; deceased forgot about her key to the bank box; said that one of the ministers came so often that he annoyed her, and that he was wanting money, and she asked the nurse to phone him and stop his coming, which was done; this was the day before she went to Hot Springs; deceased told her, after the will was made, that she had had her will made two or three times, and it didn't suit her yet, and she expected to have it changed, and that she could have it made again; deceased told her she had always intended to give the Dakota land to foreign missions, but keep her Clay County land; in talking, she would change the subject; deceased paid witness for her services in cash; she paid the medical expenses of the house through the nurse; gave witness a check to get money at the bank; talked of her property. Witness gives her opinion that deceased was of unsound mind.

Counsel for appellants strenuously insist that the testimony of this witness does not justify the expression of an opinion as to the mental condition of deceased, and they make the same claim as to other witnesses. However this may be, as to the witness Mrs. Little, she was one of the subscribing witnesses to the will, and we think her testimony is at least weakened by that fact. Some of the cases hold that the legal effect of this is to assert the mental capacity of deceased, and affects the credibility of the witness. *Sellars v. Sellars*, 2 Heisk. (Tenn.) 430, 432. Appellants of-

ferred an instruction on this point, which, or one of similar import, might well have been given.

Deceased's own brother, whose testimony we have before quoted, testifying as a witness for contestant, testifies that, up to the time the will was made, deceased was perfectly able to recognize all of her relatives; and that there never was a time, up to then, when she was so feeble that she did not know all of her friends and neighbors who came to call upon her.

She inherited the quarter section of land in Clay County, Iowa, from her husband. Some years before her death, she sold one 80 of this to her brother Thomas, a Methodist minister in Dakota. She had a piece of land in South Dakota; and, on the advice of a brother, she sold, and invested in North Dakota, and made \$8.00 an acre on this. She reinvested in other Dakota land, which was not profitable, and her brother took it off her hands. The other half of the quarter section in Clay County she conveyed to the Women's Foreign Missionary Society, a corporation, at the agreed value of \$11,121, upon the agreement of the corporation that they would pay her an annuity of 5% upon that value, in half-yearly payments, during the remainder of her life. The annuity was paid to her as long as she lived. Her brother testifies that she told him that some church people came to her and solicited means for the missionary cause, and came to her for a donation; that they were persistent. She claimed the Dakota land was missionary money, and that she was going to give that to the missionary cause. It is not quite clear from the record whether this Dakota land was a part of the deed for which an annuity was to be paid. As we understand it, it was so. She received about \$3,100 or \$3,200 from her father's estate; so that she had, up to the time of her decease, in addition to the annuity agreement of \$556 a year, property, above her liabilities, of about \$7,500,

including her home in Humboldt. She employed an attorney in Humboldt to assist her in looking after her investments. She deposited her money in a bank, and drew checks upon it for disbursements; 35 of these checks were introduced in evidence, bearing date from September 23, 1914, to February 12, 1915. Some of these were in her own handwriting; and drawn after the execution of the will. Deceased was a reader of books of the most substantial character. The man who was her pastor from October, 1913, during the remainder of her life, testified that she frequently obtained books from his library of that character; that she was a positive woman, of positive convictions, and used her own judgment; that she consulted him, but reached her own conclusions; and that she was a devoted Christian woman,—was devoted to her church work and to charity work. The provisions of her will, which will be referred to, were in line with this work in which she was interested. She was always well satisfied with the investment of money in the life annuity. She was a member of the Methodist church, and a member of its board of trustees, at Humboldt; she was class leader in the church, and a member of the official board, the business board of the church. She was one of the most regular attendants at the meetings of the board, in which she had an active part, and the evidence tends to show that she was a vital part of the business of the church, and her opinions were always regarded by her pastor as of value on the board.

About December 1, 1914, she began to prepare for the execution of her will. She consulted with her pastor about it, and about making a final disposition of her property; inquired about the different church boards and about the Children's Home. He made no suggestions as to what disposition she should make of her property. About January 1, 1915, she asked Mr. Garfield, who had been her attorney for many years, to come to her house, and talked with him

about her will, stating that she had several matters in mind, but did not at that time wish to give specific directions for having it prepared,—simply wanted to discuss some matters. She spoke of the local church and the Women's Missionary Society, and of the Iowa Children's Home; she had some literature from this institution; her attorney did not, at that time, make any suggestions as to what bequests she should make. On the same date, she wrote Rev. Slothower, superintendent of the Des Moines district of the M. E. church, asking for information and documents necessary for filling out bequests to the Women's Home Missionary Society. Her letter was answered in a few days, and again, about January 10th, she wrote him another letter, in which she stated that she wished to give \$2,000 to the Home Missionary Society, and that, if she lived until fall, she might give \$500 for the young people he was interested in, but for the present, to send blank only for the first-named society. On the day the will was executed, she again called for Mr. Garfield, who went to her house. She stated to him that she was about to go south for her health, and desired to have her will prepared before going; she gave him directions respecting it; he made a memorandum of them, and went to his office and prepared the will; later in the day, he returned to her house, where the will was executed. Mr. Garfield, as a witness, goes into detail as to all that was said and done by her in regard to her property and the persons she desired to provide for, and says that she discussed her brothers and sisters. At one point the provision was not as specific as to a certain branch of the work of one of appellants as she desired, and at her request the attorney interlined with a pen, making it more specific. He states that she was of sound and disposing mind at that time.

She left surviving five brothers and two sisters. By her will, she gave \$2,000 to the Women's Home Missionary Society of the Des Moines Conference of the M. E. Church.

a corporation at Des Moines, and expressed the desire that this sum be used for the support of Deaconess' work in Des Moines; she gave \$2,000 to the Iowa Children's Home Society; to the Board of Home Missions of the M. E. Church, with headquarters in New York City, \$250, specifying the particular purpose for which it should be used; \$250 to the M. E. Church of Humboldt, Iowa, to be directed by the Ladies Aid Society of said church; to her sister Sarah A. Esher, \$600; to her sister Rhoda Kester, \$300; to her sister Caroline Spohn, \$300; and the residue to her three sisters above named, share and share alike; and provided that, if she should use her means during her lifetime to the extent that it should be insufficient to pay all bequests, then the same should be paid pro rata. She nominated her brother, James F. Simmons, executor.

The financial condition of her brothers and sisters is shown. Some of them are well to do; others, not so well. After the execution of the will, on one or two occasions, she expressed some dissatisfaction with its provisions, and said that she was going to have it changed.

Three or four of her brothers and sisters testified for contestant, and these include contestant himself, as well as other witnesses. The tendency of the testimony for contestant, in addition to that already set out, some of which is more or less in the nature of conclusions, is that she was forgetful: She forgot that she had paid her church subscriptions; she forgot that her brother had paid her money; thought he had made a mistake, and in some instances it was found that she was mistaken; for two years before her death, she would break off, in talking, and would not finish the sentence, and as she grew weaker, she grew worse. Some of the witnesses had noticed these peculiarities for ten years or more. There is testimony that her eyesight failed, along with her health; that she said she was going to will property to her brother, the contestant, because he had

helped her out of the Sheldon difficulty; that, in recent years, there was loss of memory. One witness puts it that she talked very intelligently and interestingly, and then would forget what she was talking about, but says she did not seem to have any hallucinations, and nothing of what the doctors call mania or insanity, except just that, in her conversation, she would forget what she had been saying; and that she was a bright woman to visit with, but was a poor manager, financially. The same witness says that deceased made the bargain for her care with the nurse; that the witness considered her rational; that deceased was a Christian woman, if one ever lived,—a woman of rather extraordinary character and piety. A sister testifies that the principal thing she criticized about the mental condition of deceased was her forgetfulness. Dr. Doan, the only medical witness who testified in the case, and who was her attending physician, towards the last, had seen her occasionally and prescribed for her, but did not see her professionally, outside of his office, until December, 1914; from that time until February 4th, he saw her at her home ten or a dozen times. He gave testimony as to her condition, and gave his opinion that she was of unsound mind. He says that, from 1906 until the fore part of 1915, she was in fairly good physical health; that she was nervous and irritable after February 4th, and suffering from malnutrition; that though her body might appear plump and well nourished, the blood and nervous system were suffering from lack of nutrition, and he attempted to supply to the system the elements she was unable to obtain from food. He says that dementia is a mental condition divided into many phases, and that her case would be called a secondary form of dementia caused by some other things than the dementia itself; that in such a case, well advanced, the person is forgetful, irritable, and has not ability to follow an argument or complete a sentence. He thought that deceased, in the latter



years of her life, had dementia. When asked about how long, he answered:

"A. Well, without perfectly close observation over a continued period, it is a difficult disease to diagnose, when compared with other mental conditions and physical conditions in the female, especially at her age; but from this view, I would think that the supposition that that was the trouble could easily be stated around 1910 and 1911, at the time she was taking care of her mother; at that time her own health was reasonably good. She had most of the,—so far as I could see,—of the care of her mother. And except for that feature, there was a forgetting, and failure to comprehend the details of the plan of treatment."

He thought she had not the mental capacity to transact any business where it would require acuteness of mind, or determining values, or the consequences of an act. He says that she always recognized him, and had the capacity to recognize her brothers and sisters; that she asked for his bill; that she transacted her business with him intelligently, so far as handling money and things of that kind was concerned,—paid her bills in a perfectly intelligent way: but he did not know anything about whether she had the mental capacity to attend to the minor, current business affairs of her life. He thought she would not have the mental capacity to fill out a check; and yet the undisputed evidence is that she did so. He did not think it possible for her, unaided, in January, 1915, to write an intelligent letter in regard to her property and what she would will to do with it; and yet the undisputed evidence shows that she did so. He thought it not possible for her to have received her friends and talked with them intelligently upon a subject that might interest her, and thought she would not be able, during January and February, 1915, to see her lawyer and tell him in an intelligent way what disposition she wished to make of her property; and yet she did these things.

We have set out the evidence more fully, perhaps, than necessary; but we have not, of course, set out all the evidence. That referred to fairly sets out the substance of the testimony for contestant. On the other hand, 15 or 16 witnesses for proponents testify as to their long acquaintance with deceased, and their observation of her conduct, appearance, conversation, and her method of doing business; and give their opinion that she was of sound mind.

Appellants' contention is that the verdict is not sustained by sufficient evidence, and is against the weight of the evidence; that the case should not have been submitted to the jury. They cite, among other cases, *Perkins v. Perkins*, 116 Iowa 253; *In re Estate of Perkins*, 109 Iowa 216; *Gates v. Cole*, 137 Iowa 613; *Sevening v. Smith*, 153 Iowa 639; *Des Moines Nat. Bank v. Chisholm*, 71 Iowa 675; *Fothergill v. Fothergill*, 129 Iowa 93; *In re Estate of Townsend*, 122 Iowa 246; *Mitchell v. Mutch*, 180 Iowa 1281.

Some of these cases involve the validity of contracts, and mental capacity to make a valid contract, which requires a higher degree of mental capacity than to make a will. It will serve no useful purpose to quote from these cases, or to state the facts. It is sufficient to say that we have examined this record with care; and it seems to us quite clear that the instant case is not as strong in its facts as the cases cited, where it was held that the evidence was not sufficient to sustain a verdict setting aside the will. It is true, of course, that deceased was and had been suffering physical pain; that there was some weakening of her mental faculties,—but not sufficient to justify the conclusion that she was not competent to transact the business in hand. The fact that she contracted an unfortunate or foolish marriage, a good many years before, while a circumstance, is not persuasive: there are many such.

We are inclined to the view that the court erred in permitting witnesses who were not present at the time of the

execution of the will to testify as to her mental condition at that time. It is true that Dr. Doan testified that there was dementia in some degree. But, taking all his evidence and all the other evidence together, we think there was no such general derangement of the mental condition of testatrix as to render such evidence admissible. *Fothergill v. Fothergill*, supra; *Blake v. Rourke*, 74 Iowa 519; *Speer v. Speer*, 146 Iowa 6.

There may be other matters of minor importance argued, but what has been said is decisive of the case, and we shall not prolong the opinion to go into further detail.

It is our conclusion that the judgment ought to be, and it is,—*Reversed*.

WEAVER, GAYNOR, and STEVENS, JJ., concur.

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IOWA STATE SAVINGS BANK, Appellee, v. CITY NATIONAL BANK, Appellant.

**BILLS AND NOTES: Acceptance—Separate Writing.** Written acceptance of a check by the drawee thereof may be by a writing separate from the check. So held in the case of a telegram.

**BILLS AND NOTES: When "With Exchange" Is Surplusage.** The term "*with exchange*" is pure surplusage when added to a check which is drawn upon a bank by the bank's own depositor, and which is payable at said bank.

**BILLS AND NOTES: Primary Liability.** A bank which unconditionally promises to pay its depositor's check in a named amount becomes primarily liable on the check to one who acts on the promise.

*Appeal from Cedar District Court.*—F. O. ELLISON, Judge.

JUNE 27, 1918.

ACTION at law. The issues and relevant facts are stated in the opinion.—*Affirmed*.

*J. C. Franco*, for appellant.

*Leggett & McKemey*, for appellee.

WEAVER, J.—On June 14, 1914, one Lon Fraseur drew and delivered to one H. I. Ball a check on the defendant bank, as follows:

"Tipton, Iowa, June 4, 1914.

1. **BILLS AND  
NOTES: ac-  
ceptance: sep-  
arate writing.**

"CITY NATIONAL BANK

"Pay to the order of H. I. Ball \$1,035.00  
Ten hundred thirty-five and no/100 dollars

with ex.

"Lon Fraseur."

Thereafter, on the same day, Ball endorsed and delivered the check to the plaintiff; but, before paying any money thereon, and before giving Ball credit for the same, plaintiff telegraphed an inquiry to the defendant, as follows:

"Fairfield, Iowa, June 4, 1914.

"City National Bank, Tipton, Iowa.

"Will you pay check for ten hundred thirty-five dollars signed Lon Fraseur for cattle?

"Iowa State Savings Bank."

The message was promptly delivered, and answered at once, in these words:

"Tipton, Iowa, June 4, 1914.

"Iowa State Savings Bank, Fairfield, Iowa.

"We will pay check for ten hundred thirty-five dollars signed Lon Fraseur.

"City National Bank."

Plaintiff received the telegram, and, relying thereon, paid Ball the full amount thereof, \$1,035. Thereupon, plaintiff promptly forwarded the instrument to its correspondent, the Cedar County State Bank, at Tipton, for collection. On the following day, the last-named bank, having received the check, presented it to the defendant for payment, but was refused, on the ground that "payment had been ordered stopped." The check is still unpaid, and is the property of the plaintiff. A second presentation and demand were made on June 8, 1914, and met again with refusal. Thereafter, this action was begun.

The petition sets out the facts substantially as above related, and demands a recovery of the amount of the check, with interest and protest fees. Defendant demurred to the petition, on the ground that it fails to state a cause of action, in that the check does not operate as an assignment of any part of the funds to the credit of Lon Fraseur in the defendant bank; that the petition shows on its face that defendant never accepted the check, and without acceptance, defendant cannot be held liable thereon; and that the check does not, in terms, conform to the offer or acceptance. The demurrer was overruled; but the plaintiff thereafter amended its petition, by alleging that, neither at the time payment of the check was demanded, nor at any time prior to the commencement of this action, did plaintiff demand payment of any exchange on the check; and it avers that the words "with ex." were not intended to require the bank or any party to the check to pay exchange in any amount. A motion to strike this amendment being denied, defendant answered, denying indebtedness and denying acceptance of the check, but admitting the telegraphic correspondence, as pleaded.

The cause was tried, submitted, and decided upon an agreed statement which sets forth the facts as we have hereinbefore recited them. Judgment was rendered for the plaintiff, as prayed; and defendant appeals.

I. The first assignment of error argued by counsel for appellant is based upon the proposition that the record shows no acceptance of the check, and that, without acceptance, appellant cannot be held liable in this action.

If there could be no valid acceptance, except by writing and signing the formal words upon the face of the instrument, the exception would have to be sustained; but this is not the law. Our Negotiable Instruments Statute provides that a bill of exchange does not, "of itself," operate as an assignment of the funds in the hands of the

drawee available for the payment thereof; and that, until there is an acceptance, the drawee is not liable on the bill (Section 3060-a127, Code Supplement, 1913); and further provides that the acceptance must be in writing signed by the drawee (Section 3060-a132, Code Supplement, 1913); but it nowhere makes it necessary that such acceptance shall, in all cases, be written upon the bill itself. On the contrary, it recognizes the validity of an acceptance written on paper other than the bill, and an action can be maintained thereon against the drawee, in favor of one to whom it is shown, and who, on faith thereof, receives the bill for value (Section 3060-a134). It also makes the unconditional written promise to accept a bill before it is drawn the equivalent of an actual acceptance in favor of every person who, on faith thereof, receives the bill for value (Section 3060-a135 Code Supplement, 1913). Precedents to this effect are very numerous; but the clear and explicit terms of the statute make their citation unnecessary. The record before us shows the express promise of the appellant to pay the check of Lon Fraseur for \$1,035, and that the appellee, on faith of such promise, did receive the check for value.

The only question presented by the appeal which is open to argument is the one which is considered in the following paragraph.

II. The defense most confidently relied upon is that while appellant did promise to pay Fraseur's check for \$1,035, the check actually drawn and presented for payment does not conform to the terms of the promise, in that the language of the instrument so presented concludes with the words, "with ex." The theory of counsel in this respect seems to be that the promise to pay was made with reference to a check for \$1,035 only, and that the acceptance of the check as drawn would impose upon the drawee an additional liability for exchange; and

2. BILLS AND  
NOTES:  
when  
"with ex-  
change" is  
surplusage.

that, because of this unauthorized requirement, appellant was under no legal liability to accept or pay.

That a drawee can be held liable only in accordance with the terms of his acceptance or promise to accept, is undeniably true; and the inquiry here is, therefore, whether the addition to the check of the words, "with ex.," is such that the appellant's acceptance thereof would impose upon it any liability in excess of its promise to pay the sum of \$1,035. In support of its contention, appellant relies largely upon the decision of this court in *Lindley v. First Nat. Bank*, 76 Iowa 629. In that case, one Barro telegraphed to defendant bank, directing it to transmit \$2,000 by telegraph to plaintiff at Los Angeles, California, and to charge same to his account. To this, the bank answered that it would pay Barro's draft upon it for \$2,000. Thereupon, Barro drew his draft on the bank for \$2,000, with exchange on New York, and delivered it to Lindley in payment of a debt. On presentation, the bank refused to pay, and Lindley brought suit. It was held that plaintiff could not recover, because the draft, as presented, requested that the sum named therein should be paid in New York, or in New York exchange, which provision was not in conformity to its promise. Without in any way questioning the soundness of this precedent, as applicable to cases involving a similar state of facts, we regard it as clear that it does not control the question now before us. There is nothing in this check requiring the appellant to pay it elsewhere than over its own counter, to the lawful holder presenting it for payment, or to pay it otherwise than in lawful money of the realm. Had the payee himself presented the check and demanded, not only the sum of \$1,035, therein named, but also an additional sum, as exchange on some other named city or town not mentioned in the instrument, no one would for a minute argue that the bank was under any legal obligation to pay such exchange. "Exchange" is generally incident to bills

issued or drawn for the transmission of money from one place to another, and is supposed to represent the cost of drawing the bill and transmitting the money to the designated place to meet it. *Flagg v. School Dist.*, 4 N. D. 30; *Nicely v. Commercial Bank*, 15 Ind. App. 563 (44 N. E. 572). It is very apparent, then, that the obligation of a bank to pay its own depositor's check in the usual course of business, is to pay the same over its own counter—a duty which negatives the idea of any charge or expense for exchange; and if the words "with ex." appear in the check, they are surplusage, and have no effect whatever to increase the liability of the paying bank on account of its previous promise to certify or accept check for the sum of money specifically named in such promise. The words "with ex." without naming a place on which the exchange is to be paid, being surplusage, constitute no departure from the terms of the promise; and their insertion in the check will not relieve the drawee from liability on his promise to pay. The correctness of this view is expressly stated by this court in *Culbertson v. Nelson*, 93 Iowa 187, 194, where, in speaking of a note or bill dated in New York and payable in New York, "with current exchange on New York," we said, "The quoted words were superfluous and surplusage." In the same case, we quoted approvingly *Hill v. Todd*, 29 Ill. 101, and *Clauser v. Stone*, 29 Ill. 114, in both of which it was held that the inclusion of the words "with exchange" in a promissory note, without designation of the place on which the exchange is to be drawn, was without legal meaning, and was to be ignored as surplusage. The same rule is found illustrated in *First Nat. Bank v. Muskogee P. L. Co.*, 40 Okla. 603 (139 Pac. 1136); *North Atchison Bank v. Garretson*, 2 C. C. A. 145 (51 Fed. 168). The promise of the appellant was to pay the check of its depositor for a stated amount, and the check, drawn and negotiated on the faith of such promise and for the amount so mentioned,



was neither more nor less. There was nothing in the promise to suggest that payment was to be made elsewhere than at the drawee's own place of business, and there is nothing in the check drawn upon it to suggest or require its payment elsewhere. Indeed, the refusal to pay the check was grounded solely on the alleged fact that "payment had been stopped," presumably by the drawer; and it is only when suit is brought that this defense is raised. We are satisfied that the check was, in every legal essential, in conformity with appellant's promise.

III. We think it not very material whether the conceded facts constitute, in every technical sense, an acceptance of the check or promise to accept, or whether we treat the act and promise of the appellant as amounting to a certification of the check.

3. **BILLS AND NOTES: primary liability.** The question put to appellant by appellee was, "Will you pay?" etc. The answer was, in unequivocal terms, "We will pay," etc. When this promise was acted upon, the liability of the promisor was not that of a surety or grantor. The appellant became at once the principal debtor of the plaintiff; and, while it had the right to insist that the check drawn upon it should be such as it promised to pay, the courts should not indulge in over-refinement of reasoning to discover plausible ground upon which to relieve it from the performance of its fairly assumed obligations.

There is no reversible error in the record, and the judgment below is—*Affirmed*.

PRESTON, C. J., GAYNOR and STEVENS, JJ., concur.

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GEORGE W. KOONTZ, Appellant, v. IOWA CITY STATE BANK et al., Appellees.

**PLEADING:** General Limited by Specific. Broad and general allegations as grounds for recovery may be wholly eliminated by

a subsequent pleading which specifies with particularity the grounds relied on for a recovery. So held where the original pleading claimed recovery on the sweeping allegation that the defending party had *breached* a contract; while a later pleading, filed to meet a motion for more specific statement, alleged *two* distinct grounds.

**BONDS: Rescission and Recovery of Deposit.** One who agrees to  
2 buy bonds of a municipal corporation, provided he is "furnished a complete transcript of all proceedings leading up to the issue, evidencing the legality to the satisfaction of our attorney," may not rescind because the method and means of paying the bonds were not inserted in the bonds, such latter matter not being a proceeding "leading up to the issue," especially in view of the doubt as to the power of the governing body (a school board) to insert such provisions in the bonds. .

**BONDS: Contract to Purchase—Rescission—Estoppel.** One who  
3 agrees to buy municipal bonds, provided the proceedings leading up to the issuance of the bonds, in the opinion of his attorney, properly evidence the legality of the bonds, may not rescind and recover his deposit on the ground that the notices of the election to vote on such issue were not properly given. when, prior to the attempted rescission, the buyer's attorney had distinctly conceded the sufficiency of the proceedings relative to notices, etc., and the corporation necessarily did nothing further with reference thereto.

**PLEADING: Mistake.** Mistake, as the basis for relief, must be  
4 distinctly pleaded, and accompanied with appropriate prayer and proof.

*Appeal from Johnson District Court.—R. P. HOWELL,*  
Judge.

MARCH 12, 1918.

REHEARING DENIED JUNE 27, 1918.

UNDER a contract between him and the school district of which appellant Koontz is treasurer, the intervenor undertook to buy bonds, to be issued by the district. In connection, he made a deposit with defendant bank. He asserts he is entitled to a return of said deposit, because of failure on part of the district to comply with said contract. The trial court awarded a return. Hence this appeal.—*Reversed.*

*E. A. Baldwin*, for appellant.

*Milton Remley*, for appellees.

SALINGER, J.—I. Assume intervenor originally declared he was entitled to a return of his deposit because the contract had been breached by the district. If such claim be not thereafter narrowed, he may recover if *any* breach be proved. But as intervenor could refrain from suing, or dismiss after suing, and so waive all breaches, he could, upon the trial, forego some of the breaches by selecting from all, those which he desired to declare upon. He did narrow his suit. In response to a motion that he be required "to specifically state wherein and in what particular the bonds referred to were found to be illegal by the intervenor's attorney \* \* \* and wherein the proceedings had by \* \* \* the district did not evidence the legality of the issue of said bonds to the satisfaction of said intervenor's attorney," the intervenor selected two "particulars." We think that, so, the intervenor narrowed his suit to a claim that his deposit should be returned on account of one or both of the two points selected by him.

II. Had there been no contract, the intervenor could recover his deposit only by showing that the bonds he had undertaken to buy were *in fact* illegal because of one or both the matters which he asserted against their validity. If the good-faith opinion of his attorney, and not the fact of illegality,—and that is the theory of this suit,—is to control, the contract must create this exceptional method of determining whether a party to a contract is justified in rescinding. The contract provides that intervenor shall be furnished a complete certified transcript "of all proceedings *leading up to the issue*, evidencing the legality of the same to the satisfaction of our attorney;" and that the

1. PLEADING:  
general limited by  
specific.

2. BONDS: rescission and  
recovery of  
deposit.

district "will take such steps as may be necessary to make the bonds legal in every respect;" and that, "if the bonds are found to be illegal," then the deposit made shall be returned to intervenor.

The specific controls the general language. Qualifications must be read into what is qualified. Upon the application of these elementary rules of construction, it must be found that no failure to make proof of legality to the satisfaction of the attorney is material, except as to steps "leading up to the issue." The attorney—a Mr. Hill, and not the attorney who represents the appellee herein—was dissatisfied on two things. Whether the failure to satisfy him on these is controlling, and the judgment below, therefore, right, depends, then, upon whether the unfavorable opinion of the attorney deals with some step *leading up* to the issue of the bonds. One breach asserted by the intervenor is, in one place, stated to be that there was a failure to show "that any proper resolution was adopted, making provision for the payment of the annual interest for the bonds at maturity \* \* \* that said board refused to pass a resolution providing for the levying of an annual tax in sufficient amount to pay the interest year by year, or in any way to pledge itself to provide for the payment of the bonds at maturity and make said pledge irrevocable." Another statement is that the board declined to adopt a resolution "that there shall be levied annually, beginning with the year 1913, on all the taxable property in said Independent School District, a special direct annual tax of sufficient rate and amount with which to pay the interest on said bonds as it becomes due and to constitute a sinking fund for the payment of the principal thereof at maturity, which said tax levy and this resolution ordering the same shall be and remain irrevocable so long as any of said bonds or interest coupons shall remain outstanding and unpaid."

We are of opinion that, no matter how desirable it may be that the bond, when issued, shall contain such provisions for its payment, a failure to insert such a provision is not a failure as to any step "leading up to the issue." We shall have occasion later to deal with what is such a step. What we now decide is the following: The claim of the intervenor is that he may rescind because it was the opinion of his attorney that failure to make such provision did affect the validity of the issue. We hold that the contract gave the attorney no power to determine whether failure to make such provision for payment affected legality; and we put this much of our decision upon the sole ground that the contract gives the attorney no such power, because provisions in the completed bond fixing method and means of payment are not steps leading up to the issue. Hence, it was no breach of the contract that the attorney was not satisfied that a bond which had no such provision is valid.

We doubt whether the failure to make this sinking fund arrangement would be available to the intervenor if the contract included this subject in what is to be controlled by the opinion of intervenor's attorney. The parties made their contract with reference to the law of the state. The district lacked power to make some, if, indeed, not all, the provisions demanded. Its powers were limited to certifying to the board of supervisors the basis for making a levy, year by year. We should be loath to hold that an opinion which declared a bond issue to be illegal because the issuer would not do a thing which the law did not authorize it to do, was binding on anyone. Such an opinion as that would be quite strong evidence that it was not rendered in good faith.

III. The second attack is that the district "failed to show proper evidence of the election notice having been given by the publication of the notice of the election as

3. BONDS: con-  
tract to pur-  
chase: rescis-  
sion: estoppel.

required by law." This *does* involve a step leading up to the issue, and failure to satisfy the attorney that lawful notice was given would sustain the recovery of the deposit, unless there be some avoidance. The attorneys for the respective parties engaged in much correspondence, in which the one for intervenor claimed the publication was not sufficient, and the other, that it was. Finally, the attorney for the intervenor, Mr. Hill, receded, and wrote a letter which refers to the opinion of the attorney for the district, and states that, "from a further examination of the various laws and amendments pertaining to the issuance of bonds by school districts of Iowa, I am willing to accede to the position which he outlines as to the authority for the present issue." The writer of this opinion believes that, as to any matter which *is* a step leading up to the issue, the opinion of the attorney for the bond buyer is, in the absence of bad faith, binding upon *both* buyer and seller. Indeed, appellee, in effect, concedes this. He plants himself on the proposition that the district can have no benefit from the opinion of the attorney of the intervenor, because the district contends it is not bound by any opinion of his when adverse to it; that the opinion is binding on neither, if not binding on both; that it does not lie in the mouth of one who denies the power to bind by such opinion to claim any advantage from such opinion. The vice is in the premise. The district does not say that the opinion of the intervenor's attorney is not binding at all, but that it is binding only as to steps that lead up to the issue of the bonds. Notices of election are steps leading up to the issue of the bonds. So, the district concedes that, upon this point, the opinion of intervenor's attorney is binding; wherefore, it may avail itself of the opinion of said attorney on that point. It may be that, if it were necessary to decide the question, we might not be agreed; but it is not

necessary. Whether or not the contract made the opinion of intervenor's attorney on the legality of the publication of notice binding upon the parties to the contract, the fact remains that this attorney was the agent of the buyer in conducting so much of the negotiations as were to settle legality. When he advised the other party to the contract that the objection to the notice would not be insisted on, the sellers were justified in doing nothing more upon that point. It would violate every principle of natural equity and orderly procedure in litigation to permit the party who had made this declaration to thereafter recede from his recission. It is plain we are not concerned with whether the publication of notice was the one required by law, and we express no opinion upon the point. We ground our decision at this point upon the fact that the intervenor is in no position to urge that the notice was not such as the law requires.

There is some argument that the attorney for intervenor was mistaken in making said concession. This is a claim related to the one that the opinion is not as conclusive on the buyer as on the seller. We have disposed of that claim. We may well add that no such issue is tendered in the pleadings, and that in no view may intervenor be relieved for such mistake, if mistake there was, without appropriate plea, prayer, and proof.

We hold that there must be a reversal because the failure to put methods of payments into the bond was not, as the trial court of necessity held, a matter upon which the opinion of intervenor's attorney is material; and because appellee is estopped to urge that lawful notice of election was not given.—*Reversed and remanded.*

PRESTON, C. J., LADD, EVANS, GAYNOR, and STEVENS, JJ.,  
concur.

L. LARSH, Appellant, v. J. C. STRASSER, Appellee.

**NEGLIGENCE: Presumption—Speed of Automobile.** It may not be  
1 presumed that an automobile was moving at a rate of speed in  
excess of 25 miles per hour (Section 1571-m19, Code Supp., 1913),  
from the naked fact that, upon coming in contact with an ob-  
ject, the automobile moved the object a distance of 50 feet.

**NEGLIGENCE: Equal Fault.** Plaintiff, when equally at fault with  
2 defendant, may not recover damages consequent upon an acci-  
dent. So held where neither of two motor vehicle drivers gave  
warning of his approach to an intersecting highway.

*Appeal from Polk District Court.*—W. H. McHENRY, Judge.

JUNE 27, 1918.

ACTION for damages resulted in a judgment for defen-  
dant. The plaintiff appeals.—*Affirmed.*

A. A. McGarry, for appellant.

C. W. Woodbridge, for appellee.

LADD, J.—The plaintiff was riding a motorcycle, in  
passing south on Twenty-eighth Street, when it came in  
collision with a small automobile roadster, coming from  
the west on High Street, and was severely injured.

The petition charged that defendant was negligent  
in two respects: (1) In not sounding warning of his ap-  
proach, and, (2) in driving his car at an excessive speed;  
and pleaded that plaintiff was without fault. Though the  
defendant filed an answer, he did not appear at the trial.  
Appellant's contention is that the court erred in directing  
a verdict for defendant on the ground that there was not  
enough evidence to carry the issues to the jury. It dis-  
closed that neither party sounded any warning. Plaintiff  
testified:

"There was a bank on the west side of Twenty-eighth



Street. It cut off my view from him. It was 6 or 8 feet tall, the bank on High. I looked west on High before I went to the intersection, and I saw nothing, and could see 40 or 50 feet on High, and could have turned my motorcycle east. I could have kept out of the way of the car if I had seen it. \* \* \* I could not see the car when I looked. I could have turned east. Q. And avoid the collision? A. I couldn't have avoided it: if he was going to hit me, he would have hit me."

Laird, who lived in the second house east of Twenty-eighth Street on the north side of High Street, swore to having seen the vehicles immediately after the collision; that there was quite a cut on the west side of Twenty-eighth Street, near the intersection:

"More than two and one-half or three feet. It is about four feet. Q. There is not enough cut there to prevent a man riding on a motorcycle seeing over it and seeing a man coming east on High Street, is there? A. I wouldn't know hardly what to say about that. It seems to me it is quite deep."

Kreatch, who lived on the northwest corner of Twenty-eighth and High Streets testified to hearing the noise of the collision, and that the vehicles and plaintiff were about 25 or 30 feet east of the line of Twenty-eighth Street; that there is a cut about four feet deep at the corner where it is deepest; that his terrace was about three feet deep; that the rise of the hill was quite a good deal, but less as you recede to the north.

"I think, in going south on Twenty-eighth Street, you can see right across my lawn, and see an automobile coming east on High Street. I cut my lawn off practically level. At the corner, it is quite a rise, and the further back from the corner, the better you can see across."

On what part of the street the motorcycle was moving, does not appear; but plaintiff said, "The machine I was rid-

ing, after he struck it, went about 50 feet." Nor was there any direct evidence of the speed at which the automobile was traveling. Appellant argues that a speed in excess of 25 miles an hour is to be inferred from the circumstances proven.

1. **NEGLIGENCE:** presumption: speed of automobile.  
 Section 1571-m19 of the Code Supplement, 1913, provides that "a rate of speed in excess of 25 miles an hour shall be presumptive evidence of driving at a rate of speed which is not careful and prudent in case of injury to the person or property of another." If, then, it can be said that the automobile was moving faster, a prima-facie case was made out for the jury. The theory of appellant is that the automobile could not have struck the motorcycle with sufficient force to have carried it the distance it did, unless struck by a car moving at a speed exceeding 25 miles an hour. There was no evidence, however, indicating in what manner the automobile caused the motorcycle to move sidewise about 30 feet. Did it carry the motorcycle, or drag or push or throw it, when the vehicles collided? The record is void of evidence bearing on these questions, and, therefore, contains nothing from which the speed of the automobile may be inferred. There is no basis on which to found deductions as to the rate of speed of either vehicle; and for this reason, the trial court did not err in finding that the evidence did not make out a prima-facie case by proving that the automobile was moving to exceed 25 miles an hour.

Neither gave any warning of his approach. If it was the duty of the defendant so to do, a like duty devolved on the plaintiff; and, if the defendant may be said to have been negligent in not sounding a warning of the approach of his vehicle at the intersection of the streets, then it was negligence on the part of the plaintiff to have failed so to do. If.

2. **NEGLIGENCE:** equal fault.  
 of the approach of his vehicle at the intersection of the streets, then it was negligence

then, the defendant was guilty of negligence, the plaintiff was equally guilty of contributory negligence, and may not recover. Plaintiff undertakes to excuse himself by saying that he could not see, owing to the embankment. But the only evidence that there was sufficient embankment to obstruct the view was that of plaintiff, who said it was six or eight feet high at High Street. The evidence elsewhere that it did not exceed four feet is undisputed; and whatever it may have been, there was no showing but that it interposed the same obstruction to defendant's seeing plaintiff as it did to plaintiff's seeing defendant.

Our conclusion is that the proof merely established the occurrence of an accident, without casting the blame on either party; and that the law will not compel either party to share the consequent damages with the other. The court did not err in dismissing the petition.—*Affirmed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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JAMES WILLIAM LISTER, Appellee, v. JOSEPH LA PLANT et al.,  
Appellants.

**FRAUD: Inadequate Consideration—False Values.** Evidence reviewed, and held amply sufficient to justify the rescission of a land contract, in view of (a) gross inadequacy of consideration, (b) false representations as to values, and (c) defendant's concealment of his true relation to the property.

*Appeal from Warren District Court.*—LORIN N. HAYS,  
Judge.

JUNE 27, 1918.

SUIT to rescind exchange of farms resulted in decree as prayed. Defendants appeal.—*Affirmed*.

*C. H. E. Boardman*, for appellants.

*Mears & Lovejoy* and *A. V. Proudfoot*, for appellee.

LADD, J.—I. The plaintiff, two days past 21 years of age, owned 120 acres of land in Hardin County, of the reasonable value of \$150 to \$155 per acre, subject to a mortgage of \$6,700. One McCormack, an insurance agent, and an acquaintance of his for 15 years (as well as his foster father), suggested to him, one day, that if he wished to trade this land for a larger farm, he had a man with such a farm; and introduced the young man to the defendant, La Plant. Three days later, plaintiff called on La Plant, and insisted on going to look at his land; and, having found McCormack, proceeded to Warren County, where he looked at a 339½-acre farm, title to which stood in the name of defendant Holloway, but in which La Plant had an undivided one-half interest. It was incumbered by two mortgages, one for \$24,437.50, and the other for \$13,000. Three of the witnesses called by plaintiff estimated its value at \$75 per acre, and another, at \$80. One witness called by defendant thought it worth \$100 per acre or better. All these witnesses resided near the land, and were familiar with its character. La Plant put a price of \$150 per acre on it, while Holloway fixed \$150 as its fair value, saying that they had allowed \$140 per acre in trading for it. His father thought it ought to be worth the latter sum. A land agent called by defendant estimated its value at \$150 per acre, though admitting that more than half of it overflowed.

The evidence discloses that South River flows through the land, as does Short Creek in another direction, and that all but about 100 acres overflows, some witnesses testifying that this happens about every third year, and others, once every four or five years. During the year of this exchange, the crops were destroyed by excessive over-

flows. In view of the character of the farm, we are inclined to give greater credence to opinions of those living near to it, and familiar therewith for a long period of years. Indeed, we entertain no doubt that the fair market value of this land did not exceed \$100 per acre, and was much less than the incumbrance against it. After plaintiff had looked the land over, and consulted with McCormack, the three went to Indianola and exchanged, plaintiff giving his note to La Plant for \$3,500, with the understanding that a note and mortgage on his farm in Grundy County would be substituted, as difference. Holloway conveyed the 339½ acres to plaintiff, and the latter, the Hardin County farm to La Plant. As defendant's land was worth nothing above the incumbrances, the net result was that plaintiff had parted with \$14,800 worth of property, without receiving anything of value in return. Little wonder that defendants did not care to take the trouble to look at the Hardin County land, for they must have deemed it a good trade even though it were worthless. This inadequacy of consideration for plaintiff's land and mortgage is a strong circumstance tending to show fraud. Inadequacy of price is evidence, slight or powerful, according to its relative amount and other circumstances. Moreover, it may be so gross as that the disparity between the value of the subject and the consideration may shock the conscience, and alone constitute satisfactory evidence from which the perpetration of fraud may be inferred. 1 Black on Rescission and Cancellation, Section 175; 2 Pomeroy on Equity Jurisprudence, 926 *et seq.*; *Phillips v. Pullen*, 45 N. J. Eq. 5 (16 Atl. 9); *Bruner v. Cobb*, 37 Okla. 228 (131 Pac. 165); *Sherman v. Glick*, 71 Ore. 451 (142 Pac. 606); *Stephens v. Ozbourn*, 107 Tenn. 572 (64 S. W. 902).

Ordinarily, other circumstances throw sufficient light on transactions where the inadequacy of price is extreme, to render decision based on that alone, unnecessary. Such

cases are rare; and only where the disparity is extreme will equitable relief be granted. This is in deference to the freedom of contract, and in recognition of the right of owners to fix such prices on their property as they may choose. The evidence shows that these defendants allowed \$140 per acre in trade; and, though they may have known that this was in excess of its value, it is fair to assume that they must have thought it worth more than the mortgages against it. One of them says he thought the "equity" in it (the value above incumbrances) \$8,000 or \$10,000. Opinions of value differ greatly, and we are not inclined to give the disparity between the value of plaintiff's property and what he received greater significance than that of a strong and persuasive circumstance tending to show that he was in some manner influenced and deceived.

II. Shortly after defendants acquired the 339½ acres, they agreed that Holloway should pass as owner thereof, and La Plant as his agent; that \$1,000 should be paid any agent who would find a person who would buy the land; that the price should be \$140 per acre, and that \$7 an acre should be allowed as rent, and titles be exchanged at the time of sale or trade. In pursuance of this plan, La Plant listed the farm with several real estate agents and a life insurance agent, McCormack, on these terms. In negotiating the deal, Lister put a trading price on his land of \$200 per acre; and, according to Lister, La Plant declared the 339½ acres worth \$175 per acre, and that it would sell for \$185 per acre in the fall, and could have rented right along at \$7 per acre; and T. J. Holloway corroborated this by testifying that:

"La Plant said they could get \$7 an acre rent for this land. He told Lister that. If you buy, we will take it in at \$7 an acre. \* \* \* La Plant told him he could get him \$175 or \$180 an acre, inside of 6 months."

La Plant denied making any such representations, save that the rent would be allowed, and McCormack did not hear

anything concerning what the land could be sold for. The fair rental value of the land did not exceed \$3.50 an acre. Nothing was said of the commencement, in February previous, of proceedings to establish a drainage district, and of the excavation of a ditch through the land, straightening the watercourse of South River, which was subsequently done, and an assessment of \$4,827.73 levied against the land,—to say nothing concerning the ditch through the farm.

As Lister's testimony is corroborated by that of T. J. Holloway, who would not be likely to lean in favor of plaintiff, we are inclined to find that La Plant made the representations of value as alleged; and, as he knew that plaintiff was unfamiliar with values of land or its use, in that vicinity, that he so did as statements of fact, rather than mere opinions. *Hetland v. Bilstad*, 140 Iowa 411; *Ross v. Bolte*, 165 Iowa 499.

There is some doubt as to the extent of plaintiff's reliance on these representations. He testified first that he acted on his judgment and that of McCormack; but, on cross-examination, concluded that these matters influenced him. He looked over the land, though, in a somewhat casual way, and without inquiry of disinterested parties concerning it; but the record has left us in doubt as to whether this callow youth would not have exchanged, had nothing been said by La Plant concerning values. We are not ready to say that he would not have done so, and, therefore, treat these misrepresentations as circumstances tending to show the practice of deceit in behalf of defendants. See 1 Black on Rescission and Cancellation, Section 80.

III. The record leaves little or no doubt as to the deception of plaintiff in another respect. Holloway testified that, on the day of the trade:

"La Plant was held out as being my agent, I being the owner of the land, and McCormack was there representing Lister; and that was in accordance with the agreement I

had had with La Plant. That was the way things were to appear."

This is not disputed, save as hereafter appears. The record leaves no doubt that Lister supposed that McCormack was acting as his agent. He testified that he had told McCormack, before starting to look at the land, that he "would make it worth his while." McCormack denied this, but does not pretend that anything was said concerning his agency for La Plant until after the deal was closed and both were on their way to Marshalltown; and as to whether anything was then said, they disagree. Plaintiff is somewhat confirmed by the circumstance that he did execute a note for \$120 to McCormack for his services. The latter explains this by saying that Lister became hilarious on his way home, and boasted that he had made \$7,000; when, in response to his (McCormack's) suggestion that, if that were so, he ought to make him a present, Lister agreed to pay him \$120, and subsequently executed his note for that amount. This is extremely unlikely, if, as McCormack testified, he told him he was to be paid a commission by La Plant. It may be that plaintiff should have inferred this from McCormack's statement that "he had a man that had a farm for sale," and the fact that he was introduced by him to La Plant as agent, as contended by defendants; but La Plant was posing as agent, and plaintiff was without knowledge that he was interested in the land, other than as Holloway's agent. McCormack was not in the real estate business. Moreover, for him to have appeared as agent for La Plant other than secretly would have been inconsistent with the latter's scheme for the sale of the land. By himself posing as agent of the supposed owner, La Plant manifestly designed that the proposed victim should regard McCormack as his agent and friend; and the course of both La Plant and McCormack is entirely consistent with this theory of the case. McCormack and plaintiff went over the land together. They agreed that it looked



good, and McCormack expressed the opinion that it lay well, and "he didn't see why it couldn't be sold for more." But he did not disclose to plaintiff that the land was then listed with him at \$35 per acre less than it was then being priced at; and, when Lister directed McCormack to carry an offer from him to La Plant of \$3,500 difference, McCormack took it approvingly, ostensibly as plaintiff's agent, to the ostensible agent of the supposed owner, Holloway. McCormack excuses himself for thus encouraging plaintiff, in that he knew the price on plaintiff's land to have been inflated \$15 per acre. This would be \$1,800; while that of defendant's land above the listed price was \$12,900. Even if the price put on plaintiff's land were \$6,000 more than its value, as was the fact, this left the margin \$6,900; and the difference in the inflations over actual values, as seen, was much greater.

Even an agent owes something to the party with whom he is dealing in behalf of his principal, and ought not to stultify himself by knowingly misleading one who, notwithstanding such agency, is manifestly relying, in large measure, on his judgment. Infinitely more is his course to be condemned where, as agent for another, he knowingly allows the party with whom he deals to negotiate under the mistaken supposition that he is acting for him, and, through such mistake and consequent reliance on his advice, his dupe is defrauded of his means, to the advantage of agent and principal. Such was the scheme concocted by defendants and carried out with aid of McCormack. It is idle for the latter, in the face of this record, to pretend that he did not assume the attitude of assisting plaintiff throughout; nor can La Plant be heard to say that he was not knowingly taking advantage of the situation. He planned to assume the false position of agent, in lieu of that of part owner; and this was quite in harmony with allowing the agent employed by him to act also, ostensibly, for the party with whom he proposed to deal. The citation of authorities is

not necessary to show that this amounted to a fraud on plaintiff. Considered in connection with inadequacy of price, misrepresentation of value, and the deception practiced by the agent and by La Plant as to his relation to the deal, a conclusive case is made out. The decree of the district court is—*Affirmed*.

PRESTON, C. J., EVANS and SALINGER, JJ., concur.

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O. T. LITTLE, Appellee, v. CHARLES LAUBACH, Appellant.

**FENCES: Oral Contract between Owners—Inurement to Tenants.**

- 1 An oral contract between landowners, under which contract each agrees to build and maintain a specified portion of a division fence, inures to the benefit of not only said contracting owners, *but to the benefit of their subsequent tenants*, even though it does not appear that the tenants formally acquiesced in said contract. It follows that the tenant of the owner who has performed may recover of the owner who has not performed, the damages to crops consequent upon animals' breaking through the defaulting owner's defective fence.

**CONTRACTS: Rights Acquired by Third Persons.** A contract may

- 2 inure to the benefit of a third person, even though he is not a party thereto, or directly mentioned therein. So held where a contract between landowners, in the matter of maintaining division fences, was held to inure to the benefit of subsequent tenants.

**FENCES: Basis of Liability for Damages.** Principle recognized

- 3 that a landowner is not liable on account of the absence of a partition fence if no portion of the fence has been assigned to him either (a) by the fence viewers or (b) by agreement between the respective owners.

*Appeal from Calhoun District Court.*—M. E. HUTCHISON, Judge.

JUNE 27, 1918.

ACTION to recover damages for trespassing animals. Opinion states the facts. Verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed*.

*Healy & Thomas*, for appellant.

*J. F. Lavender and E. C. Stevenson*, for appellee.

GAYNOR, J.—At the time of the happening of the matters hereinafter complained of, the plaintiff was occupying the southeast quarter of the northwest quarter of Section 23, as tenant of one McCloud. The defendant was the owner of, and occupying the northeast quarter of, the northwest quarter of said section. An oral agreement had been entered into between the defendant and McCloud, by which McCloud undertook and agreed to keep up the east half of the fence between the land so occupied, and defendant would keep up the west half. The date of this agreement does not affirmatively appear; but, from the record, we assume that it was made some time before plaintiff went into possession, under his lease from McCloud. A fence was built and maintained on the east half of the dividing line. The defendant Laubach's pasture was immediately north of that portion of the line on which he had agreed to build a fence, and plaintiff's cornfield was immediately south of that portion of the line. Plaintiff entered into possession under his lease, and farmed the land for the years 1915 and 1916. At that time, there was a very deficient and insecure fence on the west half of the line: that is, on that portion of the line which defendant agreed with McCloud that he would keep in repair. So far as this record shows, McCloud's portion of that line was not only fenced, but sufficiently fenced. During the year 1916, defendant's cattle came through that portion which defendant had agreed to maintain, and trespassed upon plaintiff's field of corn, and destroyed large quantities of the same. It is to recover for the damages and injury and loss so caused that plaintiff brings this action.

Some facts are not in dispute: First, that the defendant, Laubach, occupied, whether as owner or not, the land imme-

1. FENCES: oral contract between owners: inurement to tenants.

diately north of the plaintiff; that McCloud owned the land immediately south of defendant's, and rented the same to the plaintiff for the years 1915 and 1916; that plaintiff went into possession under his lease, and attempted to raise a field of corn on land immediately south of the west half of this line fence; that defendant had a pasture immediately north of this corn field; that, on account of the insufficiency of the fence between the pasture and the cornfield, defendant's cattle broke over onto plaintiff's land and destroyed his corn.

There was a hearing before a jury and a verdict for the plaintiff. Judgment being entered upon the verdict, defendant appeals. The theory of the defendant is, as we gather it, that, conceding he made an agreement with plaintiff's landlord substantially as claimed by the plaintiff, the agreement was purely personal between him and McCloud, and McCloud alone can maintain an action for its breach; that plaintiff cannot recover damages for the breach of an agreement to which he was not a party. Second, that, the agreement not being made in conformity with the statute, it was only binding on the immediate parties to the agreement, and that the breach thereof furnished no basis for any action to one who is not a party to the agreement; that the duty to maintain the fence rested in contract; that the duty created by the contract was to McCloud, and not to the plaintiff; that, therefore, there was no duty owing to plaintiff for a breach of which action will lie, though the plaintiff may have suffered from the breach.

It would not be contended that, if McCloud were occupying the land and defendant failed to keep up his portion of the fence, and the same conditions existed as are here, the defendant would not have to respond in damages to McCloud. But it is contended that this contract was a personal contract between McCloud and the defendant; that the plaintiff has neither pleaded nor proven that it was adopted or

acquiesced in as a contract binding between him and the defendant. The thought urged is that, before there can be liability for a breach of a contract, the obligation of the contract must run to the party complaining, and there must be mutuality of obligation; that the plaintiff had never undertaken to maintain, nor done anything to maintain, the east half of this division fence; nor had the defendant, in consideration of any agreement or conduct on the part of the plaintiff, assumed the burden to the plaintiff of keeping the west half in condition: and it is contended that, until there is either acquiescence in the original contract made between McCloud and the defendant, or a new contract, by which both this plaintiff and the defendant become bound, there is no contract, enforceable by either, touching the maintenance of a line fence; that, there being no contract, one was as much bound as the other to keep the whole line in repair, and neither can complain of the other because any portion of the line fence is out of repair: and it is contended that the plaintiff must plead either this new contract between himself and the defendant for the maintenance of the partition fence, or he must plead that each party had acquiesced in the original contract, and become bound by its terms. The plaintiff pleaded simply the contract between his landlord and the defendant, the breach of that contract, and the damages resulting therefrom. Defendant and McCloud made a contract as between themselves, and each became bound to maintain a fence upon a portion of the line between their properties. Each bound himself to maintain a portion of that line: McCloud, the east half, and defendant, the west half. McCloud built his portion of the fence, and then placed plaintiff in possession, under a lease by which plaintiff was to pay as rental a portion of the crop raised upon the land. Defendant failed to build or maintain his portion of the fence, and the crop which plaintiff attempted to raise upon the leased premises was destroyed by defendant's cattle. It appears that

plaintiff called defendant's attention to the fact that the fence was insufficient, and that his cattle were trespassing on plaintiff's land and destroying his crops; that the defendant promised to repair the same, saying that he had the posts and wires ready, but was unable to secure time from his own work to discharge the duty which he had assumed under his contract with McCloud.

It is true, under the decisions of this court, that an oral contract, such as we have here, is not binding upon third persons who obtain rights in the property without notice of the contract. The statute provides that the contract should be in writing, and recorded like instruments affecting real estate. The recording is only for the purpose of giving notice of the fact that such an agreement has been made. Where the parties to be affected by the agreement have actual notice of the agreement (and surely Laubach knew of his agreement with McCloud), the contract becomes just as effectual between the parties as if it were reduced to writing and recorded. So it follows that this contract was binding between defendant and McCloud, though not in writing, and though not recorded; and this is true when the parties have acted upon the agreement, or where one of the parties has performed his part of the agreement, with the knowledge and consent of the other. We have, therefore, a situation where this contract between McCloud and defendant is binding upon both McCloud and defendant, though not executed in accordance with the requirements of the statute.

The question here is, Can the plaintiff, as tenant of McCloud, avail himself of this contract, and hold the defendant to its performance? The question is, Can the plaintiff, tenant in possession, hold the defendant liable for injuries which he has received from the failure of defendant to perform his contractual duty. it appearing that the landlord, McCloud, has freely performed on his part, and that the

2. CONTRACTS:  
rights ac-  
quired by  
third persons.

defendant has received, and is receiving, the benefits of such performance?

Actions for negligence may arise out of the breach of some duty which the one sought to be held owes to the one injured. It presupposes a duty to do or not to do a particular thing which, done or omitted, results in injury to the person to whom the duty ran. As soon as the defendant made his contract with McCloud, a duty arose on his part to maintain the west half of this fence. This is a duty he assumed for the benefit of the occupiers and cultivators of the land. Partition fences are erected and maintained, not only as visible monuments dividing the holdings, but for the protection of adjoining occupiers from trespass and injury from nomadic animals. An agreement to build such a fence is an agreement to protect against trespassing animals. One who desires to protect himself against such contingency may, without the consent of his neighbor, erect a partition fence upon the line between his property and his neighbor's, or he may divide the obligation with his neighbor, and agree to maintain a portion, and his neighbor a portion. This agreement when properly made, casts upon each the burden of protecting the other from injury from trespassing animals, over that part of the line against which he has assumed to afford protection. Section 2355 of the Code of 1897 provides:

"The respective owners of adjoining tracts of land, \* \* \* from which each derives any revenue or benefit, shall be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year."

Code Section 2356 provides:

"The fence viewers shall have power to determine any controversy arising under this chapter."

And it is further provided that, upon the giving of notice, and the fixing of a time and place, the fence viewers

shall meet, and determine by written order the obligations, rights, and duties of the respective parties in such matter, and assign to each owner the part which he shall erect, maintain, rebuild, etc. It will be noticed that this statute relates to controversies arising. The fence viewers are a body created by statute to determine such controversies arising between landowners. Section 2357 provides the method to be pursued in case one landowner desires to erect a partition fence when the owner of the adjoining land is not liable to contribute thereto. In such case, the fence viewers may assign to each owner the part which he shall erect and maintain, by pursuing the methods prescribed in the preceding section. Thereafter, the adjoining owner shall not be required to contribute to the expense of the erection and maintenance of the fence, until he becomes liable so to do: that is, when he desires to use the portion of the fence for purposes of pasturage, or otherwise, for revenue.

We find from this record, therefore, that the defendant obligated himself to keep up this west half of this partition fence; that he failed to do this; that, after plaintiff took possession, he recognized his obligation and promised to perform, and excused delay in performing by saying that he was pressed for time. It appears that he had procured, or, at least, said he had procured, the material with which to carry out the contract. The injury to the plaintiff is directly traceable to his failure to perform. When the plaintiff took possession of this land, as tenant under McCloud, the duty of protection under the contract passed to the plaintiff. The failure to afford him the protection to which plaintiff was entitled under the contract with McCloud, is the basis of defendant's liability. The injury to the plaintiff is directly traceable to the breach of duty to protect the land rented to the plaintiff, from trespassing animals. The purpose of the fence was to afford protection from trespassing over the west half of this line. The agreement to make the fence in-



volved in it an agreement to afford protection. In order to create liability, it is not necessary always that the breached duty rest in contract made directly with the injured party. It may be a breach of a duty made for his benefit, as well as directly with him. It is the breach of the duty created by the contract that creates the liability. It may be a breach of a legal duty, a breach of a contractual duty, or a duty implied from the relationship of the parties. Here, it had its inception in the contract made with McCloud. When plaintiff received the land from McCloud, it came to him with such protection as the contract with McCloud afforded; and it was the failure of the defendant to give him this protection that brought about the injury complained of. Defendant recognized his duty and his obligation in his dealing with the plaintiff. He gave the plaintiff to understand that he not only recognized, but would perform, the obligation. He is not in a position now to say that the obligation was not binding upon him.

Section 2313 of the Code of 1897 provides, in substance, that an owner of land from which animals escape shall be liable for all damages which the animals do, if they escape in consequence of his neglect to maintain his

3. **FENCES: basis of liability for damages.**

part of the line partition fence. He is not liable, however, on account of the absence of a lawful partition fence, if no portion of the fence has been assigned to him to keep in repair, either by the fence viewers or by agreement with the parties. From this it is evident that, if there is an agreement to build any portion of the fence, he is liable for trespass across the line which he has agreed to protect. As throwing light upon the matter here under consideration, we call attention to two of our recent cases: *De Mers v. Rohan*, 126 Iowa 488; *Nelson v. Wilson*, 157 Iowa 80.

It is urged upon our attention that the plaintiff did not plead any ratification or acquiescence in the contract relied

upon. The contract between McCloud and the defendant was one that both parties were competent to make. It was a valid contract. It needed neither ratification nor acquiescence to make it effectual as a contract. Plaintiff's rights rest on this contract, and grow out of his relationship to the subject-matter of the contract, as hereinbefore explained.

Some complaint is made of the instructions given by the court; but, in our view of the case, they were in no sense prejudicial to any rights of the defendant.

We think the judgment of the court is right, and it is—*Affirmed*.

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

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JOHN F. MIKOTA, Administrator, Appellant, v. SISTERS OF  
MERCY AND MERCY HOSPITAL, Appellees.

**MASTER AND SERVANT: Liability to Third Persons—Charitable Institutions.** A charitable institution which is conducted solely for philanthropic and benevolent purposes is not liable for the negligence of its servants in administering the charity—not even to one who pays for the charitable services rendered by the institution to him. Whether such an institution may be held liable for negligently employing an incompetent servant, with consequent damages by reason of the incompetency of the servant, *quaere*.

*Appeal from Linn District Court.*—JOHN T. MOFFIT, Judge

JUNE 27, 1918.

ACTION to recover damages from a charitable institution for injuries received through the negligence of defendant's employees. Petition dismissed. Plaintiff appeals.—*Affirmed*.

*R. S. Milner and Chas. L. Benesh, for appellant.*

*Hughes, Sutherland & Taylor, for appellees.*

GAYNOR, J.—This action is brought to recover damages for personal injuries resulting in death. The petition alleges: That the defendants are incorporated under the laws of Iowa relating to corporations other than for pecuniary profits; that their principal place of business is at Cedar Rapids, Iowa; that they are engaged in operating a hospital; that the building is a large four-story building, with a number of rooms furnished for the accommodation of the sick and disabled; that in the building the sick and disabled are received and cared for, and medical aid and treatment furnished; that the building was erected and the hospital equipped by donations and voluntary contributions, made by persons interested in hospital work; that, though a corporation, they issued no stock and received no funds from the sale of capital stock, and are without provision for paying dividends; that, in their business of conducting a hospital, they receive and care for persons who are able and persons who are unable to make payment for the care and services rendered; that they receive and care for charitable cases, and do not turn away any persons who require care, treatment, and nursing; that they receive some patients at a stated, fixed, or agreed compensation, and have a regular schedule of prices for such persons; that a number of their patrons are of that class; that these patrons agree in advance to pay for hospital service; that the sums so received are used in paying the expenses and costs of running the hospital; that the defendants are supported by and pay all their expenses and the costs of running the hospital from money so received, together with such benevolent gifts and donations as they are able to obtain by solicitation or from voluntary donations; that this is the only means they have of support.

On the 9th day of August, 1913, plaintiff's intestate, Clarence R. Mikota, was ill with typhoid fever, and was conveyed to this hospital for care and treatment. He was taken to the fourth floor, and placed in a room in the care

of nurses. While suffering from delirium, resulting from the disease, he jumped from the window and was killed. The plaintiff, as administrator, brings this action to recover for his death.

The action is brought in three counts. The first count alleges the facts above, and says that there was an express oral agreement that the intestate should pay \$15 a week, and should receive therefor proper and efficient care, attention, and treatment; that it was under this contract that the deceased entered this hospital as a patient; that the defendant violated its contract in this: that it failed to give the intestate faithful, proper, efficient care and attention, but, on the contrary, left him alone in a room on the fourth floor, without attendants and failed properly to care and guard him; that, while in a delirious condition, and while left alone and unguarded, he jumped from the window of the room, fell to the ground, and was killed; that the windows of the room were improperly, inefficiently, and carelessly left unguarded, without bars or obstructions.

The second count, after alleging all the facts above, except the express agreement, says that there was an implied agreement, and that this was violated.

The third count is based on tort. After alleging the facts above set out, it says that the officers, agents, and attendants of the hospital, knowing that deceased was likely to be seized with delusions and delirium, received and placed him in a room on the fourth floor, without bars on the windows, and left him there alone, or in charge of incompetent attendants and nurses; and that his death was due to their negligence.

The fourth count we need not consider at this time.

The defendant demurred to all the counts of the petition on the ground that the defendant is not liable for the acts of its agents and servants and employees, though negli-

gently done. This demurrer was sustained, and plaintiff's petition dismissed. From this, plaintiff appeals.

In argument, appellant claims that Count 1 charges a breach of a duty arising out of an express oral contract; that Count 2 charges a breach of an implied duty to give the deceased proper care and treatment; that Count 3 rests in tort, and charges negligence based on a violation of an express or implied contractual duty.

The only error assigned is that the court erred in sustaining the demurrer.

There is a great diversity of opinion among the courts on the question of the liability of a charitable institution to respond in damages for negligence. Some courts hold it is not liable at all for negligence. Other courts hold that, though liable to others, it is not liable to a patient received for treatment, when the injury resulted from the negligence of employees and servants. Some courts hold that, though not liable at all for the negligence of its servants or employees, it is liable for injuries traceable to some negligence on the part of the corporation itself,—a failure to discharge some duty that cannot be delegated to servants to perform. Thus, an exception is made where the liability is traceable, not to the negligence of servants, but to the negligence of the defendant in employing incompetent servants. Even where liability has been found, the courts have based their holdings upon entirely different reasoning. Some say there is no liability because trust funds cannot be diverted from trust purposes to the satisfaction of claims for negligence. Other courts repudiate this doctrine that the funds are in the nature of trust funds and cannot be diverted from their purpose, and hold such an institution liable to a stranger or a servant for negligence, though not liable to a patient received in the institution for treatment, basing nonliability to a patient on the theory of an implied contract not to hold the institution liable for the manner of the treatment by its

servants. In some cases, they have been exempted from liability because they are considered agencies of the government. We think the great weight of authority is to the effect that an institution of this kind is exempted from liability to one who comes to it and accepts the benefits of its charity,—to a patient received for treatment,—so far as liability is predicated on the negligence of its servants in administering the charity.

In *Jensen v. Maine E. & E. Inf.*, 107 Me. 408 (78 Atl. 898), it was said:

“A charitable institution, supported by private and public funds, is not liable for its servants’ torts.”

In this case, the defendant was charged with negligence in that its servant carelessly allowed the plaintiff’s decedent, while an inmate of the infirmary, to evade the supervision of her attendants and fall through a window to the sidewalk. The accident resulted in fatal injury. She was ill with a fever. In that case, it was said:

“No principle of law seems to be better established, both upon reason and authority, than that which declares that a purely charitable institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants.”

It was further held that the fact that the institution charged a compensation for the use of its rooms to those who were able to pay, did not cause it to lose any of the essential attributes of a charitable institution; and the court quoted with approval from *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432 (21 Am. Rep. 529), as follows:

“The corporation has no capital stock, no provision for making dividends or profits; and whatever it may receive from any source, it holds in trust, to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly

from public and private charity; its affairs are conducted for a great public purpose, that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will inure to their own benefit."

The same doctrine is announced in *Gable v. Sisters of St. Francis*, 227 Pa. 254 (75 Atl. 1087). In this case, the plaintiff, a young woman, was admitted into the hospital as a pay patient, and came there for the purpose of having a surgical operation performed by a surgeon of her own choice. While she was undergoing the operation, one of the hospital nurses prepared her bed, the bed to be occupied by her on her return from the operating room. For the purpose of warming the bed for the patient, bottles containing hot water were placed in the bed. Upon the patient's return from the operating room, another nurse, who had assisted in the patient's return, removed the water bottles, so as to properly place the patient in the bed, and then restored them to their proper place beside the body. The patient was unconscious at the time. Hot water escaped from one of the bottles, and caused her serious injury. To recover for these injuries, she brought an action. The court said, referring to the hospital:

"It was founded and erected out of funds bequeathed the corporation to that end, and it is maintained by charitable donations, appropriations made by the state, and pay received from such patients as demand and are accommodated with rooms separate from the general ward. \* \* \* Admission to the hospital is denied no one on grounds of religious faith or because of inability to pay. The corporation is under the management or control of a board of managers. It has no corporate stock; it can declare no dividends; and its entire income is employed to maintain and enlarge, as it is able, its capacity for gratuitous, beneficent service to the public. The fact that it receives pay for a certain class of

patients detracts nothing from its character as a purely charitable institution."

In the discussion of this case, it develops that the plaintiff was a pay patient. The court said:

"It is wholly immaterial that the patient who here complains of injury was admitted as a pay patient."

The court further said, in disposing of the argument based upon that fact:

"The argument overlooks the fact that every dollar received by the defendant corporation, from whatever source, is stamped with the impress of charity. For what did these plaintiffs pay? For accommodations which the hospital was enabled to provide through the use of money charitably donated to it. The room, the bed, the furnishings, and conveniences for which the plaintiff paid are all of them the direct and immediate product of the voluntary donations it received. It follows that the money that the hospital received from its pay patients is as strictly the increment of the charitable donations it has received as would be the interest on the money given it, if invested on loan."

It was held that the defendant was not liable.

In *Thornton v. Franklin Square House*, 200 Mass. 465 (86 N. E. 909), the defendant was a charitable corporation. The plaintiff, an inmate, was injured by the falling of a fire escape on the premises. The court held that, if the injury is caused by the negligence of servants, or agents properly selected, the defendant is not liable for their torts.

When we have a proper conception of the object of these institutions,—that they are created for the purpose of administering charity, and not for profit,—we can well understand the basis on which courts have reached the conclusion that they are not liable to those who come to receive their benefactions, for the negligence or torts of their servants to whom the distribution of the benefaction is committed.

As bearing upon the question here under consideration,



see *Fordyce v. Woman's C. N. L. Assn.*, 79 Ark. 550 (96 S. W. 155); also *Bruce v. Central M. E. Church*, 147 Mich. 230 (110 N. W. 951), in which it was charged that injury resulted from the negligence of the defendant in furnishing a defective scaffolding, on which plaintiff was required to work. There was a demurrer to the complaint, on the ground that the defendant was not liable for negligence or default of any agent or servant having the care and custody of the property; and this demurrer was sustained. It will be noted that the injured party was not a patient in the hospital. Justice Carpenter, speaking for the court, sought to differentiate those cases in which the party was receiving the benefit of the charity from those cases in which the injured party was not, and said:

"The ground upon which liability is denied in nearly all \* \* \* cases is that stated in the *Downes* case (101 Mich. 555, 25 L.R.A.[O.S.] 602), viz., that it would thwart the purposes of the trust; that is, it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's tort. It is entirely logical to say that this will must be recognized by beneficiaries of the trust. It may justly be said that the benefit of the trust is extended to them and accepted by them upon the implied condition that they shall recognize that will. By becoming beneficiaries, they agree to recognize it."

In the *Bruce* case, the defendant was held liable, though the court recognized exemptions in favor of the institution for injuries resulting to patients through the negligence of servants. The thought is that, by becoming beneficiaries, they agree to recognize the fact that the funds have been donated, to be used only for charitable purposes. The theory is that the law implies an intention, on the part of the donors of charitable funds, that such funds shall only be used for charitable purposes, and not diverted from that purpose; that the party who receives benefits from the charity

acquiesces in the intention, and consents that the fund used in administering the charity shall not be diverted from that purpose, even to the satisfaction of claims based upon the tortious acts of the servants charged with the administration of the fund. So the courts differentiate between an outsider and one who is receiving the benefits of the charity. All the charities must be administered through human instrumentality, and these are simply the agencies employed in the distribution of the charity; and he who accepts the charity through the instrumentalities employed, cannot complain of the manner of distribution, though in it he receives a hurt.

In *Powers v. Massachusetts Hom. Hosp.*, 47 C. C. A. 122 (109 Fed. 294, 65 L. R. A. 372), it was said:

"That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence, is familiar law. Such is the case of common employment, and such are the cases of athletic sports and the like. \* \* \* Such is the case at bar. One who accepts the benefit either of a public or private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. \* \* \* If, in their dealings with their property appropriated to charity, they create a nuisance, by themselves or by their servants, \* \* \* there are strong reasons for holding them liable to outsiders, like any other individual or corporation. \* \* \* But if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected."

See, also, *Taylor v. Protestant Hosp. Assn.*, 85 Ohio St. 90 (96 N. E. 1089).

From an examination of the authorities, we think the courts are practically agreed—at least the weight of authority tends to support the holding—that a charitable institution is not responsible, to those who avail themselves of its benefits, for injury sustained through the negligence or torts of its managers, agents, and servants; and this on the theory so well stated by Justice Lowell in the *Powers* case, *supra*. For late cases, see *Duncan v. Nebraska S. B. Assn.*, 92 Neb. 162 (137 N. W. 1120), in which it is said:

“It is a well-established doctrine that a charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses.”

See, also, *Hearns v. Waterbury Hosp.*, 66 Conn. 98 (33 Atl. 595), in which the authorities generally are reviewed. In this case, it is said:

“It is enough that a charitable corporation like the defendant—whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty—is not liable, on the grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case, the servant alone is responsible for his own wrong.”

In *Nicholson v. Atchison, T. & S. F. Hosp.*, 97 Kan. 480 (155 Pac. 920), a suit by a patient to recover for negligence, recovery was denied, on the ground of public policy. See *Conklin v. John Howard Ind. Home*, 224 Mass. 222 (112 N. E. 606); also, *Schloendorff v. Society of N. Y. Hosp.*, 211 N. Y. 125 (105 N. E. 92), in which it is said:

“Certain principles of law governing the rights and duties of hospitals, when maintained as charitable institutions, have, after much discussion, become no longer doubtful. It

is the settled rule that such a hospital is not liable for the negligence of its physicians and nurses in the treatment of patients [citing authorities]. This exemption has been placed upon two grounds. The first is that of implied waiver. It is said that one who accepts the benefits of a charity enters into a relation which exempts one's benefactor from liability for the negligence of his servants in administering the charity. \* \* \* The hospital remains exempt, though the patient makes some payment to help defray the cost of board [citing authority]. Such a payment is regarded as a contribution to the income of the hospital, to be devoted, like its other funds, to the maintenance of the charity."

See *Morrison v. Henke*, 165 Wis. 166 (160 N. W. 173), in which it is said:

"The authorities in this country almost uniformly hold that, in the absence of any negligence in their selection, charitable hospitals are not liable to their patients for the torts of their employees."

On the theory that the defendant was not liable for the negligence of the servants of the defendant in this case, we think the demurrer to plaintiff's petition was rightly sustained.

It may be contended, however, that the plaintiff has brought the case within the claimed exceptions to the general rule, and has alleged negligence on the part of the corporation itself. A careful examination of the petition discloses that in no place does it affirmatively appear that the injury complained of was caused or contributed to by any negligent act of the defendant in the selection of servants. There is no allegation that the defendant did not use reasonable care in the selection of its servants, or that the injury was due to negligence in the selection of servants, as differentiated from the negligence of the servants selected. When the injury is traceable to the negligence of the servant, there is no liability. If the case rested on the negligence of

the defendant in the selection of incompetent servants, then it should appear affirmatively that the injury is traceable to such negligence. Even an incompetent servant may be negligent, and if the injury is traceable to such negligence, and not to the incompetency, then there is no liability, under the rule hereinbefore stated. A fair interpretation of the language used leads the mind to the thought that liability is predicated, not upon incompetency on the part of the servant employed, but upon the negligent manner in which they, whether competent or incompetent, discharged the duty assigned. Even though we grant the execution, we do not find the case brought within the exception, and the general rule hereinbefore stated must prevail. The demurrer was, therefore, rightly sustained, and we affirm the action of the court.—*Affirmed.*

PRESTON, C. J., WEAVER and STEVENS, JJ., concur.

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ROBERT T. MOWBRAY et al., Appellees, v. IRENE SIMONS et al.,  
Appellants.

**MORTGAGES: Assumption of Debt—Consideration.** An agreement  
1 by the owner of mortgage-encumbered property to pay the  
mortgage (to which he was not, originally, a party), in order  
(a) to secure the dismissal of a foreclosure and (b) to secure  
certain corrections in his title, is supported by ample consideration, even though the agreement was to pay the mortgage on  
the very date called for by the mortgage, but not on the date  
called for by the note which the mortgage secured.

**BILLS AND NOTES: Conflict Between Note and Mortgage as to Ma-**  
2 **turity.** Date of maturity, as fixed in a note, controls a conflict-  
ing date of maturity as fixed in a mortgage which secures the  
note.

**PRINCIPAL AND SURETY: Who are Principals.** One who, on a  
3 consideration running to himself, agrees to pay a note and  
mortgage to which he was not, originally, a party, is not a mere

surety for the original debtor. It follows that a release of the original debtor works no release of the new promisor.

*Appeal from Black Hawk District Court.*—H. B. BOIES,  
Judge.

JUNE 27, 1918.

SUIT in equity to foreclose a mortgage upon real estate, and against appellant upon a contract by which he assumed and agreed to pay the mortgage indebtedness. Decree as prayed.—*Affirmed.*

*J. G. Mitchell and Paulsen & Wood, for appellants.*

*Edwards, Longley, Ransier & Smith, for appellees.*

STEVENS, J.—Irene and John H. Simons, wife and husband, on March 17, 1914, executed and delivered a note for \$3,350, antedated November 25, 1913, and payable March 1, 1916, to plaintiffs. The consideration for this note was a part of the purchase price for a tract of land. Payment of the note was secured by a mortgage on the land. The reason assigned for antedating the note was that interest was to commence on the indebtedness on November 25, 1913, instead of on the date on which the note and mortgage were executed. Both the note and mortgage provided that a failure to pay the interest when due would cause the whole indebtedness to at once become due and payable. The mortgage erroneously described the note as of even date therewith. Prior to November 9, 1914, L. C. Megow acquired title to the land, and on that date conveyed the same, by warranty deed, to Thomas G. Watterson, appellant herein, subject to the above mortgage. The interest on the note was not paid on November 1, 1914, and on December 8th, appellees demanded payment of the full amount of the indebtedness from the appellant. Appellant lived some distance from the

1. MORTGAGES :  
assumption of  
debt : consider-  
ation.

home of appellees, and, in reply to their demand for payment, wrote them that, according to the mortgage, the interest would not become due until March 1, 1915. Upon receipt of this letter, original notice of suit to foreclose the mortgage was placed in the hands of the sheriff for service upon appellant; but, before service thereof, and on December 16, 1914, the contract in writing which forms the basis of plaintiffs' claim against appellant, was entered into between the parties hereto, by which appellees agreed to extend the time of payment to March 1, 1915, in consideration of the assumption and agreement upon the part of appellant to pay the mortgage indebtedness on that date.

Subsequently, appellant sold the land to a purchaser who failed to pay the note on March 1, 1915, whereupon suit was brought upon the note, and a decree of foreclosure entered. Appellant was joined as defendant in the suit, and judgment was demanded against him on the contract for the full amount of the mortgage indebtedness. The premises were sold under special execution for \$2,500. General execution was then issued and levied upon certain real estate belonging to Simons; but, before sale, the execution was returned, and an agreement entered into between plaintiff and Simons, releasing the latter from further liability on the judgment. Appellant appeared in the foreclosure suit and filed answer, reciting the history of the transaction, and, among other defenses, alleged: First, that the contract imposed upon him the liability of a surety only, and that, by the settlement with Simons, the principal debtor, he was released from liability on the contract; and, second, that the contract was executed without consideration. As these are the principal defenses relied upon, and the only matters discussed in argument, we will not refer to other issues tendered.

I. Counsel for appellant does not seriously contend that the note did not become due, according to its terms, on

November 25, 1914, because of the nonpayment of interest; but, as we understand it, their position is that, in the absence of notice to the contrary, the statement in the mortgage that the note was of even date therewith is controlling, and, therefore, the suit to foreclose the mortgage, in which the original notice was delivered to the sheriff for service, but not served, was premature, and the agreement to extend the time of payment to March 1, 1915, did not operate as an extension of time, and, therefore, the contract was without consideration. In this connection, it should be stated that there was an error in the description in the deed from appellee to Simons and from appellant's grantor to him, and the contract provided for the correction of these errors by the exchange of quitclaim deeds, which deeds were executed, as agreed. This is also relied upon by appellees as a consideration for the contract.

It has been generally held by the courts that the provisions of the note and of the mortgage given to secure the payment thereof, must be construed together and enforced

2. **BILLS AND  
NOTES: con-  
flict between  
note and mort-  
gage as to  
maturity.**

accordingly, where this is possible. It is also the general, if not universal, holding that, where there is a conflict between the terms of the note and mortgage as to the maturity of the former, its provisions must control. This proceeds upon the theory that the mortgage, executed for the purpose of securing the payment of the note, is an incident thereto, and not the primary obligation. *Jones on Mortgages* (7th Ed.), Section 351; *State Bank v. Tweedy*, 8 Blackf. (Ind.) 447 (46 Am. Dec. 486); *Ferris v. Johnson*, 136 Mich. 227 (98 N. W. 1014); *Kennedy v. Gibson*, 68 Kan. 612 (75 Pac. 1044); *Owings v. McKenzie*, 133 Mo. 323 (33 S. W. 802); *San Gabriel Valley Bank v. Lake View Town Co.*, 4 Cal. App. 630 (89 Pac. 360).

It therefore follows that the indebtedness, payment of which was secured by the mortgage, fell due on November



21, 1914, because of the nonpayment of interest; and, if title had remained in the mortgagor, it would not be contended that the mortgage could not then be foreclosed. Appellant, it is true, did not assume, or agree to pay, the mortgage indebtedness, and, unless by the terms of the contract, was not personally liable for the debt; but the land was conveyed to him subject thereto. The note was antedated by mutual arrangement between the maker and appellees; and while the recitals in the mortgage may have misled appellant and caused him to default in the payment of the interest, the note, nevertheless, as between the maker and the appellees, became due according to its terms. Nothing appears in the record from which it may be inferred that the delivery of the original notice to the sheriff for service upon appellant was not in good faith, or that appellees did not believe they had a right to foreclose the mortgage. The commencement of a suit to foreclose the mortgage made it necessary for appellant to incur the expense of making defense thereto; and, in the event plaintiff succeeded, the land would be sold under special execution.

It may be assumed that appellant found it inconvenient, or undesirable, to pay the indebtedness, or to contest the suit to foreclose the mortgage, and that an extension of time until March 1, 1915, was beneficial to him. It is obvious that the contract was executed for the purpose of securing this extension, and perhaps also to obtain the execution of a quitclaim deed, correcting the description in his deed from Megow. The conveyance to him was subject to the mortgage for the payment of which the land was the primary fund. By the terms of the contract, he assumed and agreed to pay the same in consideration of an extension of time therefor until March 1, 1915. Plaintiffs agreed to forbear the foreclosure of the mortgage, and to extend the time as provided in the contract. The most that appellant can claim is that there was a fair controversy as to the right of the holder to

foreclose the mortgage. Appellees' agreement to forbear further foreclosure proceedings and to extend the time furnished a good consideration for the contract by which appellant bound himself for the full amount of the mortgage indebtedness. *Koon v. Tramel*, 71 Iowa 132; *Robertson v. United States L. S. Co.*, 164 Iowa 230; *Farrelly v. Gadsden*, 110 Iowa 69; *Runkle & Fouse v. Kettering*, 127 Iowa 6; *Blake v. Robinson*, 129 Iowa 196; *Gibson v. McIntire*, 110 Iowa 417; *First State Bank v. Williams*, 143 Iowa 177.

As illustrating what constitutes a good consideration for a contract, see the following: *Moench v. Hower*, 137 Iowa 621; *Adams v. Morton*, 37 Iowa 255; *Lucy v. Price*, 39 Iowa 26; *Burke v. Dillin*, 92 Iowa 557; *Mackin v. Dwyer*, 205 Mass. 472 (91 N. E. 893); *Snohomish R. B. Co. v. Great Northern R. Co.*, 57 Wash. 693 (107 Pac. 848); *Sutton v. Dudley*, 193 Pa. 194 (44 Atl. 438); *Nicholson v. Neary*, 77 Wash. 294 (137 Pac. 492).

Probably appellant, at the time, believed that the value of the land justified the assumption of the indebtedness. Some evidence was offered to the effect that he desired to plat the same into town lots, for the purpose of sale. The evidence, however, was conflicting upon this point. In any event, he must have desired to protect the land from foreclosure sale, and to avoid litigation. It is evident that the contract is supported by a good consideration.

II. Counsel also contends that the obligation assumed by appellant was that of a surety only. *Christner v. Brown*, 16 Iowa 130, is cited to sustain this contention. It is quite apparent that the liability of the defendant

3. PRINCIPAL AND SURETY: in that case was that of a surety; but, in the case at bar, appellant, for a good consideration, assumed and agreed to pay the mortgage indebtedness. He did not intend or assume to become a surety only. He desired to prevent the foreclosure of the mortgage, and to obtain an extension of time in which to pay

the indebtedness. The contract was entered into, in part at least, for his benefit, and he thereby became primarily liable for the payment of the indebtedness. He was the owner of the land which was subject to the mortgage; and, while it is true that the note and mortgage were executed by his remote grantors, he was directly interested in preventing a sale of the land under foreclosure. His liability was not, therefore, affected by the settlement with and release of Simons.

Other issues tendered by appellant are not argued by counsel. We reach the conclusion, therefore, that the decree and judgment of the lower court should be and is—*Affirmed.*

PRESTON, C. J., WEAVER and GAYNOR, JJ., concur.

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JOHN ORIGER, Appellee, v. A. E. KUYPER et al., Appellants.

**SPECIFIC PERFORMANCE:** Evidence—Sufficiency. Uncertainty respecting the terms of the contract sought to be specifically enforced, plus an element of inequity in the contract as alleged, demands the refusal of the relief sought.

*Appeal from Palo Alto District Court.*—N. J. LEE, Judge.

JUNE 27, 1918.

Suit for specific performance of an oral contract to execute a note and mortgage. Decree for plaintiff as prayed. Defendant appeals.—*Reversed.*

*Van Oosterhout & Kolyn, and Davidson & Burt, for appellants.*

*Sullivan & McMahon, and E. A. & W. H. Morling, for appellee.*

STEVENS, J.—The decree of the court below granted the prayer of plaintiff's petition for the specific performance of

an alleged oral contract between the plaintiff and A. A. Kuyper, by the terms of which, it is claimed, the latter agreed to execute a note for \$5,123.50 and secure the payment thereof by a mortgage upon a certain tract of land in Minnesota and to assume and pay all of the outstanding indebtedness of A. E. Kuyper & Company and the West Bend Auto Company.

From the evidence, we gather that A. E. Kuyper & Company was a copartnership, organized in 1907, for the purpose of conducting an implement business at West Bend, Iowa; that the West Bend Auto Company was also a copartnership, organized shortly after the above-mentioned firm went out of business. A. E. Kuyper and plaintiff were members of both firms, and evidence was offered to sustain plaintiff's claim that A. A. Kuyper was also a partner in the business of A. E. Kuyper & Company.

In September, 1914, A. E. Kuyper traded the stock of A. E. Kuyper & Company, together with some real estate belonging to his wife and himself personally, for a half section of Minnesota land. It is conceded that plaintiff invested \$4,500 in the firm of A. E. Kuyper & Company, and that he received little, if any, of the profits from said business. The exchange of the stock for the Minnesota land was made without the knowledge of plaintiff; but he later fully consented thereto, and ratified the transaction. Later, A. E. Kuyper and wife executed their joint note to plaintiff for \$4,500, for the purpose of reimbursing him for the amount invested in the partnership. A. E. Kuyper and plaintiff also executed a joint note in the sum of \$1,200 to one of the creditors of the company.

A. A. Kuyper, who is the father of A. E. Kuyper, advanced considerable sums of money for the payment of the creditors of the company; and, in November, 1914, A. E. Kuyper and wife conveyed the Minnesota land to him. There is no doubt that A. A. Kuyper knew that plaintiff had

an interest in the stock which was traded for the Minnesota land, and that he orally promised to see that plaintiff should be reimbursed for the amount invested by him. Some time after the \$4,500 note fell due, A. A. Kuyper and plaintiff entered upon negotiations for the settlement thereof. The former sought to induce plaintiff to accept a conveyance of a portion of the Minnesota land at \$100 per acre, and to allow him, on the consideration, the full amount of this note and also the \$1,200 note. Failing in these negotiations, the parties met at West Bend, on December 8, 1915, at a bank, where it is claimed that the alleged oral contract was entered into between the parties. The negotiations were conducted in a private room in the bank, during which time plaintiff and his attorney and the defendants A. A. and A. E. Kuyper were present.

It is claimed by plaintiff that, after some negotiations, A. A. Kuyper agreed to pay the full amount of the \$4,500 and \$1,200 notes, less a discount of \$1,000, and to execute his note therefor, secured by a mortgage on the Minnesota land, as stated above, and to assume and agree to pay all of the indebtedness of A. E. Kuyper & Company; that it was agreed that plaintiff's attorney should later prepare and forward the necessary papers to A. A. Kuyper for execution. A note and mortgage, together with a separate agreement covering the indebtedness of A. E. Kuyper & Company, were prepared and forwarded by plaintiff's attorney to A. A. Kuyper, who declined to sign the same.

It is practically conceded by A. A. Kuyper that he orally agreed, upon the above occasion, to execute a mortgage, as claimed, and to pay the indebtedness of A. E. Kuyper & Company; but he denies that he understood he was to pay the indebtedness of the West Bend Auto Company, or that he agreed to do so. In view of the conclusion reached upon the facts, we will not consider appellant's contention that

the contract alleged is void, under the statute of frauds, and without consideration.

That courts exercise a large discretion in granting the specific performance of contracts, and that, where there is doubt or uncertainty respecting their terms, the relief will be denied, is familiar doctrine (*Hopwood v. McCausland*, 120 Iowa 218; *Bradford v. Smith*, 123 Iowa 41; *Quarton v. American Law Book Co.*, 143 Iowa 517); and likewise, it is often denied when to grant it would be inequitable (*New York Brok. Co. v. Wharton*, 143 Iowa 61; *Webber v. Harter*, 154 Iowa 317; *Ormsby v. Graham*, 123 Iowa 202; *Hopwood v. McCausland*, supra).

While the indebtedness of the West Bend Auto Company was admittedly discussed at the December conference, it is not shown by the evidence that appellant knew that its obligations exceeded the amount mentioned by approximately \$3,000. The fair inference from what occurred on that occasion is that he did not know that the indebtedness was so greatly in excess of the amount indicated by A. E. Kuyper. The plaintiff apparently knew little about the financial condition of either company, and A. E. Kuyper appears not to have been inclined, if he knew, to fairly represent the facts to plaintiff or to appellant. Appellant denies specifically that he agreed to pay the debts of the Auto Company, or that he understood he was doing so. Plaintiff's attorney, upon his return home, prepared a note and mortgage, together with an agreement to assume and pay the debts of A. E. Kuyper & Company, and forwarded the same by mail to appellant for execution. The agreement made no direct reference to the indebtedness of the West Bend Auto Company, nor was that concern mentioned therein. It is claimed, however, in explanation of this omission, that all parties understood that the West Bend Auto Company was really the same concern as A. E. Kuyper & Company, and that the

partners were the same, except that Tony Andert had acquired an interest in the Auto Company.

We need not determine whether appellant was a partner in the business of A. E. Kuyper & Company, but the evidence offered upon the trial below was insufficient to prove that he was a partner in the Auto Company. No good reason is offered why appellant should, therefore, without some possible benefit to himself, have assumed and agreed to pay the indebtedness of the West Bend Auto Company. Indebtedness of this concern, amounting to about \$1,100, was mentioned at the meeting at the bank; but it appeared upon the trial that it in fact exceeded \$4,000. While plaintiff testified that appellant was a partner in the business, it appears that, subsequent to the 8th of December, 1915, he brought a suit in equity against the partners of the West Bend Auto Company for an accounting, in which he made no reference in the petition to appellant, but gave the names of the partners thereof as A. E. Kuyper, Tony Andert, and himself. Appellant and A. E. Kuyper both testified that the former had no interest in the business of the West Bend Auto Company. The same firm of attorneys which represented plaintiff at the time the alleged oral agreement was entered into, brought the above suit. It is claimed, however, that the attorney who was present at West Bend did not personally prepare the petition; but plaintiff testified that he had a full conference with the attorney who prepared it, before it was filed.

The West Bend Auto Company was organized for the purpose of selling automobiles, after the implement stock was traded for the Minnesota land. Several agencies were taken over, and a new business was started under the above name and style. The proof leaves the terms of the alleged oral contract in doubt. We are not convinced by the evidence that appellant agreed to assume and pay the indebtedness of the West Bend Auto Company, but we are con-

vinced that to enforce the contract would be unjust and inequitable. That appellant should in some way account to plaintiff for his interest in the Minnesota real estate conveyed to him by A. E. Kuyper, in exchange for the stock of implements owned by A. E. Kuyper & Company, may be conceded; but that is a matter for the future consideration of the parties interested. The conclusion herein reached shall not be construed as in any way prejudicial to the right of plaintiff to pursue any remedy, legal or equitable, to which he may otherwise have been, or may be, entitled. Plaintiff parted with nothing on account of the alleged contract, and may yet pursue any remedy available to him at the time he claims same was entered into. It is our conclusion that the decree of the court below must be, and is, reversed, and the costs will be taxed to the plaintiff.—*Reversed.*

PRESTON, C. J., WEAVER and GAYNOR JJ., concur.



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TO

ADVERSE POSSESSION

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**ADVERSE POSSESSION.**

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**Brief Points—Insufficiency.** A statement of error and the brief points thereunder must be sufficient, *in and of themselves*, to definitely lay before the court, without independent investigation on its part, the *precise* ruling complained of, and the law as applicable thereto, as contended by appellant. *Wine v. Jones*, 183—1166.

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made in the trial court. *Wine v. Jones*, 183—1166; *Powers v. Iowa Glue Co.*, 183—1082.

**Argument in Lieu of Brief Point Not Allowable.** A brief point 9 applicable to each statement of error is absolutely essential. Subsequent argument is not essential. Therefore, a point or proposition not appearing as a *brief* point, or insufficiently stated as a brief point, may not be considered, even though fully covered in the general argument. *Wine v. Jones*, 183—1166; *Powers v. Iowa Glue Co.*, 183—1082.

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**Points Noticed Sua Sponte by Appellate Court.** Error in over- 11 ruling motion to strike is waived by subsequently demurring and answering—a waiver which the appellate court will apply *sua sponte*. *Wheeler v. Schilder*, 183—623.

**Reference to Record—Necessity.** Assertions in argument of af- 12 firmative fact must be accompanied by appropriate reference to the record for the verification of such assertions. *Wheeler v. Schilder*, 183—623.

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**“Brief Points” as Limiting Scope of Review.** The propositions 14 or “points” set forth by appellant in his brief and argument, and *not the abstract or assignments of error*, define

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the scope of appellate review. *McNamara v. Chicago, R. I. & P. R. Co.*, 183—577.

**Finding of Fact—Equity Cause.** A finding of fact on substantial supporting evidence in an equity cause is persuasive with the appellate court on appeal. *Rembe v. Ferguson*, 183—29.

**Contest In Re Official County Newspaper.** Contests *in re* official county newspapers will not be reviewed *de novo* on appeal. *Ames Evening Times v. Ames Weekly Tribune*, 183—1188.

**Non-Buling in Trial Court.** A question not presented to, and ruled on by, the trial court may not be reviewed on appeal. So held as to a controversy concerning the scope of an appearance in the trial court. *Emery & Co. v. Wabash R. Co.*, 183—687.

**Decree Beyond Pleadings.** Issues not tendered by the pleadings and which do not necessarily inhere in the controversy, will, in an equity case, on appeal and trial *de novo*, be excluded from the adjudication. *Tusant v. Grand Lodge A. O. U. W.*, 183—489.

**Correction of Judgment—Certiorari (?) or Appeal (?).** Review of an order of correction of a judgment must be had by appeal, and not by certiorari, unless the order of correction is one which is absolutely *void*. *Snyder v. Fahey*, 183—1118.

REVIEW—PRESUMPTIONS.

**Presumptions as to Finding of Verdict—Supporting Fact.** A general verdict, on conflicting evidence, is accompanied by a presumption that the jury's unrevealed findings of fact were in perfect harmony with the verdict. In other words, it will not be presumed that the jury found in favor of a contention that would leave the verdict without any support. *Frahm v. Eggers*, 183—572.

**Reception of Incompetent Testimony.** Prejudice from receiving incompetent testimony is not cured by admitting incom-

## APPEAL AND ERROR Continued

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**Reception of Incompetent Testimony.** Prejudice from receiving incompetent testimony is not cured by admitting incom-

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petent evidence over due objection. *Yarcho v. Chicago, R. I. & P. R. Co.*, 183—1180.

## REVIEW—DISCRETION OF LOWER COURT.

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23 aided by giving consideration to the fact that the trial court  
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*George v. Iowa & S. R. Co.*, 183—994.

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**Exclusion of Unnecessary Evidence.** The erroneous exclusion  
24 of evidence which bears solely on a question of fact, on  
which the appellate court holds with appellant, is harmless.  
*Powers v. Iowa Glue Co.*, 183—1082.

**Incompetent Evidence on Competently Established Fact.** Harm-  
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*Spahn & Rose Lbr. Co. v. Chicago, R. I. & P. R. Co.*, 183—  
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Equity Fire Ins. Co.*, 183—906.

**Curing Error by Instructions.** The erroneous admission, on a  
28 matter not in issue, of non-inflammatory evidence bear-



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ing on the amount of recovery, is cured by specific instructions to the jury to wholly disregard the same in making up their verdict. *Jeffries v. Iowa R. & L. Co.*, 183—858.

**Inconsequential Testimony.** The erroneous admission of immaterial but inconsequential testimony is harmless. *Scovel v. Monaghan*, 183—581.

**Untenable Objection to Objectionable Testimony.** It matters not, on appeal, whether the objections were tenable on which evidence was *excluded*, provided any ground exists which justifies exclusion. *Wheeler v. Schilder*, 183—623.

## SUBSEQUENT APPEALS.

**Law of Case.** A ruling, on appeal, that the evidence was sufficient to carry an issue to the jury, is conclusive on a subsequent appeal, on practically the same record. *Retherford v. Knights and Ladies of Security*, 183—1099.

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**Law Actions—Insufficiency of Evidence—Right to Retrial.** Reversals in law actions, on the ground of insufficiency of evidence to support the verdict for plaintiff, send the causes back to the lower court for full *retrial*, subject to a directed verdict should the evidence on such retrial be the same as on the former trial. *Bruce v. Galvin*, 183—145.

**Retrial—Law of Case.** A holding on appeal that stated that evidence (a) presented a jury question, or (b) established a complete defense to the claim sued on, necessitates the same holding on a subsequent appeal which presents substantially the same evidence. *Boeck v. Modern Woodmen*, 183—211.

**Effect of General Reversal.** A general order of reversal, on the ground of insufficiency of evidence to sustain the verdict, sends the cause back to the trial court for full retrial. If no materially different evidence is produced on such retrial, a directed verdict should be entered against plaintiff. *Hawthorne v. Delano*, 183—444.

APPEAL AND ERROR Continued TO BANKRUPTCY

**Directing Judgment in Lower Court.** When all questions of law and fact are, on plaintiff's appeal, fully settled in favor of plaintiff's recovery, a reversal will be entered, with orders to the lower court to enter judgment; otherwise, an order for a new trial will be entered. So held in an action against a carrier for damages to a shipment of goods. *Emery & Co. v. Wabash R. Co.*, 183—687.

### SUPERSEDEAS BONDS.

**Liability.** A supersedeas bond, conditioned as provided by statute, becomes a nullity upon the final entry by the appellate court of an order of reversal and for new trial, with judgment against appellee for all the costs of appeal. So held where appellee, after reversal and on new trial, obtained a second judgment, and sought to hold the former supersedeas bond therefor. (Sec. 4128, Code, 1897.) *Nolan v. Glynn*, 183—21.

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### BANKRUPTCY.

#### JURISDICTION.

**Exclusiveness of Jurisdiction of Bankruptcy Court.** Bankruptcy proceedings against one who was a tenant is no obstacle to proceedings in the state courts by the landlord against one who has converted property upon which the rent was a lien. *Boles v. Missouri Valley Elevator Co.*, 183—517.

#### TRUSTEES.

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**BANKRUPTCY Continued**

TO

**BANKS AND BANKING**

**Remedies—Transactions with Deceased.** A trustee in bankruptcy, in an action to enforce an alleged trust in favor of the bankrupt, may not have the same right to exclude evidence of personal transactions with a deceased grantor as the bankrupt would have, were he prosecuting the action. (See Sec. 4604, Code 1897.) *Barber v. Wiemer*, 183—72.

**BANKS AND BANKING.** See **APPEAL AND ERROR**, 1;  
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27; **TAXATION**, 1.

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- 1 It is suggested, inferentially, that the drawer of a check who, at the end of the month, receives said check from his banker, with the usual bank statement showing payment of the check, and retains the same without objection for some two years, is estopped to plead that payment was made on an unauthorized, or even forged, indorsement. *Iowa Nat. Bank v. Pyle*, 183—87.

**Officers—Misapplication of Funds.** The president of a banking

- 2 partnership who, *to further his own personal interests*, causes loans to be made by the bank to a known insolvent concern, is liable to the partnership for the resulting loss. *Watt v. German Sav. Bank*, 183—346.

**Officers—Liability.** A bank president who, at a time when his

- 3 bank had no money with which to make a loan, caused his bank to issue, without consideration, its certificate of deposit to another bank, which thereupon actually furnished the money for the loan, may not defend an action against him by the bank for recoupment of the loss, on the ground that his bank *has not yet paid said certificate*. *Watt v. German Sav. Bank*, 183—346.

**Directors—Scope of Authority.** Individual directors of state

- 4 and savings banks, *unless specially authorized by the board of directors*, have no power to bind their bank to the discharge of obligations not connected (a) with the management of the bank's ordinary business, or (b) with the receipt and payment of deposits; and this is especially true

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BASTARDS

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Watt v. German Sav. Bank, 183—346.

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**Fraudulent Banking—Individual Insolvency of Members of Part-  
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v. Kiefer, 183—319.

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of such latter certificate, within the meaning of the Fraud-  
ulent Banking Act. Sec. 1884, Code, 1897. State v. Kiefer,  
183—319.

**BASTARDS.** See INSURANCE 15; WILLS, 1.

**Proceedings in Bastardy as Evidence.** Bastardy records, includ-  
1 ing the verdict of guilty and judgment thereon, constitute  
competent evidence of the paternity of the child in question,  
and that such proof was made during the lifetime of the

## BASTARDS Continued

TO

## BILLS AND NOTES

putative father, even though the judgment entry does not formally declare the paternity, and even though said judgment has been set aside, in the sense that all payments for support are terminated. (Sec. 3385, Code, 1897.) *McKellar v. McKellar*, 183—1030.

**Written Recognition—Articles of Adoption.** Recitals in articles  
2 of adoption that the signer is the father of the child which is given in adoption, that such paternity has been declared by a certain judgment of court, and that said signer “consents” to said adoption, constitute a *written* recognition of the paternity of said child, within the provisions of Section 3385, Code, 1897, even though, in the execution of such articles, the signer was acting under compulsion, in the sense that he was complying with an order of court as a condition to escaping further liability on a bastardy judgment against him, covering the support of said child. *McKellar v. McKellar*, 183—1030.

**BILLS AND NOTES.** See NOVATION.

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**Acceptance—Separate Writing.** Written acceptance of a check  
1 by the drawee thereof may be by a writing *separate* from the check. So held in the case of a telegram. *Iowa State Sav. Bank v. City National Bank*, 183—1347.

**Fraud—Evidence—Sufficiency.** Evidence attending the giving  
2 of a promissory note for stock foods reviewed, and held to justify a finding of fraud on the part of the payee. *Scovel v. Monaghan*, 183—581.

## EXECUTION AND DELIVERY.

**Failure to Read—Effect.** One who can read, and has an oppor-  
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## BILLS AND NOTES Continued

**Conditional Delivery—Principal and Surety.** A surety on a  
4 promissory note may show, against the original payee, and as a complete defense, that the note in question was delivered to said payee on the condition that said note should not become effective against the surety until the payee first secured from the principal maker certain specified indemnity in favor of the surety, and that the payee wholly failed to fulfill said condition. *Selma Sav. Bank v. Hinkle*, 183—200.

**Transfer by Indorsement—Non-Presumption as to Ownership.**

5 The law does not presume that a note payable to order belongs to a party, from the naked fact that his name appears on the back thereof as indorsee. Evidence sufficient to show *delivery* to such indorsee is imperatively necessary. (Sec. 3060-a30, Code Supp., 1913.) *Young v. Hayes*, 183—134.

**Transfer—Evidence.** The declaration of one acquiring a note

6 to which he was not a party, to the effect that he wishes to "take up" the note, does not necessarily exclude the purpose to *purchase* it. *Dillenbeck v. Herrold*, 183—264.

**When "With Exchange" Is Surplusage.** The term "with ex-

7 change" is pure surplusage when added to a check which is drawn upon a bank by the bank's own depositor, and which is payable at said bank. *Iowa State Sav. Bank v. City National Bank*, 183—1347.

## ACTIONS.

**Title to Sustain Action.** Plaintiff's title to a note, though ac-

8 quired from one who was without authority to sell it, may not be questioned by the maker, in an action thereon, when the former owner acquiesced in and ratified the unauthorized sale. *Dillenbeck v. Herrold*, 183—264.

## HOLDERS IN DUE COURSE.

**Tainted Note—Burden of Proof.** Proof that a note was, in its

9 inception, tainted with fraud, throws the burden of proof

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upon the holder to show that he is a holder "in due course."  
Seovel v. Monaghan, 183—581.

**Fraud in Inception of Note—Burden of Proof.** The *uncontroverted* denial, by the cashier of a bank, of notice of a defect in the original title to a negotiable instrument purchased by the bank through him, does not *conclusively* establish such want of notice. In such cases, material considerations are:

1. Whether other bank officers charged with duties pertaining to such matters might have had notice.
2. Whether the purchase was a departure from the ordinary business methods of the bank.
3. Whether the time, place, and circumstances of the purchase were *somewhat* unusual. German American Nat. Bank v. Kelley, 183—269.

**PAYMENT AND DISCHARGE.**

**Evidence.** Evidence reviewed, and held to show affirmatively that the payment alleged had not been made. Iowa Nat. Bank v. Pyle, 183—87.

**Cancelling Indorsement of Payment.** One who holds a promissory note as collateral may peremptorily cancel an indorsement of payment when such indorsement was made without the knowledge or consent of the holder, and without the receipt by said holder of any consideration. Iowa Nat. Bank v. Pyle, 183—87.

**Transfer by Delivery—Surrender by Collateral Holder—Warranty.** One who purchases a note at a time when it is held by another as collateral security, and, at the request of the seller, pays the purchase price by check to the collateral holder, may not deny liability on the check on the ground that the purchased note was a forgery, it appearing that the collateral holder, on receipt of the purchaser's check, cancelled the seller's debt, and delivered the collateral to the purchaser thereof. Under such circumstances, there is no warranty by the collateral holder of the *title* or *validity* of the note. (See Sec. 3060-a65, Code Supp., 1913.) Packers Nat. Bank v. Michener, 183—122.

## BILLS AND NOTES Continued

TO

BANKS

**Primary Liability.** A bank which unconditionally promises to  
 14 pay its depositor's check in a named amount becomes primarily liable on the check to one who acts on the promise.  
 Iowa State Sav. Bank v. City National Bank, 183—1847.

**Conflict Between Note and Mortgage as to Maturity.** Date of  
 15 maturity, as fixed in a note, controls a conflicting date of maturity as fixed in a mortgage which secures the note.  
 Mowbray v. Simons, 183—1389.

**BONDS.** See ELECTIONS, 1; MUNICIPAL CORPORATIONS, 3

**Contract to Purchase—Rescission—Estoppel.** One who agrees to  
 1 buy municipal bonds, provided the proceedings leading up to the issuance of the bonds, in the opinion of his attorney, properly evidence the legality of the bonds, may not rescind and recover his deposit on the ground that the notices of the election to vote on such issue were not properly given, when, prior to the attempted rescission, the buyer's attorney had distinctly conceded the sufficiency of the proceedings relative to notices, etc., and the corporation necessarily did nothing further with reference thereto.  
 Koontz v. Iowa City State Bank, 183—1353.

**Rescission and Recovery of Deposit.** One who agrees to buy  
 2 bonds of a municipal corporation, provided he is "furnished a complete transcript of all proceedings leading up to the issue, evidencing the legality to the satisfaction of our attorney," may not rescind because the method and means of paying the bonds were not inserted in the bonds, such latter matter not being a proceeding "leading up to the issue," especially in view of the doubt as to the power of the governing body (a school board) to insert such provisions in the bonds. Koontz v. Iowa City State Bank, 183—1353.

**BRIDGES.** See MUNICIPAL CORPORATIONS, 5.**BROKERS.**

**Compensation—Evidence—Sufficiency.** In a controversy between  
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TO

CARRIERS

dence reviewed, and held sufficient to support a judgment for intervenor. *Floyd v. Misner*, 183—222.

**Compensation—Rival Claimants.** A broker must recover his  
2 commission, if at all, on the strength of what *he* did under his contract with the owner, and not on the weakness of the case made by a rival claimant for the same commission. *Floyd v. Misner*, 183—222.

**Compensation—When Earned—Evidence.** Evidence reviewed, and,  
3 giving it the most favorable construction which, in reason, could be given to it, held sufficient to present a jury question on the issue whether the broker was the procuring cause of a sale. *Clark & Co. v. Monson*, 183—980.

**Compensation—Fraud of Principal—Evidence—Sufficiency.** Evi-  
4 dence reviewed, and held insufficient to show that the principal, in order to avoid the payment of a commission, had fraudulently availed himself of the efforts of the broker. *Mullen v. Crawford*, 183—14.

**BURDEN OF PROOF.** See **BILLS AND NOTES**, 9; **CARRIERS**, 10, 17; **CRIMINAL LAW**, 4; **EVIDENCE**, 2; **PRINCIPAL AND SURETY**, 2; **WILLS**, 2.

## CARRIERS.

### CARRIAGE OF GOODS.

**Failure to Show Condition When Delivered to Carrier.** Failure of  
1 the evidence to show the condition of stock *when delivered to the carrier* is not fatal to recovery of damages, under pleadings distinctly alleging damages by reason of a specified act of negligence occurring *subsequent to receipt by the carrier*. *McNamara v. Chicago, R. I. & P. R. Co.*, 183—577.

**Interstate Bill of Lading Limiting Damages.** The provision of  
2 an interstate bill of lading that the carrier's liability for loss or damage "*shall be computed on the basis of the value of the property at the time and place of shipment:*"

## CARRIERS Continued

(a) Is valid.

(b) Applies to damages arising from *delay*.

(c) Creates a measure of damages which excludes all consideration of market variations pending the transportation. *Keeney v. Chicago, B. & Q. R. Co.*, 183—522.

**Limitation on Filing Claims—Waiver.** The provision of a  
3 interstate bill of lading that claims for damages must be filed with the carrier within a limited time may not be waived by the carrier. *Keeney v. Chicago, B. & Q. R. Co.* 183—522.

**Presumption from Good Condition.** Goods delivered to a car-  
4 rier in undamaged condition are presumed to remain in that condition. Claimant for damages must break this presumption by a showing of bad condition at the time the carrier parts with the goods, not at a time when a drayman to whom the carrier had delivered them, parts with the goods—the damage being such that no retrospective presumptions could be indulged. *Yarcho v. Chicago, R. I. & P. R. Co.*, 183—1180.

**Written Claims for Damages.** The requirement of an interstate  
5 B/L that claims for damages be made (a) in writing, and (b) within four months, etc., is for the purpose of enabling the carrier, by prompt notice, to adequately protect itself. No particular form of written notice is essential. *Held*, such requirement was sufficiently met by a writing evidencing a joint inspection by shipper and carrier prior to delivery, which writing specified the shipment and the extent of damage thereto, was duly signed by the carrier's agent, and by him indorsed on the shipper's freight receipt. *A priori*, such writing is sufficient when followed by a written notice by the shipper to the carrier, specifying the shipment and damage thereto, coupled with a written expressed intention of filing future claim. *Emery & Co. v. Wabash R. Co.*, 183—687.

**Bill of Lading Requiring Written Notice, Etc.—Waiver.** The  
6 plea that the provisions of an interstate B/L which provides that claims for damages must be filed in writing and within a specified time may not be waived, because such waiver would work an unlawful discrimination between

## CARRIERS Continued

shippers, will not be heeded when it appears that the Interstate Commerce Commission, within the range of its discretion, has formally held that, under stated conditions, the *waiver* of such provision actually worked for *equality* between shippers, while the literal enforcement of said provision actually worked a discrimination. *Emery & Co. v. Wabash R. Co.*, 183—687.

**Damages—Measure.** In an action for damages to a specific part  
7 of a shipment, the carrier may not contend for a measure of damages which would apply the shipper's profits on the undamaged part to the payment of the damage caused by the carrier. *Emery & Co. v. Wabash R. Co.*, 183—687.

**Initial and Subsequent Carriers—Liability.** Principle recognized  
8 that an initial interstate carrier is liable for all damages caused, either by its own negligence or by the negligence of a connecting or delivering carrier; while a delivering carrier is liable only for damages caused by its own negligence. *Emery & Co. v. Wabash R. Co.*, 183—687.

**Damages—Presumption.** Principle recognized that a shipper is  
9 entitled to the benefit of the rebuttable presumption that the delivering carrier received the goods in as good condition as they were in when received by the initial carrier. *Emery & Co. v. Wabash R. Co.*, 183—687.

**Perishable Goods—Damages—Burden of Proof.** Principle recog-  
10 nized that the shipper of perishable goods, in an action against a delivering interstate carrier, has the burden to prove that the goods were delivered to the initial carrier in such condition that damages thereto could only occur by reason of some negligence of the carriers'. *Emery & Co. v. Wabash R. Co.*, 183—687.

**Delivery Without Bill—Subsequent Acquisition.** A carrier is  
11 absolved from all liability on the score of delivery by delivering a shipment without obtaining possession of the bill of lading, but subsequently acquiring the bill of lading from one who had title to it. *Midland Linseed Co. v. American L. F. Co.*, 183—1046.

## CARRIERS Continued

**Unauthorized Delivery.** A shipper who sends to a bank a bill of lading with draft attached, may not, as between himself and the carrier, claim that the act of the bank in delivering the bill of lading to the buyer was unauthorized. So held where the bank, erroneously supposing the draft to be paid, delivered the bill of lading to the buyer, and the buyer delivered the same to the carrier. *Midland Linseed Co. v. American L. F. Co.*, 183—1046.

**Unauthorized Delivery—Ratification.** A shipper who, with knowledge that a carrier had made an *unauthorized* delivery, treats the one to whom the delivery was made as his debtor, thereby ratifies the unauthorized delivery and necessarily precludes himself from proceeding against the carrier as for conversion. So held where the shipper retained partial payments made by the one to whom delivery was made, and later brought suit against said party to collect the balance. *Midland Linseed Co. v. American L. F. Co.* 183—1046.

**Non-Delivery—Form and Time of Making Claim.** A provision in an interstate bill of lading requiring claims for non-delivery to be made (a) in writing, and (b) within a stated time, applies, in compliance with Federal court rulings, to a *misdelivery*. *Midland Linseed Co. v. American L. F. Co.* 183—1046.

**Form of Claim—Authority of Agent to Receive.** A shipper obligated by a bill of lading to make his claim for damages in a specified form, must show such authority in the person to whom the claim is made that it may be inferred that service on such person was service on the carrier. Certain indefinite evidence held insufficient to show such authority. *Midland Linseed Co. v. American L. F. Co.*, 183—1046.

## CARRIAGE OF PASSENGERS.

**Derailement—Res Ipsa Loquitur.** A passenger injured by the derailement of a train need not show the *causes* of the derailement, *though alleged*. The injured party makes a *prima facie* case by showing: (a) That he was a passenger on the

## CARRIERS Continued

TO

## CHATTEL MORTGAGES

train; (b) that the train was derailed; (c) that he was injured thereby; and (d) that he was not guilty of negligence. *Lewis v. Cedar Rapids & Iowa City R. & L. Co.*, 183—725.

## CARRIAGE OF LIVE STOCK.

**Loss or Injury—Burden to Show Human Agency.** Receipt by  
17 a carrier of live stock in good condition, followed by the death of the stock prior to arrival at point of delivery, creates a presumption of negligence on the part of the carrier *only* in those cases where the conditions attending the dead stock indicate injury *by human agency*. In the absence of such indications, the shipper must negative death by natural causes. *Nugent v. Chicago & N. W. R. Co.*, 183—1073.

## INTERSTATE COMMERCE.

**Preparation for Repair of Instrumentality.** An employee is en-  
18 gaged in interstate commerce when, on orders from his superior, and on a car furnished by the master, he is *on his way* to repair an instrumentality of interstate commerce. *Brier v. Chicago, R. I. & P. R. Co.*, 183—1212.

**CERTIORARI.** See APPEAL AND ERROR, 19.

**CHARITABLE INSTITUTIONS.** See MASTER AND SERV-  
ANT, 10.

## CHATTEL MORTGAGES.

**Sale of Property as Working Waiver of Lien.** One of several beneficiary creditors under a trust deed to chattel property who allows the trustee to sell the property, and later approves of a sale by the purchaser to a third party who, in good faith, supposed that the property was free of any incumbrance, will not be permitted, subsequently, to bring

CHATTEL MORTGAGES Continued TO CONSTITUTIONAL LAW  
 forth a prior chattel mortgage on the property and fore-  
 close the same. Hall v. Getty, 183—436.

**COLLATERAL INHERITANCE.** See TAXATION, 1.

**COMMERCE.** See CARRIERS.

**"Original Packages."** An "original package" of interstate commerce ceases to be such when, after completed delivery to the consignee at the point of destination, said consignee holds the same with *intent* to break such package, as his customary business may require, and sell the separate contents thereof at said point of destination, or within the state thereof. State v. C. C. Taft Co., 183—548.

**COMPROMISE AND SETTLEMENT.** See PLEADING, 5.

**Consideration—Unfounded Claims.** The good-faith assertion of a judicially unfounded claim furnishes ample consideration for a compromise and settlement. Urdangen v. Fryer, 183—39.

**CONSPIRACY.** See CORPORATIONS, 4.

## CONSTITUTIONAL LAW.

**Right of Appellate Court to Prescribe Rules.** The legislature  
 1 may not deprive the Supreme Court of its inherent power,  
 as a court for the correction of errors at law, to prescribe  
 appropriate rules for the orderly and accurate presentation  
 of appeals; moreover, rules which require "statements of  
 error and brief points" are not in conflict with Sec. 4136,  
 Code Supp., 1913. Wine v. Jones, 183—1166.

**Classification—Animal Registration.** The primary right and du-  
 2 ty of the legislature to classify—to say who and what sub-  
 ject-matters shall come under the provisions of an enact-  
 ment—are not improperly exercised in the Animal Registra-  
 tion Act, which requires pedigree registration, and certifi-  
 cate thereof, of stallions and jacks, and omits such require-

## CONSTITUTIONAL LAW Continued TO CONTRACTS

ments as to bulls and other animals. Such classification is eminently natural, in view of the inherent differences in the species and in the purposes for which they are owned and used. (See Sec. 2341-f, Code Supp., 1913.) *State v. McGuire*, 183—927.

**Prevention of Fraud—Animal Registration.** The prevention of  
3 fraud in the sale, use, etc., of stallions, is ample justification for the statutory requirement that the pedigree of all such shall be duly registered, and a certificate thereof obtained. (See Sec. 2341-f, Code Supp., 1913.) *State v. McGuire*, 183—927.

**CONTRACTS.** See EVIDENCE, 7, 8, 15; FRAUD, 1, 2, 4;  
PARTNERSHIP, 1; SPECIFIC PERFORMANCE.

## REQUISITES AND VALIDITY.

**Non-Literal Performance—Effect.** One who performs his con-  
1 tract undertaking in a manner acceptable to those to whom performance is due, may not later assail the validity of his undertaking, on the ground that he, himself, did not literally perform his said undertaking as he had agreed. *Watt v. German Sav. Bank*, 183—346.

## CONSIDERATION.

**Guaranty in Consideration of Indefinite Extension of Debt.** A  
2 guaranty of a debt, in consideration of *such extension of time as the holder of the debt might elect to give the debtor*, is not supported by a sufficient consideration even though the said holder did forbear collection for a time. *Watt v. German Sav. Bank*, 183—346.

## CONSTRUCTION AND OPERATION.

**Subject-Matter—Scope and Extent of Obligation.** An enforceable  
3 agreement to pay the debts of a financially embarrassed corporation does not embrace the *personal* notes of the officers of said corporation given for money borrowed by said off-

CONTRACTS Continued TO CONVERSION  
 cers for the sole use and benefit of the corporation. Watt  
 v. German Sav. Bank, 183—346.

**Parties—Privity.** Ordinarily, there is no privity of contract be-  
 4 tween the original seller and the buyers of the same prop-  
 erty in subsequent sales. So held on the question whether  
 a warranty and the right to rely thereon passed to a donee  
 of the original vendee. *Fulton Bank v. Mathers*, 183—226.

**Expiration of Written Contract—Continuance of Business—Pre-**  
 5 **sumption.** The *presumption* that a continuance of business  
 relations between contracting parties after the expiration of  
 a written contract is on the terms of the old, expired con-  
 tract, does not prevail on a record which presents a jury  
 question on such issue of fact. *Merchants T. & S. Co. v.*  
*Emerson-Brantingham Imp. Co.*, 183—533.

**Rights Acquired by Third Persons.** A contract may inure to the  
 6 benefit of a third person, even though he is not a party  
 thereto, or directly mentioned therein. So held where a  
 contract between landowners, in the matter of maintaining  
 division fences, was held to inure to the benefit of subse-  
 quent tenants. *Little v. Laubach*, 183—1370.

#### PERFORMANCE OR BREACH.

**Substantial Performance.** *Substantial* performance of a con-  
 7 tract is, ordinarily, all that is required. *Watt v. German*  
*Sav. Bank*, 183—346.

#### CONVERSION.

**Avoidance by Reconversion.** The fiction of equitable conversion  
 of real estate may be avoided by the agreement of the  
 sole beneficiaries to take the land *as land*—the gift being  
 immediate, and not in trust. *Norris v. Loyd*, 183—1066.



## CORPORATIONS

**CORPORATIONS.** See CONTRACTS, 3; PRINCIPAL AND SURETY, 2.

## CAPITAL STOCK, ETC.

**Retirement by Purchase of Goods—Enforcibility.** A provision

- 1 in certificates of stock (transferable only by holder, and on the books of the corporation) to the effect that the holder thereof may employ the stock in payment of the products of the issuing corporation, may not be enforced by a partnership of which the holder is a member, even though, to the knowledge of the corporation, the stock was purchased with partnership funds, and issued to the individual member of the partnership as a matter of convenience. *National Sewer Pipe Co. v. Smith-Jaycox Lbr. Co.*, 183—17.

**Issuance—Consideration.** If consideration for an issuance of

- 2 corporate stock would exist if the stock were issued to one person, such consideration equally exists for its issuance to another, to whom the first party caused the corporation to issue it. *Watt v. German Sav. Bank*, 183—346.

**What Constitutes Stock.** The term "certificate of stock," as ap-

- 3 plied to a corporate instrument which contains conditions *which tend to impair the corporate capital available for the satisfaction of creditors*, is a misnomer. Said instrument is not a "certificate of stock," in any legal sense—is simply an evidence of a debt owing by the corporation. It follows that, as to such an instrument, the statutory regulation of the issuance of *stock* for property other than money, has no application. (See Sec. 1641-b, *et seq.*, Code Supp., 1913.) *Wright v. Johnston*, 183—807.

## TRANSFER OF SHARES.

**Conspiracy to Destroy Business.** Evidence reviewed, in an ac-

- 4 tion to compel the transfer of shares, and held insufficient to show that plaintiff was in a conspiracy to destroy defendant's business. *Post v. Null*, 183—760.

## CORPORATIONS Continued

## OFFICERS AND AGENTS.

**Tenure—Unlawful Removal.** A duly elected corporate officer, 5 whose tenure of office is definitely fixed by the articles of incorporation, may not, prior to the expiration of said fixed time, be legally discharged, without cause, by the board of directors. *Barker v. National L. Assn.*, 183—966.

## ELECTIONS.

**Formalities Necessary.** No particular formality is required, in 6 electing the officers of a corporation, especially when no contest attends the election. On the issue whether the ambiguous proceedings of a board of directors constituted an election, a construction which would lead to invalidity because in excess of legal power in the directors will not be adopted, when another construction is available which is concededly within the powers of the directors. *Barker v. National L. Assn.*, 183—966.

**Power to Postpone.** Articles of incorporation which distinctly 7 provide that the directors shall, on a specified day, elect the officers of the corporation, are not mandatory, in such sense that the directors may not, on said specified day, postpone such election to a subsequent day. *Barker v. National L. Assn.*, 183—966.

**Non-Voluntary Proxy.** A proxy is not rendered non-voluntary 8 by the fact that the president of the company sent the stockholder a blank form, with a request that the stockholder execute the same. (See Sec. 1821-y, Code Supp., 1913.) And such a proxy is personal to the one to whom it is addressed, even though such person is described as "president," etc., of the corporation. *State v. Meredith*, 183—783.

**Improper Solicitation of Proxy.** A vote cast at a stockholders' 9 meeting, under a proxy which the stockholder voluntarily executed, is in no manner invalidated by the fact that the person to whom the proxy was given was guilty of criminal solicitation in obtaining the proxy. (See Sec. 1821-y, Code Supp., 1913.) *State v. Meredith*, 183—783.

CORPORATIONS Continued

TO

CRIMINAL LAW

**Tenure—Holding Over.** An officer of a corporation, by holding  
10 over, without re-election, after the expiration of his duly  
elected term of office, because of the failure of the directors  
to elect his successor, does not, *ipso facto*, succeed to a full  
new term, under articles of incorporation which provide  
"that the term of office of said officer shall be two years,  
and until his successor is elected and qualified." *Barker v.*  
*National L. Assn.*, 183—966.

CORPORATE DEBTS.

**Liability on Unpaid Stock.** Extending credit to a corporation,  
11 with knowledge that the corporate stock has been issued  
without payment therefor, precludes the one so extending  
credit from pursuing the stockholders on their unpaid stock  
subscriptions. *Watt v. German Sav. Bank*, 183—346.

**COUNTIES.** See APPEAL AND ERROR, 16; HIGHWAYS, 6, 7.

**Highways—Negligently Obstructing—Liability.** The non-li-  
ability of a county for damages resulting from the act of its  
board of supervisors in negligently obstructing a highway,  
as distinguished from a bridge, extends to the supervisors  
who order the obstruction, and to a mere employee, who  
does only that which the supervisors direct him to do. *Gib-  
son v. Sioux County*, 183—1006.

CRIMINAL LAW.

**Accomplices in Crime of Incest.** A 16-year-old daughter is, un-  
1 der the record, held to be an accomplice with her father  
in the crime of incest. *State v. Kurtz*, 183—480.

**Spectacular Conduct of County Attorney.** It is not necessarily  
2 reversible error for a county attorney to suddenly appear  
before the jury with a 22-day-old infant in his arms, to  
hand the child to the prosecuting witness, and to have the  
witness identify the child, and testify to its paternity. *State*  
*v. Kurtz*, 183—480.

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## CRIMINAL LAW Continued

TO

## DAMAGES

**Existence and Sufficiency of Corroboration.** Corroboration of an  
 3 accomplice may consist of a failure of the accused to deny  
 his guilt when openly accused thereof, and of conduct im-  
 pliedly admitting his guilt and inconsistent with innocence.  
*State v. Kurtz*, 183—480.

**Presumption and Burden of Proof.** The presumption of illegal  
 4 sale or keeping for sale which the law indulges from the  
 fact that intoxicating liquors are found in unusual quanti-  
 ties in the defendant's residence, etc., does not justify an  
 instruction that the jury must convict unless the accused  
 overcomes the presumption. *State v. Bertinelli*, 183—1143.

**Other Offenses.** A witness may not, on cross-examination, be  
 5 interrogated as to offenses alleged to have been committed  
 by an accused, which offenses are separate and distinct from  
 the one under investigation, and which were in no manner  
 brought out on direct examination. *State v. Dillman*, 183—  
 1147.

**DAMAGES.** See CARRIERS; FENCES; LANDLORD AND TEN-  
 ANT, 5; MUNICIPAL CORPORATIONS, 6, 7, 8; NEGLIGENCE, 14, 15;  
 PHYSICIANS AND SURGEONS; WATERS AND WATERCOURSES, 4.

**Avoidable Damages—Non-Necessity to Commit Trespass.** The  
 1 rule that one may not recover for avoidable consequences  
 does not require that the injured party commit a trespass.  
*Straight Bros. Co. v. Chicago, M. & St. P. R. Co.*, 183—934.

**Injury to Leasehold Interest.** On the issue as to the damages  
 2 to a leasehold interest in farm lands by reason of the un-  
 lawful flooding of the land, evidence is admissible of the  
 usual crop yield and the value thereof in the neighborhood  
 in question. *Straight Bros. Co. v. Chicago, M. & St. P. R.*  
*Co.*, 183—934.

**Flooding of Lands and Injury to Soil.** "The difference between  
 3 the value of a farm as an entirety, immediately before and  
 immediately after an unlawful flooding" which causes in-  
 jury to the soil, is, or may be, a better measure of damages.

**DAMAGES Continued TO DEDICATION**

than such difference confined solely to the lands receiving the physical injury. *Straight Bros. Co. v. Chicago, M. & St. P. R. Co.*, 183—934.

**Flooding of Lands and Injury to Crops.** Injury to growing crops, and injury by reason of inability to plant or raise crops, caused by the unlawful flooding of lands, may very properly be worked out by determining the difference between the rental value of the land for the term in question, immediately before and after the flooding. *Straight Bros. Co. v. Chicago, M. & St. P. R. Co.*, 183—934.

**Flexibility of Measures.** Principle recognized that it matters little just what rule is adopted for measuring damages, provided the jury can and does thereunder work out substantially just compensation. *Straight Bros. Co. v. Chicago, M. & St. P. R. Co.*, 183—934.

**Double Recovery.** Allowing damages to land which has, in a sense, been permanently injured by reason of an unlawful flooding, and allowing damages to growing crops and damages by reason of inability to raise crops on the same land, and by reason of the same flooding, do not constitute or authorize a double recovery. *Straight Bros. Co. v. Chicago, M. & St. P. R. Co.*, 183—934.

**DEDICATION.**

**Town Plats—Acceptance.** The filing and recording of a town plat acts as a deed in fee to the public of the lands set apart for streets and alleys, but, like all other deeds, an acceptance is absolutely necessary. In other words, such lands do not become public "roads" until accepted by the public. *Bowersox v. Board*, 183—645.

**Acceptance—Evidence.** It is suggested that evidence of the acceptance of a town plat dedication of lands for streets and alleys, aside from a formal order of acceptance by the public authorities, may consist of:

(a) The expenditure of labor or money thereon by the public authorities.

- |  |    |       |
|--|----|-------|
| DEDICATION Continued   | TO | DEEDS |
| <p>(b) The general or frequent use of the land as a street or road.</p> <p>(c) The general recognition by the public of the land as a public highway. <i>Bowersox v. Board</i>, 183—645.</p> |    |       |

**DEEDS.** See EVIDENCE, 17; GUARDIAN AND WARD, 1; HOMESTEAD, 2, 3.

#### VALIDITY.

**Parol.** A parol gift of real estate, where the donee takes possession thereunder and improves the land as his own, will be sustained. *Barber v. Wiemer*, 183—72.

**Undue Influence and Intoxication.** Evidence reviewed, and held insufficient to establish the invalidity of a deed by reason of undue influence on the part of grantee, or intoxication on the part of grantor. *Slater v. Slater*, 183—472.

#### CONSTRUCTION AND OPERATION.

**Deed to Lot Impliedly Conveying Vacated Alley.** Owners of lots who consent to the vacation of an appurtenant and separating alley, on the express condition that such vacation will carry to each lot owner title to a proportionate part of said alley, are bound thereby. It follows that a subsequent deed by one of such owners for his particular lot will be construed as carrying title to the grantor's portion of the alley, even though the lot is described by its lot number only. *Whalen v. Smith*, 183—949.

**Fee (?) or Easement (?)—Railway Right of Way.** A deed which "sells and quitclaims to the grantee all the right, title and interest" of the grantor, carries a fee, and not a mere easement, even though coupled with an agreement that grantee will use the land for the construction and operation of a street railway. *Des Moines City R. Co. v. City of Des Moines*, 183—1261.

**Estate in Fee—Possibility of Reverter.** An estate in fee is not deprived of such characteristic by a clause in the deed pro-

DEEDS Continued TO DESCENT AND DISTRIBUTION  
 viding for a "possible reverter." Des Moines City R. Co.  
 v. City of Des Moines, 183—1261.

**Conditions and Restrictions—Validity.** One who is, in fact, the  
 6 absolute owner of real estate under an executed parol gift,  
 is none the less so because of the subsequent execution by  
 the donor of a deed to donee, containing trust provisions to  
 which donee did not consent. Barber v. Wiemer, 183—72.

**CANCELLATION.**

**Nominal Consideration and Marked Mental Impairment.** Want  
 7 of consideration is not of itself, sufficient ground for set-  
 ting aside a completed conveyance, but such want of con-  
 sideration plus the marked mental impairment of the grant-  
 or—*of which grantee had full knowledge*—may demand such  
 cancellation. Casady v. Bickford, 183—973.

**DESCENT AND DISTRIBUTION.** See WILLS, 6-9, 12.

**PERSONS ENTITLED.**

**How Determined.** Heirs must be determined by the law in  
 1 force at the time of the death of the person whose estate  
 is under consideration. McAllister v. McAllister, 183—245.

**Wife Not Heir of Husband.** A widow is not an "heir" of her  
 2 deceased husband, within the meaning of Sec. 3378, Code,  
 1897, which provides that property which cannot descend  
 to the son of an intestate because of the prior death of the  
 son, shall descend to the *heirs* of such pre-deceased son.  
 Schultz v. Schultz, 183—920.

**Non-Dowable Lands.** A widow takes no dowable interest in  
 3 lands which her husband would have taken had he not pre-  
 deceased his intestate father. (See Sec. 3366, Code, 1897;  
 Sec. 3379, Code Supp., 1913.) Schultz v. Schultz, 183—920.

**Heirs of Bastard—Putative Grandfather.** The children of a de-  
 4 ceased bastard mother inherit the share which their mother  
 would have inherited from *her* father, even though it be

## DESCENT AND DISTRIBUTION Continued to

## DRAINS

conceded that the father, in case he outlives such children, may not inherit from them. (Sec. 3385, Code, 1897.) McKellar v. McKellar, 183—1030.

**Adoption of Bastard—Effect on Inheritance from Natural Parent.** The adoption of an illegitimate child in no wise lessens its right to inherit from its natural parents. (Sec. 3384, Code, 1897.) McKellar v. McKellar, 183—1030.

**DITCHES.** See DRAINS; WATERS AND WATERCOURSES.

**DIVORCE.**

**Unsupported Conditions.** A modifying order in divorce proceedings which require the defendant father to support an immature child, who was not born at the time of the original decree of divorce, may not, *in the absence of evidence of the mother's unfitness*, be made conditional upon the mother's surrendering the custody of the child to persons other than the defendant father, nor conditional upon the court's selecting the proper school for the child's education. (Sec. 3180, Code, 1897.) Cline v. Cline, 183—1255.

**Supplemental Proceedings—Attorney Fees.** Concede, *arguendo*, that the court has power to allow attorney fees in supplemental proceedings to obtain modifications of a divorce decree, yet such allowance is largely a matter of discretion with the trial court. (Sec. 3177, Code, 1897.) Cline v. Cline, 183—1255.

**DOWER.** See DESCENT AND DISTRIBUTION, 3.

**DRAINS.** See HIGHWAYS, 3; NUISANCE; WATERS AND WATERCOURSES.

**Establishment—Objections—Requirements.** Objections to the establishment of a drainage district need not be in *writing* nor in any particular *form*, nor made at or before any particular *date*. The all-essential requirement is that such objections be raised in *some* intelligent manner before the



## DRAINS Continued

board of supervisors, in ample time for due consideration.  
Lewis v. Pryor Drain. Dist., 183—236.

**Establishment—Modifying Engineer's Report—Appeal.** An order establishing a drainage improvement by eliminating a portion of the engineer's recommendations, *without previous notification of intention to so eliminate*, is appealable by those adversely interested, without presentation of any objections before the board. Lewis v. Pryor Drain. Dist., 183—236.

**Establishment—Appeal—Failure to File Petition.** Failure of one who appeals from an order establishing a drainage improvement, to file, on or before the first day of the next term of the district court succeeding the taking of the appeal, a petition setting forth the order appealed from, with his objections thereto, is fatal to the appeal, when the drainage authorities availed themselves of said failure by motion to dismiss, filed *before* such petition is filed. (Sec. 1989-a14, Code Supp., 1913.) Stewart v. Board, 183—256.

**Establishment—Inclusion of Lands—Benefits—Presumption.** The inclusion of lands within a drainage district is a finality on the question of *some* benefit to the land. Stewart v. Board, 183—256.

**"Deepening and Widening" Under Guise of "Cleaning and Repairing."** An assessment made under a proceeding "*to clean and repair*" a public drain, without notice to the property owner, is wholly illegal, when the work actually done constitutes, in general substance, a "widening and deepening" of the ditch, even though, in the process of "widening and deepening," cleaning and repairing were done. (See Secs. 1989-a11, 1989-a21, Code Supp., 1913.) Lade v. Board of Supervisors, 183—1026.

**Illegality—Estoppel.** Landowners are not estopped to object to an illegal assessment by the naked fact that they knew that work was being done on the drain. So held where the work done was under proceeding *to clean and repair*, but in truth constituted a *widening and deepening*. Lade v. Board of Supervisors, 183—1026.

ELECTION OF REMEDIES

TO

ELECTIONS

**ELECTION OF REMEDIES.**

**Non-Inconsistent Proceedings.** The act of a landlord in attempting to collect rent from the tenant's estate, and, after failure, proceeding against one who had converted property upon which the rent was a lien, is entirely consistent and non-prejudicial to the conversioner. *Boles v. Missouri Valley Elevator Co.*, 183—517.

**ELECTIONS.****QUALIFICATIONS OF VOTERS.**

**"Electors"—Women Voters—Bonds.** The term "elector," un-  
1 qualified and unexplained, means a *constitutional* elector. A constitutional elector is a *male* person. Therefore, when a statute requires "*a majority of all electors voting*," as a condition to the issuance of bonds, it means the same as though the statute had omitted "elector" and used the term "male voters," *even though women are permitted to vote on such bond issue*. So held under Sec. 1306-e, Code Supp., 1913, providing for bond issues for specified public utility purposes. *Sears v. City of Maquoketa*, 183—1104.

**Naturalization—Adoption.** The adoption by a citizen of the  
2 United States of a foreign born minor does not, *ipso facto*, naturalize such minor. *Powers v. Harten*, 183—764.

**Residence.** Evidence reviewed, and held insufficient to show  
3 that an elector was not a resident of the precinct in which he voted. *Powers v. Harten*, 183—764.

**CONDUCT OF ELECTIONS.**

**Privilege of Secrecy as to How Elector Votes.** An *illegal* voter,  
4 who admits that he did vote on the occasion in question, possesses no right of secrecy as to *how* he voted. *Powers v. Harten*, 183—764.

**How One Voted.** Circumstances, in and of themselves, may be  
5 sufficient to show *how* a person voted. *Powers v. Harten*, 183—764.

EMINENT DOMAIN

TO

EVIDENCE

**EMINENT DOMAIN.** See HIGHWAYS; RAILROADS, 13.**ESCHEAT.**

**Liability of State—Interest.** One who proves his heirship to funds which are held by the state under an order of escheat, is entitled to interest on the fund only from the date of the decree which establishes such heirship, and then, only for such amount of interest as the state or its officers *actually* receive after said date on the fund, as a school loan. (Sec. 3391, Code, 1897.) *McKeown v. Morrow*, 183—454.

**ESTOPPEL.** See HIGHWAYS, 4.

**Asserting Validity of Foreclosure Deed and Fraud Leading There-  
to.** One may not base his claim to title on a foreclosure deed, and in the same breath contend that the entire foreclosure proceedings were a fraud upon him. *McCreary v. McGregor*, 183—732.

**EVIDENCE.** See BASTARDS, 1; FALSE PRETENSES, 1, 2;  
FRAUD; LIBEL AND SLANDER, 3; NEGLIGENCE, 18;  
TRIAL.

**JUDICIAL NOTICE.**

**Official Signatures.** Courts take judicial notice of the official  
1 character and signature of their own clerk. *Ames Evening  
Times v. Ames Weekly Tribune*, 183—1188.

**BURDEN OF PROOF.**

**Expiration of Express Contract—Continuance of Business—Effect.**

2 He who pleads that the terms of an expired written contract control subsequent business relations has the burden to so prove. *Merchants T. & S. Co. v. Emerson-Brantingham Imp. Co.*, 183—533.

## EVIDENCE Continued

## PRESUMPTIONS.

**Agent Reporting to His Principal.** It will be presumed that the  
3 agent of a common carrier duly reported to his superior officers a fact which it was his duty to know, which he did know, and which it was his duty to so report. *Emery & Co. v. Wabash R. Co.*, 183—687.

## RELEVANCY, COMPETENCY, AND MATERIALITY.

**Master and Servant—Correspondence Relative to Discharge.** In  
4 an action by a servant for wrongful discharge, the correspondence relative thereto which passed between the parties may become competent, relevant, and material. *Redfield v. Boston P. & M. Co.*, 183—194.

**Intent and Purpose.** The holder of a note (not a party thereto  
5 on its face) may testify, in an action thereon, that, in acquiring the note, it was not his *intention* to voluntarily pay the note, but that it was his *intention* to purchase the note. *Dilenbeck v. Herrold*, 183—264.

**Person as Exhibit.** Conceding, *arguendo*, that a human being  
6 may be offered as an exhibit, yet a formal offer is properly rejected when the person in question was a witness, and fully examined before the jury. *Ferguson v. Ferguson*, 183—519.

**Breach of Contract.** On the issue of damages for breach of con-  
7 tract to prevent the growth of weeds upon a farm, evidence as to the price at which the owner had contracted to sell the farm and the lesser price which he was compelled to accept, owing to the breach of said contract, is relevant, competent, and material. *Wheeler v. Schilder*, 183—623.

**Extent of Breach of Contract.** On the issue whether a farm was  
8 infested with noxious weeds, evidence is admissible to show (a) the time necessary to cut and destroy such weeds, (b) the crops raised on the farm from year to year, and (c) the relative extent to which the farm was infested with weeds when the tenant took possession and when he relinquished possession. *Wheeler v. Schilder*, 183—623.

## EVIDENCE Continued

**Ancient Documents—Conditions to Admissibility.** Instruments

9 of ancient nature, free from suspicious appearance, found in places consistent with their genuineness, and (if constituting conveyances of land) attended with circumstances corroborative of their genuineness, are admissible, without formal or further evidence of genuineness. So held as to a 60-year-old unacknowledged conveyance of land for a highway. *Bidwell v. McCuen*, 183—633.

**How Strangers Would Testify.** What another person would tes-

10 tify to, if asked as to a certain matter, is wholly incompetent. *State v. Fountain*, 183—1159.

**Ex-Parte Affidavits, Etc.** An ex-parte affidavit, and an unsworn

11 and unsigned statement of account concerning alleged damages to a shipment of goods, are wholly inadmissible. *Yarcho v. Chicago, R. I. & P. R. Co.*, 183—1180.

## DECLARATIONS.

**Declarations of One Having Conflicting Interests.** Declarations

12 of the deceased officers of a savings bank that the bank was owner of and carrying on a business prohibited by law to the bank are inadmissible, when such declarations are distinctly hostile to the interests of the bank. *Watt v. German Sav. Bank*, 183—346.

**Declarations as to Possession.** On an issue whether one is in

13 possession of property as owner, or as agent only, his declarations relative to the nature of such possession are admissible. *Secvel v. McNaghan*, 183—581.

## DOCUMENTARY.

**City Ordinance—Negligence.** Ordinances regulating the use of

14 streets in private building operations are admissible in connection with the evidence that such regulations were violated, with resulting injury to another. *Malloy v. Stoddard Cons. Co.*, 183—881.

## EVIDENCE Continued

## PAROL AS AFFECTING WRITING.

**Subject-Matter Not Covered by Writing.** Evidence of an oral  
15 contract, contemporaneous with a written contract, but on  
a subject-matter on which the written contract is silent, is  
not violative of the parol evidence rule. *Armstrong v. Car-*  
*anagh*, 183—140.

**Bills and Notes—Indorsement as to Payment.** The indorsement  
16 "Paid," on the face of a promissory note, while prima-facie  
evidence of a complete satisfaction, is, nevertheless, subject  
to oral explanation or contradiction, especially as against  
the maker, who was not a party to the transaction which  
resulted in such indorsement. *Dillenbeck v. Herrold*, 183—  
264.

**Engrafting Condition on Deed.** Parol evidence is inadmissible to  
17 engraft upon an absolute deed to a wife of premises paid  
for by the husband, a condition to the effect that the wife  
was to have absolute title only in case she survived the  
husband. *Mossestad v. Mossestad*, 183—311.

**When Rule Not Available.** The rule prohibiting the reception  
18 of parol evidence to vary, etc., the terms of a valid writing,  
is not available to one who is a stranger to the contract.  
*Wheeler v. Schilder*, 183—623.

## OPINION EVIDENCE.

**Conclusions—Wills—Influence Over Testator.** It is error to per-  
19 mit a contestant to state that proponent had great influence  
over testatrix, yet nonprejudicial when the fact of such in-  
fluence abundantly and without controversy appears from  
other portions of the record. *Monahan v. Roderick*, 183—1.

**Nonexpert Witness—Insufficient Detail of Facts—Wills.** It is not  
20 prejudicial error to permit a nonexpert witness, on an in-  
sufficient detail of facts, to give an inconsequential opinion  
as to the soundness of mind of a person. *Monahan v. Rod-*  
*erick*, 183—1.

**EVIDENCE Continued**

**Nonexpert Witness—Detail of Facts—Sufficiency.** The detail of  
21 facts which will qualify a nonexpert witness to give an  
opinion as to the unsoundness of mind of a person, is sufficient, if such detail is as to matters somewhat out of the ordinary, and of a nature such as to attract attention to the mental condition of the person in question. *Monahan v. Roderick*, 183—1.

**Physicians—Opinion without Detail of Facts.** A physician,  
22 though not an expert in mental diseases, may, without a detail of facts, give his opinion as to the mental soundness of a person professionally treated by him. *Monahan v. Roderick*, 183—1.

**Physical Condition of Injured Person—Qualification of Expert.**  
23 The opinion of a physician as to the physical condition of an injured person is not necessarily erroneous to the extent of prejudice because based, in some degree, on information obtained from *hearsay* sources. *Little v. Maxwell*, 183—164.

**Competency of Expert—Lack of Knowledge of Material Condition.** An expert witness is not competent to testify to the  
24 value of a thing, when such value depends materially on a condition as to which the expert shows no knowledge. *Dilly v. Paynesville Land Co.*, 183—217.

**Conclusion—Knowledge of Another.** An assertion by a witness  
25 that a bank had no notice of any infirmity in the original title to a note which the bank had purchased, is a pure conclusion. *German American Nat. Bank v. Kelley*, 183—269.

**Impeaching Evidence.** Opinion evidence on values may not be  
26 considered as impeaching evidence of former opinion evidence on values introduced by the same party. *State v. Kiefer*, 183—319.

**Conclusions—Understanding of Witness.** The “understanding”  
27 of witnesses that a savings bank was the owner of and carrying on a business prohibited to such bank is an inadmissible conclusion. *Watt v. German Sav. Bank*, 183—346.

## EVIDENCE Continued

**Conclusions—Lessened Value of Land. Evidence by competent**

28 witnesses as to the relative value of land with and without noxious weeds thereon is an allowable conclusion. *Wheeler v. Schilder*, 183—623.

**Examination of Experts. An expert who answers an opinion**

29 question which assumes the existence of a certain fact, *which fact the expert has not yet testified to*, will be presumed to have had such fact in mind in giving such answer, when the record shows that, subsequent to such answer, he did testify to the existence of such missing fact and knew thereof before he gave said answer. *Jeffries v. Iowa R. & L. Co.*, 183—858.

**Hypothetical Question—Proper Form. When nature has so far**

30 healed and repaired a physical injury that symptoms of pain are purely subjective, a medical expert (first duly informed of the nature, location, and extent of the original injury) is not limited to an opinion as to what *might* or what *could* cause the pain, but may state directly what, in his opinion, *did* or *does* cause the pain. *Brier v. Chicago, R. I. & P. R. Co.*, 183—1212.

## WEIGHT AND SUFFICIENCY.

**Positive Assertions Against Physical Facts. A direct assertion**

31 of fact which is detrimental to the interest of the party making it is not necessarily conclusive on the party if, upon a consideration of *all* the evidence and the physical facts attending the matter, it is clear that the assertion is not true. *Powers v. Iowa Glue Co.*, 183—1082.

## PRIVILEGED COMMUNICATIONS.

**Report of Accident. The report of an accident, made by a rail-**

32 road company to the railway commission, under Section 2120-k, Code Supp., 1913, is not privileged. *Hawthorne v. Delano*. 183—444.



## EXECUTORS AND ADMINISTRATORS

**EXECUTORS AND ADMINISTRATORS.** See APPEAL  
AND ERROR, 13.

**Paying Taxes from Personalty.** An administratrix may not legally apply the personal property of an estate to the payment of taxes on the real estate left by deceased, when she was not, as administratrix, in possession of such real estate, and when said taxes were not even payable when the intestate died. But where such taxes were paid from rents accruing subsequent to the intestate's death, the error may be corrected by charging the administratrix with one third and the shares of the heirs with two thirds of the payment. In re Estate of Dalton, 183—1013.

**Paying Interest on Mortgage Indebtedness.** An administratrix may validly pay, from the personal funds of the estate, duly filed claims for interest due on the intestate's real estate mortgages. In re Estate of Dalton, 183—1013.

**Repairs on Homestead.** Repairs or betterments on the homestead during the "occupancy" period may not be made at the expense of the estate. In re Estate of Dalton, 183—1013.

**Rents—When Treated as Realty.** Rent notes falling due after the death of the owner of the real estate will be treated as real estate, with consequent right on the part of the surviving widow, who was administratrix, to refuse to account, as *administratrix*, for one third of such rents. In re Estate of Dalton, 183—1013.

**Attorney Fees—Necessity and Reasonableness.** An administrator must defend his employment of an attorney on behalf of the estate, and the amount paid the attorney, by *affirmative* evidence showing the *necessity* for the services and the *reasonableness* of the amount paid. Evidence of the amount that the administrator *agreed* to pay is wholly immaterial. Even a judgment against the administrator for the amount of the fee will be ignored, in the absence of a showing that it was rendered on an issue as to its *reasonableness*. In re Estate of Dalton, 183—1013.

## EXECUTORS AND ADMINISTRATORS Continued TO

## FALSE PRETENSES

**Administrator Employing Attorney to Defeat Will.** An administrator has no authority, *as such*, to employ an attorney to contest the probate of a will and to charge the estate with the resulting fees. In re Estate of Dalton, 183—1013.

**Collection of Estate—Payments to Legatee Instead of Administrators—Effect.** One who is indebted to an estate may legally pay directly to the one who, as heir or legatee, etc., would be unqualifiedly entitled to receive the payment from the administrator if made to the latter, *provided such payments are not needed to discharge debts or other prior claims against the estate.* Molendorp v. First Nat. Bank 183—174.

**Allowance to Surviving Wife—Divorced Wife—Right to Allowance.** Concede, *arguendo*, the right of a divorced wife, under Sec. 3314, Code, 1897, upon the death of the unsuccessful defendant in divorce proceedings, to an allowance, out of the defendant's estate, for a year's support for defendant's child, who was unborn at the time the original divorce decree was entered, yet such right is effectively foreclosed by a former modifying order of the divorce decree wherein said defendant was required to support said child. Cline v. Cline, 183—1255.

**EXEMPTIONS.** See HOMESTEAD, 1; TAXATION, 4.

**Portable Saw Mill—"Mechanic."** The operator of a portable saw mill is a "mechanic;" and, if he be the owner of such mill, and employs it in an occupational way by means of his own labor and the labor of the dependent members of his family, of which he is the head, and is a resident of this state, then such mill, irrespective of its size, value, or necessity, is exempt from execution, both as a proper "tool" and as a proper "instrument" of his occupation. (Sec. 4003, Code, 1897.) Baker v. Maxwell, 183—1192.

**FALSE PRETENSES.**

**Evidence—Failure of Proof.** In a prosecution for false pretenses, 1 wherein the State relies on the testimony of *one witness*, a total failure of proof results from testimony which shows

## FALSE PRETENSES Continued

TO

## FRAUD

that the accused, in what he did say at the time and place alleged, either made a statement of *fact* or a statement of *opinion*, with no corroborating evidence in favor of either theory. *State v. Sherman*, 183—42.

**Evidence—Falsity of Representations—Sufficiency.** Evidence re-  
2 viewed, and held insufficient to show the falsity of representations concerning the value of corporate stock, especially as part of the evidence related to values long *subsequent* to the time when the alleged false representations were made. *State v. Sherman*, 183—42.

**Elements of Offense—Scienter.** Knowledge on the part of an  
3 accused of the falsity of alleged false representations is an essential element of obtaining property by false pretenses. *State v. Sherman*, 183—42.

**FENCES.** See HIGHWAYS, 1.

**Oral Contract between Owners—Inurement to Tenants.** An oral  
1 contract between landowners, under which contract each agrees to build and maintain a specified portion of a division fence, inures to the benefit of not only said contracting owners, *but to the benefit of their subsequent tenants*, even though it does not appear that the tenants formally acquiesced in said contract. It follows that the tenant of the owner who has performed, may recover of the owner who has not performed, the damages to crops consequent upon animals' breaking through the defaulting owner's defective fence. *Little v. Laubach*, 183—1370.

**Basis of Liability for Damages.** Principle recognized that a  
2 landowner is not liable on account of the absence of a partition fence if no portion of the fence has been assigned to him either (a) by the fence viewers or (b) by agreement between the respective owners. *Little v. Laubach*, 183—1370.

**FRAUD.**

## ACTS CONSTITUTING FRAUD.

**Representations of Value.** False assertions of value, made for  
1 the purpose of being relied upon as a *fact*, and so relied  
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## FRAUD Continued

upon, furnish basis for rescission of contracts. *Murray Bros. & Ward Land Co. v. Keesey*, 183—739.

**Inadequate Consideration—False Values.** Evidence reviewed, 2 and held amply sufficient to justify the rescission of a land contract, in view of (a) gross inadequacy of consideration, (b) false representations as to values, and (c) defendant's concealment of his true relation to the property. *Lister v. La Plant*, 183—1363.

**Fraudulent Representations—Reliance—Examination of Property** 3 —Effect. An examination of property by the buyer before purchasing does not necessarily preclude reliance upon a distinct affirmation of *value* by the seller. So held where the parties did not stand on equal footing. *Rembe v. Ferguson*, 183—29.

## LIABILITY FOR FRAUD.

**Examination of Property—Effect.** The fact that the one alleging 4 fraudulent representations in the execution of a contract for the exchange of properties *makes an examination of the property which he is to receive*, does not necessarily preclude reliance upon the fraudulent representations. *Murray Bros. & Ward Land Co. v. Keesey*, 183—739.

## EVIDENCE.

**Weight and Sufficiency.** A hopeless conflict of evidence on the 5 issue of fraud, without *reason* in the record to credit the one who affirms, rather than the one who denies, leaves the charge unproven. But such *reason* may be found in the difference (a) in the mental attainments of the parties, and (b) in the considerations passing between the parties. *Rembe v. Ferguson*, 183—29.

**Weight and Sufficiency.** Evidence bearing upon an exchange 6 of properties, the exaggerated values placed thereon by both parties, and the alleged fraudulent representations inducing the trade, reviewed, and held insufficient to establish fraud. *Thuesen v. Johnson*, 183—206.

FRAUDS, STATUTE OF

TO

GARNISHMENT

**FRAUDS, STATUTE OF.**

**Debt of Another—Oral Promise.** An *oral* promise to pay a written obligation which is, in form, *the sole obligation of another*, is not within the statute of frauds, when it is made to appear that said obligation is, in fact, the personal obligation of the oral promisor, and for his sole benefit. *Watt v. German Sav. Bank*, 183—346.

**FRAUDULENT CONVEYANCES.**

**Transfers Invalid—Insolvency.** Insolvency defined as such a condition of a person's affairs that the aggregate of his property is not, at a fair valuation, sufficient to pay his debts. *Crenshaw v. Halvorson*, 183—148.

**Confidential Relations—Husband and Wife—Indebtedness.** A conveyance from husband to wife, on reasonably adequate consideration, in good-faith payment of a bona-fide debt from husband to wife, is not fraudulent, even though the husband was insolvent, and even though the conveyance will hinder or prevent the husband's creditors from collecting their claims. *Crenshaw v. Halvorson*, 183—148.

**Consideration—Transaction between Husband and Wife.** The bona-fide existence of a debt between husband and wife is sufficiently shown by evidence that the wife actually did deliver her property to the husband, and that the conduct and language attending the delivery were such as to exclude the claim of gift, and to fairly give rise to the inference that both understood that the husband would repay the wife. *Crenshaw v. Halvorson*, 183—148.

**GARNISHMENT.**

**Time of Perfecting Appeal.** Attachment proceedings and garnishments thereunder are collateral to the main action, and are carried down by a final judgment against the plaintiff in the main action, and are not preserved for review on appeal unless intention to appeal is announced at the time of such adverse judgment, and unless appeal is perfected

GARNISHMENT Continued TO GUARDIAN AND WARD  
 within two days thereafter. (Sec. 3931, Code, 1897.) *Emery & Co. v. Wabash R. Co.*, 183—687.

**Receivers.** A receiver is, without the consent of the court, subject to garnishment as to funds which he has assumed to collect under his appointment, but which in fact *do not belong to the estate for the preservation of which he was appointed*. It necessarily follows that evidence is admissible in the garnishment proceedings to prove such fact. *Ewing v. Ewing P. M. Co.*, 183—711.

**GIFTS.** See DEEDS, 1, 6; INTOXICATING LIQUORS, 8.

## **GUARANTY.**

**Discharge of Guarantors—Guaranty of Debt—Novation of Debt—Effect.** Liability upon the guaranty of a debt ceases upon the subsequent novation of the guaranteed debt. *Watt v. German Sav. Bank*, 183—346.

**GUARDIAN AND WARD.** See HOMESTEAD, 2, 3; INJUNCTION, 2; INSANE PERSONS.

**Validity—Limitation of Actions.** The five-year limitation for questioning the validity of a guardian's sale and deed does not apply to a deed which is absolutely void. *Singleton v. National Land Co.*, 183—1108.

**Jurisdiction—Nonresidence of Ward and Guardian.** Guardians duly appointed and qualified at a time when both guardian and ward are residents of this state, may make valid sales of the ward's property in this state at a time when both guardian and ward have become nonresidents. (Sec. 3206, Code, 1897.) *In re Guardianship of Caskey*, 183—1323.

**Removal of Funds from State.** Jurisdiction to compel a guardian to account for funds belonging to the ward is not lost because of the fact that the guardian has removed the funds from the state. *In re Guardianship of Caskey*, 183—1323.

## HIGHWAYS

**HIGHWAYS.** See COUNTIES; MANDAMUS.

## ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

**Private Ways of Necessity—Rights Acquired—Fences.** He who  
1 condemns a private way through the lands of another, in order to secure access to a public highway, acquires no fee to the land so condemned, and therefore takes no title to a fence then existing along one side of said condemned way. The condemnor must build and maintain the fences on both sides of such way. It follows that the landowner from whose lands the said way is carved may remove existing fences. (Sec. 2028, Code Supp., 1913.) *Wrede v. Grothe*, 183—60.

**Construction—Preparing for Travel—Destruction of Growing**  
2 **Things.** While things existing upon and in land condemned for a highway belong to the landowner from whom the way is taken, in so far as they are not necessary for road purposes, yet he who condemns a private way of necessity may, equally with the road supervisor, put the condemned way in condition for travel, and for such purpose, if necessary, may burn or wholly remove from the said way the grass, brush, or wood existing thereon. *Wrede v. Grothe*, 183—60.

**Construction, Etc.—Caring for Diverted Drainage.** One who ma-  
3 terially diverts the natural course of drainage acquires no rights against the public, howsoever long the diversion may be continued. In other words, one may not divert the natural course of drainage and thereby cast the waters into a public highway, and then compel the public authorities to so take care of such diverted waters that the one diverting will not be injured. *Brightman v. Hetzel*, 183—385.

**Failure of Public to Use Full Width—Estoppel.** The right of  
4 the public to the full width of a duly established highway is not lost by abandonment by the fact that, for some 60 years, the public has not used the entire width, nor is it lost by estoppel by the fact that, during most of said time, the adjoining landowner has been in possession of the unused portion, and has planted trees of small value thereon. *Bidwell v. McCuen*, 183—633.

## HIGHWAYS Continued

TO

## HOMESTEAD

**Graves within Limits of Highway.** Graves, mistakenly placed  
5 within the limits of a duly established highway and near the border line thereof, and during a time when the entire width of the highway was not in use, should be appropriately protected after the highway is opened to its entire width. *Bidwell v. McCuen*, 183—633.

**Unaccepted Dedication.** *Dedication* of lands for streets and al-  
6 leys, by the filing and recording of a town plat, does not work the creation of a public "road" *until there has been a public acceptance of the dedication*. It follows that an order of the board of supervisors which assumes to vacate a street, the dedication of which has never been expressly or impliedly accepted by the public, is a nullity. So held where a *dedication* had remained unaccepted for some 60 years. (See Secs. 917, 1482, 1507, Code, 1897.) *Bowersox v. Board*, 183—645.

**Destroying Undercrossing for Stock.** Passageways under public  
7 highways, though long used by landowners as runways for stock (in instant case, some 15 years), may, in the construction of highway improvements, be replaced by lesser openings, in the absence of some definite, legal *reservation* by the landowner of right to have the openings maintained as such runways. *Roberts v. Madison County*, 183—915.

## LAW OF THE ROAD.

**Inability to Turn to Right.** One who knows that the driver of  
8 an approaching conveyance is unable to give one half the traveled way because of the condition thereof, and who might easily stop his own conveyance, but does not do so, is guilty of negligence. *Dircks v. Tonne*, 183—403.

**HOMESTEAD.** See EXECUTORS AND ADMINISTRATORS, 3;  
SPECIFIC PERFORMANCE, 4.

**Surviving Issue—Right of Exemption.** Homesteads which pass  
1 to the owner's issue are exempt from the debts of such ancestral owner contracted subsequent to the acquisition of the homestead, whether the issue take by *will* or by *descent*. (Sec. 2985, Code, 1897.) In re Estate of Guthrie, 183—851.



HOMESTEAD Continued

TO

HUSBAND AND WIFE

**Sales by Guardian—Validity.** A guardian's sale and deed of a  
 2 homestead belonging to an insane wife, for debts neither  
 antedating the acquisition and occupancy of the homestead  
 nor created by the husband or wife, are a nullity. Especially is this true when the husband is not made a party to the proceedings leading up to and culminating in the sale and deed, and does not join in said deed with said guardian. (Secs. 2974, 2976, 3166, Code, 1897.) *Singleton v. National Land Co.*, 183—1108.

**Sales by Guardian—Husband Joining in Deed.** Conceding, *argu-*  
 3 *endo*, that a guardian may, under Section 3225, Code, 1897, validly sell the homestead, to which an insane wife has title, yet such deed is of no validity unless the husband joins therein. (Sec. 2974, Code 1897.) *Singleton v. National Land Co.*, 183—1108.

**Abandonment by Husband.** The act of a husband in neither  
 4 residing in nor giving any attention to a homestead for four years after he knew that the title, standing in the name of the wife, had been quieted against her, works a complete abandonment of the homestead by him, even though the decree quieting title might have been defeated by proper contest. *Singleton v. National Land Co.*, 183—1108.

## HOMICIDE.

**Self-Defense—Duty to Retreat.** Defendant's failure to avail himself of reasonable opportunity to retreat, and thereby avoid the killing, is quite persuasive on the question whether a jury question as to murder has been made out by the State. Evidence held to present a jury question, though deceased was of superior size, was drunk, was quarrelsome, but was unarmed. *State v. Dillman*, 183—1147.

**HUSBAND AND WIFE.** See DESCENT AND DISTRIBUTION, 2, 3; EVIDENCE, 17; EXECUTORS AND ADMINISTRATORS, 8; FRAUDULENT CONVEYANCES, 2, 3; HOMESTEAD, 2, 3, 4; PRINCIPAL AND AGENT, 1; SPECIFIC PERFORMANCE, 4; TRUSTS; WILLS, 6-9, 12.

INCEST

TO

INDICTMENT AND INFORMATION

**INCEST.**

**Weight and Sufficiency of Evidence.** Evidence reviewed, and  
1 held sufficient to sustain a verdict of "guilty of incest."  
State v. Kurtz, 183—480.

**Duty of Court and Jury as to Corroboration.** The existence of  
2 corroborating evidence is a question for the court; the sufficiency thereof, for the jury. State v. Kurtz, 183—480.

**INDICTMENT AND INFORMATION.**

**Amendment—Proper Procedure.** An authorized amendment of  
1 an indictment duly returned by the grand jury should not be accomplished by the filing by the county attorney of what amounts to an "Amended and Substituted Indictment." But where such was filed after the court had authorized certain amendments, and the accused was put on trial on the original indictment, and the court gave no heed to the "Amended and Substituted Indictment," except in so far as it embraced the amendments which the court had authorized, *held*, the accused might not complain. (Sec. 5289, Code Supp., 1913.) State v. Kiefer, 183—319.

**Amendment—Surplusage—Effect.** Any unauthorized allegation  
2 or change inserted by a county attorney in a writing which is designed to effect an authorized amendment to an indictment returned by the grand jury is necessarily surplusage and without legal effect, and must be ignored by the court. So held where the county attorney, in order to effect an authorized amendment to such an indictment, assumed to redraw the indictment, and in addition omitted the names of two of the defendants, who were not on trial. State v. Kiefer, 183—319.

**Amendment—Service of Copy on Accused—Waiver.** *Proposed*  
3 amendments to an indictment returned by the grand jury should be drafted in the precise language which is to be employed when the accused is placed on trial, and these, or a copy thereof, must, in the absence of waiver, be served on the accused, preliminary to a ruling thereon by the court, authorizing or rejecting the same. (Sec. 5289, Code

INDICTMENT AND INFORMATION Continued TO

INJUNCTION

Supp., 1913.) Where the accused was served simply with a notice that application would be made to the court for an order authorizing certain amendments, which were designated in a general way, without pretense of setting forth the precise language of each amendment sought, and later, and at the hearing on the application, said amendments in precise form were embodied in a writing filed by the county attorney, and the accused appeared, and had his attention called by the court to the amendments, and objected thereto, *held*, accused had waived his right to a copy of the precise amendments sought. *State v. Kiefer*, 183—319.

**Amendment—Scope—Names of Persons and Things.** Names of  
4 persons and things appearing in an indictment may be changed by authorized amendments, so long as no new offense is charged. So held as to the name of a depositor in an insolvent bank, and as to the amounts of certificates of deposit given and received by him. *State v. Kiefer*, 183—319.

**INJUNCTION.** See INTOXICATING LIQUORS, 2.

**Subjects of Protection and Relief—Contracts—Breaches.** Injunction will lie to restrain one party to a contract from so proceeding under the contract as to involve all the parties in obligations not authorized or contemplated by the contract. So held where the parties agreed to first organize a corporation, and thereunder to carry on a sand and gravel business; but one of the parties proceeded to carry on the business without the organization of the corporation. *Lyons v. Van Oel*, 183—114.

**Restraining Prosecution of Action.** Injunction will lie to re-  
2 strain the prosecution of an action to remove a guardian of the property of another until another action is determined wherein an adjudication is sought as to the status of the property held by the guardian. *Robison v. Boone*, 183—465.

INSANE PERSONS

TO

INSURANCE

**INSANE PERSONS.** See HOMESTEAD, 2, 3.

**Grounds for Guardianship.** A jury question on the issue of guardianship is presented by evidence that the person in question (a) is of great age, (b) lacked all education, business experience, training, and capacity, (c) was weak mentally, and (d) had been overreached in a transaction that would render him a pauper. *Ferguson v. Ferguson*, 183-519.

**INSURANCE.** See REFORMATION OF INSTRUMENTS; TAILORING, 3.**CONTROL AND REGULATION.**

**Refusal to Grant License.** The legislature may validly delegate

- 1 to the commissioner of insurance the power to refuse, for good cause, licenses to act as agents of insurance companies, and such power is properly exercised by the commissioner in refusing a license on the sole ground that the applicant is a *nonresident* of the state; and especially is this true when the company for which applicant desires to act is a foreign company. (Sec. 1821-k, Code Supp., 1912.) *Noble v. English*, 183-893.

**AVOIDANCE OF POLICY.**

**Non-Specific Statement of Occupation—Knowledge of Agent**

- 2 Fraud in obtaining insurance may not be predicated on a statement by the insured, in his application, as to his occupation, when such statement *was true as far as it went*, but, to the personal knowledge of the company's agent who took the application, was capable of greater elaboration as to duties of the insured; especially is this true when the blanks in the applications were inadequate for elaborate explanations. *Bucknam v. Interstate B. M. A. Assn.*, 183-652.

**Receipt of Premiums—Effect.** An incorrect statement of in-

- 3 sured's occupation becomes wholly immaterial when, subsequent to the issuance of the policy, the insured entirely changes his occupation, and the insurer, with full knowl-

## INSURANCE Continued

edge thereof, continues to receive premiums, and the insured was killed by reason of the dangers attending the newly assumed occupation. *Bucknam v. Interstate B. M. A. Assn.*, 183—652.

**Change of Title—Waiver.** Right to rely on an avoidance of a  
4 policy because of a change of title to the property insured is waived by causing the insured to spend time and incur expense in the preparation of proofs of loss, at a time when the insurer had full knowledge of such change of title. *Petroff & Co. v. Equity Fire Ins. Co.*, 183—906.

## FORFEITURE OF POLICY.

**Waiver of Automatic Forfeiture.** An insurer who fails to avail  
5 himself of an automatic forfeiture of all rights under a policy when it is to his interest not to do so may not avail himself of such forfeiture when it is to his interest to do so. More concretely, an insurer who, while the insured is alive, continually fails to insist upon the payment of assessments, etc., within the time specifically stipulated by the policy, and thereby causes the insured, as a reasonably prudent person, to believe that such payments may be made within a reasonable time after such stipulated time, thereby waives the right, after the insured is dead, to insist that the policy was automatically forfeited by the failure of the insured to make his last payment within the time stipulated in the policy. *Conkling v. Knights & Ladies of Security*, 183—655.

**Fraudulent Statements as to Insurance.** False statements as to  
6 the amount of insurance upon the property at the time of loss, will forfeit the policy only in case such statements are fraudulent—made with some design to conceal the truth. *Petroff & Co. v. Equity Fire Ins. Co.*, 183—906.

**Furnishing Blanks and Making Proofs.** A provision to the ef-  
7 fect that the act of the company in "furnishing" blanks for proofs of loss, or in the "making up" of proofs by an agent, shall not work a waiver of any right of the company, does not apply to a case where the company discovers grounds for a clear forfeiture, and *thereafter acts as though the policy was valid*. *Petroff & Co. v. Equity Fire Ins. Co.*, 183—906.

## INSURANCE Continued

## BENEFICIARY INSURANCE.

**Right to Proceeds—Assignment by Insured of Portion Due Deceased Beneficiary.** An insured in an ordinary life insurance policy, payable to named beneficiaries "*or to their executors, administrators or assigns,*" even though possessing the right, under the policy, to avail *himself* of loan and cash surrender value, may not, in the absence of a policy provision so authorizing, and after the death of a beneficiary, validly assign to another the portion of the proceeds of the policy which would have passed to said deceased beneficiary, had said beneficiary survived the insured. *Condon v. New York L. Ins. Co.*, 183—658.

## RISK AND CAUSES OF LOSS.

**"Obvious Risk of Danger."** "Exposure to obvious risk," within the meaning of a policy of insurance, is shown as a matter of law, under instant record, which deals with the act of the insured in attempting to cross, in a rowboat, a swollen and turbulent stream, for the purpose of reaching and destroying an ice gorge. *Rommel v. National Trav. B. Assn.*, 183—776.

**Dangers Incident to Occupation.** Concede, *arguendo*, that a clause in a policy of insurance providing for limited liability in case of death from exposure to "obvious dangers" has no application to dangers attending the *official* duties of the insured, yet manifestly such concession becomes immaterial when, at the time of the exposure in question, the insured was performing a non-official act. *Rommel v. National Trav. B. Assn.*, 183—776.

## ACTIONS ON POLICIES.

**Non-Attached Applications.** Applications or representations of an assured, which, by the terms of the policy, are made a part thereof, or referred to therein, or which may in any manner affect the validity of the policy, are, under Section 1741, Code, 1897, non-provable to defeat an action on a *fraternal beneficiary certificate of insurance*, unless attached to the certificate by true copy, even though Section 1826

## INSURANCE Continued

of said Code, enacted some years *subsequent* to Section 1741, and dealing with beneficiary associations alone, covers the same subject-matter, though less comprehensively than said Section 1741. *Tusant v. Grand Lodge A. O. U. W.*, 183—489.

## ACCIDENT INSURANCE.

**Accidental Injuries—Insurer as Final Arbiter.** A policy which  
12 provides that the insurer shall not be liable for injuries from the discharge of firearms unless the accidental character of the discharge shall be established by at least one eyewitness of the event, other than the insured, "provided \* \* \* the directors may waive this limitation when they are satisfied that said discharge was accidental," simply means that there shall be no liability if the directors, as *reasonable* men, and acting *reasonably*, find that the accidental nature of the discharge has not been established. And the insurer may not constitute himself the *supreme arbiter* of this fact question. *Ellis v. Interstate B. M. Acc. Assn.*, 183—1279.

**Res Gestae, Etc.** The *res gestae* attending an injury and the  
13 condition of matters and things relating thereto, without any direct evidence as to what took place at the very instant of time when the injury was received, may be sufficient to establish, to a reasonable certainty, the accidental character of the injury. *Ellis v. Interstate B. M. Acc. Assn.*, 183—1279.

**"Eyewitness" Requirement.** An "*eyewitness*," within the mean-  
14 ing of a policy which provides for non-liability in case of injury from the discharge of firearms unless the accidental character of the discharge be established by an "eyewitness" of the event other than the insured, is (a) one who, having been present at or near the scene of the injury, testifies to the *operating cause* of the injury as then observed by him, or (b) one who, having been so present, testifies to the existence of an operating cause, as then observed by him, to which the accident may fairly be attributed, and who testifies in at least a general way, to the nature and working of such operating cause. *Ellis v. Interstate B. M. Acc. Assn.*, 183—1279.

## INSURANCE Continued

## MUTUAL BENEFIT.

**Bastard as Heir and Beneficiary.** Written recognition of the pater-  
15 nity of an illegitimate child constitutes the child an heir  
of the one so recognizing, and consequently renders the  
child a proper beneficiary in a fraternal certificate of in-  
surance on the life of the father, within the meaning of  
Sec. 1824, Code, 1897. (See also Sec. 1789, Code, 1897.)  
Booz v. Booz, 183—381.

**Construction—What Law Governs.** A mutual benefit certificate  
16 of insurance issued by an Iowa corporation, with proviso  
for performance in Iowa, is an Iowa contract, and must  
be construed and applied in accordance with the laws of  
Iowa. Booz v. Booz, 183—381.

**Validity of Fundamental Change in Insurance.** A statutory  
17 fraternal mutual benefit association possesses no power, sub-  
sequent to its organization, incorporation, and receipt of  
members, to fundamentally change the nature of its in-  
surance, without the consent of members adversely af-  
fected, by arbitrarily dividing its membership into dis-  
tinct classes, and compelling each class to separately meet  
its own death losses by discriminatory rates applied in  
utter disregard of the long-maintained membership of  
members. Tusant v. Grand Lodge A. O. U. W., 183—489.

**Limitation on Rates.** Whether a statutory fraternal beneficiary  
18 association has power, *by advance contract*, to limit assess-  
ments to an amount less than is reasonably necessary to  
pay death losses, etc., *quære*. Tusant v. Grand Lodge  
A. O. U. W., 183—489.

**Power to Apply Level Premium Rates.** Whether a statutory fra-  
19 ternal beneficiary insurance association has power to adopt  
a table of level premium rates which are sufficient not only  
to pay all current death losses, but to create a *reserve* fund  
which will be sufficient to mature all certificates many years  
hence, regardless of the future acquisition of any new mem-  
bers, *quære*. Tusant v. Grand Lodge A. O. U. W., 183—  
489.



INSURANCE Continued TO INTOXICATING LIQUORS  
ELECTIONS.

**Solicitation of Proxies.** Whether the president of an insurance  
20 company is an "*agent*," within the prohibition of Sec. 1821-y,  
Code Supp., 1913, relating to solicitation of proxies, *quære*.  
State v. Meredith, 183—783.

**INTERSTATE COMMERCE.** See CARRIERS; COMMERCE;  
PLEADING, 3.

**INTOXICATING LIQUORS.** See TAXATION, 2.

**Contempt—Unusual Quantities—Presumption.** Ten gallons of  
1 whisky in a dwelling house, and in the unfinished and inac-  
cessible attic thereof, constitute an "unusual" quantity,  
and raise a presumption that such liquors were kept for  
the purpose of illegal sale. Evidence on the issue whether  
the same was kept solely for family use reviewed, and held  
not to overcome the presumption. (Sec. 2427, Code, 1897.)  
McMillan v. Anderson, 183—873.

**Contempt—Evidence—Reputation of Place.** Evidence of the  
2 general reputation of a place where intoxicating liquors  
were found is admissible in an action to *enjoin*, but inad-  
missible in an action to punish for *contempt*. (See Sec.  
2406, Code Supp., 1913.) McMillan v. Anderson, 183—873.

**Mulct Tax—Wholesale Dealers.** A wholesale dealer in intoxicat-  
3 ing liquors is liable for the payment of the so-called "Mulct  
Tax" equally with a retailer. In other words, the term  
"penalty," as employed in Sec. 2456, Code, 1897, does not  
embrace the "mulct tax." (See Secs. 2382, 2432, 2447, 2460,  
Code, 1897.) Des Moines Brewing Co. v. Polk County, 183—  
984.

**Mulct Tax—Avoidance.** The procedure provided by Sec. 2441  
4 *et seq.* Code, 1897, for contesting the imposition of the so-  
called "mulct" tax, is exclusive of all other procedure and  
remedies. Des Moines Brewing Co. v. Polk County, 183—  
984.

## INTOXICATING LIQUORS Continued

**Possession of Liquors—Revenue Stamp Presumption.** Presump-  
5 tion of guilt of unlawful sale and keeping for sale is raised both by the finding of liquors in a place of business and by the possession of an internal revenue stamp for such liquors. (Sec. 2427, Code, 1897.) *State v. Fountain*, 183—1159.

**Evidence—Relevancy, Etc.** Evidence bearing upon defendant's  
6 want of knowledge of the possession of liquors is wholly irrelevant, when it is conceded that defendant had full knowledge. *State v. Fountain*, 183—1159.

**Intent Not Element of Sale.** The matter of *intent* is not in-  
7 volved in an accusation of *selling* intoxicating liquors. *State v. Fountain*, 183—1159.

**"Gift" as Violation.** A "gift" of intoxicating liquors to one's  
8 employee, *in order to induce the employee to continue work*, is a violation of that part of the statute which prohibits gifts of such liquors "in consideration \* \* \* of any services or in evasion of the statute." (Sec. 2382, Code Supp., 1911.) *State v. Fountain*, 183—1159.

**Place Made to Resemble Saloon.** The jury may, on the issue  
9 whether a so-called "Temp Bar" was a place for the unlawful sale of intoxicating liquors, take into consideration the fact that the place was equipped in all respects as intoxicating liquor saloons were formerly equipped. *State v. Fountain*, 183—1159.

**Offenses—Judgment—Modification.** Fine reduced from \$1,000  
10 to \$600. *State v. Fountain*, 183—1159.

**Possession of Liquors—Presumption.** The finding of intoxicating  
11 liquors in unusual quantities in a private dwelling house of a person not keeping a tavern, etc., raises no presumption of illegal sale or keeping for sale. (Sec. 2427, Code, 1897. But now, see Ch. 323, Acts 37 G. A.) *State v. Bertinelli*, 183—1143.

## JUDGMENT

**JUDGMENT.**

## AMENDMENT, CORRECTION, ETC.

**Abatement (?) or Bar (?)—Nunc Pro Tunc Order.** Lapse of  
1 time is no obstacle to the jurisdiction of the court, as between the parties to a judgment, to make a *nunc pro tunc* entry. So held where the judgment inadvertently failed to state that it was in *abatement*, and not in *bar*. *Snyder v. Fahey*, 183—1118.

**Nunc Pro Tunc Order—Correctness.** A judgment, apparently  
2 in bar, but shown beyond question by the entire record to have been in abatement, will, as between the immediate parties, be corrected by an appropriate *nunc pro tunc* entry. *Snyder v. Fahey*, 183—1118.

## OPENING OR VACATING.

**Vacation—Operation and Effect.** The formal vacation of a judg-  
3 ment, in the sense that all future financial obligation thereunder is terminated, does not destroy the evidential value of such judgment, or of the proceedings leading up to and culminating therein. So held as to a judgment in bastardy proceedings. *McKellar v. McKellar*, 183—1030.

## CONFORMITY TO PLEADINGS.

**Permissible Variance.** A decree in equity, which is in full ac-  
4 cord with the undisputed evidence of both parties, will not be disturbed, in the absence of objection in the trial court, even though such decree is slightly variant from the pleadings. *Waite v. Consigny*, 183—259.

## CONCLUSIVENESS.

**Controlling Issues.** A judgment or decree, when construed in  
5 the light of the issues upon which it is based, may show that it is less comprehensive in its conclusiveness than the general language might fairly indicate. *McAllister v. McAllister*, 183—245.

## JUDGMENT Continued

TO

JUSTICES OF THE PEAC

**Judgments on Demurrer.** A judgment sustaining a demurrer is  
6 an equity action, without further pleading over, is a final  
judgment. *Cooley v. Maine*, 183—560.

**Foreign Judgment in re Title to Real Estate.** An adjudication  
7 by a foreign court of the ownership of Iowa real estate is  
entitled to no "faith and credit" in the courts of Iowa, even  
though all parties in interest were properly before such for-  
eign court when it rendered such adjudication. *Norris*  
*v. Loyd*, 183—1056.

**Parties Concluded—Withdrawal Without Prejudice.** A decree  
8 which quiets title against all defendants, yet later distinctly  
specifies those against whom title is quieted, is not conclu-  
sive on a defendant not specifically mentioned in the decree,  
especially when the record shows a dismissal, without prej-  
udice, at a later date, and prior to any joinder of issue there-  
on, of the answer and cross-petition of said latter defendant.  
*Singleton v. National Land Co.*, 183—1108.

**JURISDICTION.** See **BANKRUPTCY**, 1; **MASTER AND**  
**SERVANT**, 17.

**JURY.**

**Waiver.** The right to have disputed questions of fact deter-  
1 mined by the jury is waived by the conduct of counsel in  
permitting the court to proceed, without objection, on its  
clearly expressed understanding that all matters are with-  
drawn from the jury and are to be disposed of by the  
court. *Conkling v. Knights & Ladies of Security*, 183—666

**Voir Dire—Effect of Evidence.** A juror may not be asked as  
2 *voir dire*, as to the effect which certain contemplated evi-  
dence will have on his mind. *State v. Dillman*, 183—116

**JUSTICES OF THE PEACE.**

**Writ of Error—Scope.** Sufficiency of evidence to sustain a judg-  
1 ment in justice court may not be reviewed on writ of error

## JUSTICES OF THE PEACE Continued TO

## LANDLORD AND TENANT

either by the district court or by the Supreme Court on appeal from rulings on the writ by the district court. *Spahn & Rose Lbr. Co. v. Chicago, R. I. & P. R. Co.*, 183—1141.

**Judgment Lacking in Vital Support.** Writ of error will lie to  
2 review a judgment which is based wholly on irrelevant and incompetent testimony, or which is lacking in support *as to some vital fact*. *Yarcho v. Chicago, R. I. & P. R. Co.*, 183—1180.

**Affidavit—Sufficiency.** An affidavit for a writ of error is too  
3 indefinite to authorize a review of rulings receiving testimony which is contained in a deposition, when such affidavit simply contains the statement "that the justice erred in refusing to sustain defendant's motion to strike certain testimony, and erred in admitting certain testimony contained in a deposition." *Yarcho v. Chicago, R. I. & P. R. Co.*, 183—1180.

**LANDLORD AND TENANT.** See **BANKRUPTCY**, 1; **CONTRACTS**, 6; **ELECTION OF REMEDIES**; **FENCES**, 1; **MECHANICS' LIEN**, 1.

**LEASES.**

**Construction—Exterminating Weeds.** Provisions of a lease that  
1 the tenant "shall prevent the growth of noxious weeds on the cultivated parts of the land," and "will cultivate said land in good and husbandlike manner," are related clauses, and impose the obligation on the tenant to make reasonable effort to keep both the cultivated and uncultivated portions free from such weeds. *Wheeler v. Schilder*, 183—623.

**When Assignment Works Surrender of Lease.** A tenant's obligation to pay rent is not terminated by the naked fact that  
2 the tenant, with the consent of the landlord, assigns the lease, and the landlord thereafter receives the rent from the assignee; but such result will follow from the additional act of the landlord in exacting from the assignee conditions separate and distinct from those exacted of the former tenant. *Keeley v. Beenblossom*, 183—861.

## LANDLORD AND TENANT Continued

**Oral and Written Lease of Same Premises.** The execution and  
3 delivery of a written lease between a landlord and a tenant  
does not necessarily negative the claim of the landlord that  
he had an oral lease with another party, as a joint tenant  
with the one mentioned in the written lease. *Bell v. Fisher*,  
183—1208.

## PREMISES—POSSESSION, ENJOYMENT, ETC.

**Wrongful Deprivation—Damages.** In working out the measure of  
4 damages for wrongfully depriving a tenant of the possession  
of leased premises, reserved *cash* rent must be compared  
with fair *cash* rental of the premises, and reserved crop rent  
must be compared with fair *crop* rental. For instance, if  
the reserved cash rent be \$10 per acre, and the fair cash  
rental be \$12 per acre, then the damages are \$2 per acre;  
if the reserved crop be 10 bushels per acre, and the fair  
crop rental be 12 bushels per acre, then the damages are 2  
bushels per acre, which, when reduced to money value, rep-  
resents the ultimate and required form of the damages.  
*Dilly v. Paynesville Land Co.*, 183—217.

## RENT—LIEN.

**Scope of Lien.** A lien on the property of an original tenant, re-  
5 served solely "to secure the *rent* at any time remaining  
unpaid," may not be enforced for the payment of *damages*  
done to the property by one to whom such tenant has, with  
the consent of the landlord, assigned the lease. *Keeley v.*  
*Beenblossom*, 183—861.

**Action by Landlord for Damage to His Share of Rent.** A land-  
6 lord who leases on shares may maintain an action against  
third parties for damages to his share of the crops; espe-  
cially is this true when the action is begun after the expi-  
ration of the lease, and after the landlord has received an  
assignment of the tenant's claim for damages. *Straight*  
*Bros. Co. v. Chicago, M. & St. P. R. Co.*, 183—934.

LIBEL AND SLANDER

TO

MANDAMUS

**LIBEL AND SLANDER.**

**Fraudulent Procurement of Pension.** A published charge that  
 1 plaintiff had procured the allowance to himself of a pension from the government by the false pretense that he had been injured while in the military service, is actionable *per se*. *Fleagle v. Downing*, 183—1300.

**Libel and Slander of the Dead.** A son may not recover damages for a libel or for a slander of his father, published or spoken after the father's death. *Fleagle v. Downing*, 183—1300.

**Privileged Communications.** Privilege will never be presumed.  
 3 *Fleagle v. Downing*, 183—1300.

**Innuendoes.** Innuendo may not enlarge the meaning of published or spoken words. *Fleagle v. Downing*, 183—1300.

**LIMITATION OF ACTIONS.** See GUARDIAN AND WARD, 1.

**Nature, Etc.—Public Rights.** Principle recognized that the statute of limitations does not run, nor may prescriptive rights be claimed, against the *public*. *Brightman v. Hetzel*, 183—385.

**Second Action as Continuance of Former Unsuccessful One.** The  
 2 "failure" of an action which will authorize the rebringing of the same action within six months as a continuance of the former unsuccessful one must be a failure *unaccompanied by a final judgment*. (Sec. 3455, Code, 1897.) *Cooley v. Maine*, 183—560.

**MANDAMUS.**

**Controlling Township Trustees in Repair of Highway.** Mandamus  
 1 will not lie to *control* the statutory discretion of the township trustees to "equitably and judiciously" expend the township road funds, even though it be conceded that ample funds are on hand. (Sec. 1533, Code Supp., 1913; Sec. 4341, Code, 1897.) *O'Neil v. Stuber*, 183—542.

MANDAMUS Continued

TO

MASTER AND SERVANT

**Controlling Road Supervisors in Repair of Highway. Mandamus**

2 will not lie to compel a township road supervisor or contractor to put a highway in a passable condition, in the absence of allegation and proof that road funds are on hand, and have been actually apportioned for that purpose by the township trustees. *O'Neil v. Stuber*, 183—542.

**MASTER AND SERVANT.** See CARRIERS, 18; MINES AND MINERALS.**THE RELATION.****Wrongful Discharge—Defense.** A master may not, in defense of

1 an action for wrongful discharge, plead and prove that he offered to retain the servant in his employ at a reduced wage. *Redfield v. Boston P. & M. Co.*, 183—194.

**Wrongful Discharge—Defense.** A master may not, in defense of

2 an action for wrongful discharge, plead and prove that the servant, since the discharge, has made "profits" out of his business ventures, and should account therefor. *Redfield v. Boston P. & M. Co.*, 183—194.

**DUTIES AND LIABILITY OF MASTER.****Method and Plan of Work—Negligent Construction of Bridge.**

3 A master may be guilty of actionable negligence by adopting an unsafe plan and method of doing his work. So held in the construction of a railway bridge: *Johnson v. M. & St. L. R. Co.*, 183—101.

**Safe Tools—Defective Hanger for Scaffold.** A master is guilty

4 of negligence in furnishing a servant with an unsafe tool, not known by the servant to be unsafe. *Johnson v. M. & St. L. R. Co.*, 183—101.

**Safe Tools—Servant's Right to Assume Tools to be Safe.** A serv-

5 ant, no knowledge on his part to the contrary appearing has the right to assume that a tool furnished to him by the master is reasonably safe for the purposes for which intended. *Johnson v. M. & St. L. R. Co.*, 183—101.



MASTER AND SERVANT Continued

**Inconsistent Attitude of Master.** A master may not take the  
6 position that he was wholly free from negligence because  
the condition which is alleged to have injured the servant  
came into existence almost at the instant of the injury, and  
also the position that said condition had existed for a  
long time, and the servant had assumed the risk attending  
such long-standing condition. *Powers v. Iowa Glue Co.*,  
183—1082.

**Pleading.** A servant who proceeds at common law against a  
7 master, makes a prima-facie case by alleging: (a) that the  
relation of master and servant existed; (b) that the injury  
arose out of and in the course of the employment; (c) that  
the master had, and that the servant had not, rejected the  
Workmen's Compensation Act; and (d) that the servant  
had suffered damages by reason of said injury. (Sec. 2477-  
m, Code Supp., 1913.) *Balen v. Colfax Cons. Coal Co.*, 183—  
1198.

**"Working Place" of Miner.** A miner must keep his "working  
8 place" safe, and is negligent if he does not. The mine own-  
er must keep the rest of the mine safe, and is negligent if  
he does not. A miner's "working place" is his *immediate*  
place of work—not necessarily the entire *room* in which he  
is working. So held where the miner was injured by the  
falling of an insecurely propped room, at a point some 13  
feet from the miner's immediate working place. (Sec. 2489-  
13a, Code Supp., 1913.) *Erickson v. Maple Block Coal Co.*,  
183—1292.

**Statutory Duty Non-Avoidable by Contract.** A mine owner's  
9 statutory duty to keep safe that part of his mine outside  
the miner's "working place" may not be controlled by con-  
tract with the miner. So held where the contract called  
for double-timbering the roof only in case the miner called  
for such double-timbering. (Sec. 2489-13a, Code Supp.,  
1913.) *Erickson v. Maple Block Coal Co.*, 183—1292.

**Liability to Third Persons—Charitable Institutions.** A charita-  
10 ble institution which is conducted solely for philanthropic  
and benevolent purposes is not liable for the negligence of  
its servants *in administering the charity*—not even to one  
who pays for the charitable services rendered by the insti-

## MASTER AND SERVANT Continued

tution to him. Whether such an institution may be held liable for negligently employing an incompetent servant, with consequent damages by reason of the incompetency of the servant, *quaere*. Mikota v. Sisters of Mercy, 183-1878.

## ASSUMPTION OF RISK.

**Master's Neglect.** A servant does not assume dangers unknown  
11 to him, and arising from the neglect of the master. Johnson v. M. & St. L. R. Co., 183-101.

**Assumption as Matter of Law.** It requires a very clear case of  
12 knowledge and appreciation of danger on the part of a servant before it may be said, as a matter of law, that he assumed the danger attending the doing of a thing, when he did it with the one instrumentality *specifically directed by the master*. Johnson v. M. & St. L. R. Co., 183-101.

**Contributory Negligence—Passing Along Known Dangerous Way.**  
13 A servant who, in the ordinary discharge of his duties, rejects a concededly safe way of travel for one attended at all times by grave and impending danger, is guilty of contributory negligence. So held where a miner attempted to pass across the bottom of a shaft, and was hit by a descending cage. Dennis v. Gibson, 183-565.

**Rough Railway Track, Etc.** An employee upon a railway engine  
14 may not be held to have assumed the risk attending the operation of an engine over a rough and uneven track, with a post negligently left in close proximity thereto, from the mere fact that he *knew* of such condition, unless the danger is so imminent that a reasonably prudent person would not have continued in the work—a question which is rarely one of law. George v. Iowa & Southwestern R. Co., 183-994.

**Limitation on Assumption.** Instructions are properly refused  
15 which require the servant to assume the risk arising from the master's negligence. Powers v. Iowa Glue Co., 183-1082.

## MASTER AND SERVANT Continued

**Failure to Plead Assumption.** A master may not properly ask  
16 instructions as to assumption of risk, when he has pleaded  
no such defense. *Powers v. Icwa Glue Co.*, 183—1082.

## WORKMEN'S COMPENSATION ACT.

**Jurisdiction of Court to Review Decision of Industrial Commis-**  
17 **sioner.** The jurisdiction of the district court to enter a de-  
cree "*in accordance*" with the order or decision of the In-  
dustrial Commissioner respecting claims for compensation  
under the Workmen's Compensation Act, upon due filing  
with said court of said order or decision and "all papers  
in connection therewith," is not limited to the formal, min-  
isterial, and perfunctory act of recasting said order or de-  
cision into the form of a court decree, but embraces the  
power to determine:

(1) Whether the servant was, as a proper conclusion of  
law *upon said certified transcript and findings*, "in the  
course of his employment" at time of injury.

(2) Whether the injury, as a proper conclusion of law  
*upon said certified transcript and findings*, "arose out of  
the servant's employment."

(3) If both queries be answered in the affirmative, to  
*apply the compensation schedules and enter a decree accord-*  
*ingly.* (Sec. 2477-m33, Code Supp., 1913.) *Griffith v. Cole*  
*Bros.*, 183—415.

**Injuries in "Course of Employment."** An employee engaged in  
18 continuous employment for the master is "*in the course*  
*of his employment*" so long as he is in the *sphere* of his  
employment, even though at the time of injury he is not  
directly performing any part of his daily task. *Griffith v.*  
*Cole Bros.*, 183—415.

**Injuries "Arising Out of Employment"—Bolt of Lightning.** An  
19 injury does not "*arise out of an employment*," within the  
meaning of the Workmen's Compensation Act, unless claim-  
ant establishes, by a preponderance of evidence, that the  
injury is reasonably traceable to the *nature of the work*  
*done*,—that a causal connection exists between the con-  
ditions under which the work is required to be performed  
and the said resulting injury. *Griffith v. Cole Bros.*, 183—  
415.

MASTER AND SERVANT Continued TO

MECHANICS' LIEN

**Remedy for Non-Industrial Accidents.** Non-industrial accidents  
 20 to one who happens to be an employee of the one negligently  
 inflicting the injury are remediable under the general law  
 of negligence—not under the Workmen's Compensation Act.  
*Griffith v. Cole Bros.*, 183—415.

**Rejecting Master and Non-Rejecting Servant—Procedure.** A ser-  
 21 vant who has, expressly or by statutory presumption, ac-  
 cepted the provisions of the Workmen's Compensation Act  
 and suffered injuries arising out of and in the course of  
 the employment, must proceed against his employer, who  
 has rejected the act, by and through a modified common-law  
 action, modified by depriving the employer of specified  
 common-law defenses, and by creating, against the employ-  
 er, specified presumptions relative to negligence and prox-  
 imate cause. (Secs. 2477-m, 2477-m2, Code Supp., 1913.)  
*Balen v. Colfax Cons. Coal Co.*, 183—1198.

## MECHANICS' LIEN.

**Permanent Improvements on Leased Premises.** Real estate is  
 1 subject to a mechanics' lien for permanent improvements  
 placed upon the land by a tenant under a lease providing  
 for such improvements by the tenant, with proviso that the  
 same shall belong to the owner upon the termination of  
 the lease. Especially is this true when the owner is im-  
 mediately active in causing the improvements to be made.  
*Denniston v. Brown*, 183—398.

**Minors.** A minor's interest in real estate is not subject to a  
 2 mechanics' lien, in the absence of a showing that the mi-  
 nor was represented in the making of the improvement by  
 his or her duly authorized and acting guardian. (See Sec.  
 3089, Code, 1897.) *Denniston v. Brown*, 183—398.

**Subcontractor's Failure to File Claim within 30 Days.** Failure  
 3 of the subcontractor to file his claim for a lien within 30  
 days following the furnishing of the last item of labor or  
 material, opens the door to *unrestricted* settlement between  
 the owner and principal contractor, irrespective of the own-  
 er's prior knowledge that the subcontractor had not been  
 paid,—a door which remains open until closed by the filing

## MECHANICS' LIEN Continued TO MINES AND MINERALS

of a claim with written notice thereof to the owner. If, in the meantime, and after said 30 days, the owner has settled with the principal contractor, then the belated filing by the subcontractor is futile. (Sec. 3093, Code Supp., 1913; Sec. 3094, Code Suppl. Supp., 1915.) Cedar Rapids Sash & Door Co. v. Heinbaugh, 183—1236.

**Non-Permissive Payments.** The fact that, during the progress  
4 of an improvement, the owner had full notice that a subcontractor was furnishing labor or material, and had not been paid, and the further fact that, during such time, the owner made payments to the principal contractor which were *then* non-permissible, become wholly immaterial to said subcontractor when the owner fully settles with the principal contractor after the lapse of 30 days from the subcontractor's last item of labor or material, and at a time when the subcontractor had filed no claims for a lien. (Sec. 3093, Code, 1897.) Cedar Rapids Sash & Door Co. v. Heinbaugh, 183—1236.

**Failure to File Claim—Estoppel.** An owner who induces a sub-  
5 contractor to refrain from filing a claim for a lien within the time provided by law, under a promise that the claim will be paid by the owner, will not, thereafter, be permitted to plead that the claim was filed too late. Evidence held insufficient to establish an estoppel. Cedar Rapids Sash & Door Co. v. Heinbaugh, 183—1236.

**MINES AND MINERALS.** See MASTER AND SERVANT, 8, 9.

**Negligence in Passing Over Shaft Bottom.** The statutory declaration that the shaft bottom of a mine may be crossed only by employees who are necessarily working "*at the bottom of the shaft,*" applies solely to those who are working in the sump—that part of the shaft which is below the cage when it comes to rest. (Sec. 2486-j, Code Supp., 1913.) Dennis v. Gibson, 183—565.

MINORS

TO

MORTGAGE

**MINORS.** See **MECHANICS' LIEN**, 2.**MORTGAGES.** See **BILLS AND NOTES**, 15.**TRANSFER OF PROPERTY.**

**Assumption of Debt—Consideration.** An agreement by the owner of mortgage-encumbered property to pay the mortgage (to which he was not, originally, a party), in order (a) to secure the dismissal of a foreclosure and (b) to secure certain corrections in his title, is supported by ample consideration, even though the agreement was to pay the mortgage on the very date called for by the mortgage, but not on the date called for by the note which the mortgage secured. *Mowbray v. Simons*, 183—1389.

**FORECLOSURE AND REDEMPTION.**

**Sale of Equity—Specific Performance.** Evidence held sufficient to sustain a finding that a conveyance of mortgage-foreclosed premises by the owner was on the consideration that grantee discharge specified encumbrances. *Forsyth v. Lobaugh*, 183—410.

**Redemption by Equitable Owner.** An equitable owner of real estate by virtue of a contract to pay a sum which includes a pre-existing mortgage, may not acquire full title, and thus absolve himself from obligation to pay the balance of the purchase price, by redeeming from a foreclosure sale of said mortgage, and taking deed thereunder. Such redemption simply works a payment of his debt by the owner. *McCreary v. McGregor*, 183—732.

**Who May Purchase Trust Property.** A bona-fide foreclosure sale of trust property, made in full compliance with the order of court, is not invalid, even though the property be sold for less than its value, because the purchaser is a corporation of which the trustee is an officer and stockholder. *Powers v. Maytag-Mason Motor Co.*, 183—771.

## MUNICIPAL CORPORATIONS

**MUNICIPAL CORPORATIONS.** See BONDS; DEDICATION; DEEDS, 3; ELECTIONS, 1; EVIDENCE, 14; NEGLIGENCE, 4, 7, 8, 11, 17; TELEGRAPHS AND TELEPHONES; TRIAL, 11.

## PUBLIC IMPROVEMENTS.

**Assessments—Railroad Right of Way as Abutting Property.** A

- 1 strip of land extending along the center of a public street, but which is *no part of the street*, because owned in *fee* by a street railway company which occupies it with its tracks, the public being wholly excluded from all right therein, except at intersecting street crossings, is "abutting property," within the meaning of Sec. 792 *et seq.*, Code Supp., 1913, and consequently subject to special assessment for public improvements on the street. *Des Moines City R. Co. v. City of Des Moines*, 183—1261.

**Assessments—Railway Right of Way Abutting on Street.** The

- 2 statute (Sec. 834, Code, 1897), which imposes the duty upon all railways to pave between the rails of their tracks and one foot outside, does not apply to a railway right of way which is owned by the company in *fee*, and which is no part of the street, but which abuts on a street. *Des Moines City R. Co. v. City of Des Moines*, 183—1261.

**Assessments—Railway Right of Way.** The term "railroad," as

- 3 employed in Sec. 791-1, Code Supp., 1913 (authorizing special assessments for public improvements against railroad right of ways fronting or abutting on public streets, etc.), includes a *street* railroad. *Des Moines City R. Co. v. City of Des Moines*, 183—1261.

**Assessments—Railway Right of Way—Street Railway Defined.**

- 4 Conceding, *arguendo*, that Sec. 791-1, Code Supp., 1913 (authorizing assessments against railroad right of ways for paving, etc.), is not applicable to "street railways," yet such section is applicable to a railway which, along the center of a public street, occupies with its tracks a strip of ground which it owns in *fee*, which is no part of the street, and in which the public has no interest, except at street cross-

## MUNICIPAL CORPORATIONS Continued

ings. Such a railway is not a *street* railway. Des Moines City R. Co. v. City of Des Moines, 183—1261.

**Bridge Bonds—Limitations.** Any indebtedness for the construction of bridges, under Sec. 758-d, Code Supp., 1913, is valid, when such indebtedness, plus all other indebtedness of the city, does not exceed 5 per centum of the actual value of the taxable property of the city. In other words, the additional power of a city under Sec. 758-d is not restrained within the  $1\frac{1}{4}$  per centum limitation provided by Sec. 1306-b, Code Supp., 1913. France v. City of Des Moines, 183—1311.

## STREETS, ETC.

**Vacation—Action for Damages—Petition.** In an action by a property owner for damages for a valid vacation of a public alley adjacent to the plaintiff's property, it should be alleged and proven: (a) That the vacation was without plaintiff's consent; and (b) that compensation has not been made to plaintiff by reason of the vacation. Hubbell v. City of Des Moines, 183—715.

**Vacation—Damages—When Action Lies.** A property owner suffers no actionable injury by reason of the valid vacation of an adjacent alley, unless he can show that, at the time of the vacation, his then use of, and right of access to and egress from, his property was, by reason of said vacation, substantially interfered with. Hubbell v. City of Des Moines, 183—715.

**Obstructions—Snow and Ice.** Principle reaffirmed that the mere accumulation of ice and snow upon a public street, with resultant injury to a pedestrian, does not fix liability upon the city. Contra if such accumulations become dangerous by reason of travel thereover, and the city, after express or implied notice, might have eliminated the danger by the exercise of reasonable care. Allen v. City of Ft. Dodge, 183—818.

**Obstructions—Degree of Care.** No duty is imposed upon a city to keep its streets in a reasonably safe condition: the duty imposed is to exercise reasonable care to see to it that its



## MUNICIPAL CORPORATIONS Continued TO

## NEGLECT

streets are maintained in a reasonably safe condition. *Allen v. City of Ft. Dodge*, 183—818.

**Obstructions—Power to Remove, and Assess Costs.** The statutory power of a city to remove snow, etc., from sidewalks and to assess the cost of such removal to abutting property (Sec. 781, Code, 1897), is wholly immaterial on the issue of the city's negligence in allowing such accumulations to remain on the street in a dangerous condition. *Allen v. City of Ft. Dodge*, 183—818.

**Non-Negligent Defects—Elevated Obstructions.** While the maintenance of a slight *depression* in a sidewalk might be denominated non-negligence *per se*, yet the maintenance of an equally slight *elevation* in the sidewalk may present a jury question on the issue of negligence. So held where a section of a cement walk had been *elevated* from one to three inches above the surrounding walk by the growth of a tree. *Geer v. City of Des Moines*, 183—837.

**NAMES.**

**Initials—Identity of Persons.** In the substitution, by proper amendment, in an indictment, of the name Eugene S. Burr for E. S. Burr, it will be presumed that reference is made to one and the same person. *State v. Kiefer*, 183—319.

**NEGLECT.** See CARRIERS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 8-11; PHYSICIANS AND SURGEONS; PRINCIPAL AND AGENT, 2; RAILROADS.

## ACTS OR OMISSIONS CONSTITUTING.

**Negligence Per Se—Violation of Statute—Unauthorized Requirement—Hog Cholera.** The Hog Cholera Serum Act, directing the director of the laboratory to establish the "standard degree of potency" of hog cholera serum, and prohibiting the sale of serum below such standard, authorizes a standard which calls for a "condition" of potency of the serum at the time it is offered for sale, and not a standard which calls for "results" *after it is administered to the*

## NEGLIGENCE Continued

*animal. Held*, a standard which required a potency sufficient to prevent a hog from contracting hog cholera was unauthorized. (Sec. 2538-w *et seq.*, Code Supp., 1913.) It follows that the sale of serum below such unauthorized standard does not constitute a violation of the statute, and bring the seller within the rule that the violation of the statute constitutes negligence *per se*. *Hollingsworth v. Midwest Serum Co.*, 183—280.

**Manufacture of Hog Cholera Serum—Evidence.** Evidence reviewed, concerning the manufacture and sale of hog cholera serum, and held insufficient to establish negligence. *Hollingsworth v. Midwest Serum Co.*, 183—280.

**Custom Inducing Violation of Statute.** Reliance on a custom will not justify the clear violation of a mandatory statute. So held with reference to the statutory prohibition against miners' passing "*across the shaft bottom.*" *Dennis v. Gibson*, 183—565.

**Operation of Automobile—Necessary Degree of Control.** The operator of an automobile is not necessarily guilty of negligence *per se* by failing to have the automobile under such control that he can stop it within the distance that he can plainly see obstructions ahead of him. So held where the operator, on a dark and misty night, drove into a negligently guarded excavation in a public street. *Kendall v. City of Des Moines*, 183—866.

**Independent Contractors.** Admission by one that he was under a duty to perform a certain act necessarily excludes any claim that he had passed such duty to an independent contractor. *Malloy v. Stoddard Cons. Co.*, 183—881.

**Unhitched Horse.** Evidence reviewed, and held sufficient to present a jury question on the issue of negligence in leaving a horse unhitched in a private yard adjacent to a public street. *Ferlinac v. Italian Imp. Co.*, 183—991.

**Crossing Streets Between Intersections.** The act of a pedestrian in crossing a street at a point other than at regular crossings, even without looking both ways, or listening, does not necessarily constitute negligence *per se*, especially where

NEGLIGENCE Continued

the surface of the street was the same at all points. *Wine v. Jones*, 183—1166.

**Failure to Give Statutory Signals.** It is suggested that the failure of a motor vehicle driver to give the statutory signals may not be excused on the ground that the driver "believed" he could, in safety, pass a pedestrian without giving such signals. *Wine v. Jones*, 183—1166.

**Equal Fault.** Plaintiff, when equally at fault with defendant, may not recover damages consequent upon an accident. So held where neither of two motor vehicle drivers gave warning of his approach to an intersecting highway. *Larsh v. Strasser*, 183—1360.

CONTRIBUTORY NEGLIGENCE.

**Avoidance—"Last Clear Chance"—Pedestrian on Railway Track.** Two persons may be so contemporaneously negligent that, if such negligence continues unbroken, no recovery may be had for a resulting injury to one of the parties; but if one of the parties actually discovers the other party in his position of reasonably manifest danger, at a time when the one discovering can avoid the injury by the exercise of reasonable care, such discovery presents to the one discovering it the last clear opportunity to avoid the injury; and if he does not, from the time of such discovery, exercise such reasonable care, and thereby avoid such injury, he is guilty of a *new, independent, and proximate* negligence—a negligence which neutralizes the former or continuing negligence of the one injured. *James v. Iowa Cent. R. Co.*, 183—231.

**Obstructed Street—Choice of Ways.** It is not necessarily negligence *per se* for a pedestrian, though blind, to attempt to pass over obstructions in a much used and, to him, convenient street, of which obstructions he had prior knowledge. *Malloy v. Stoddard Cons. Co.*, 183—881.

## NEGLIGENCE Continued

## IMPUTED NEGLIGENCE.

**Use of Automobile.** One who purchases an automobile for the use, convenience, and enjoyment of his family, and permits members of his family to use it for said purposes, thereby constitutes such members his agents, and the negligence of such members, while so operating said machine for such purposes, will be imputed to the principal. *Dircks v. Tonne*, 183—403.

**Failure to Erect Lightning Rods on Tent.** No imputation of negligence may be drawn from the failure of a master to erect lightning rods over an ordinary lodging tent furnished by him for the use of his employees. *Griffith v. Cole Bros.*, 183—415.

## TRIAL.

**Evidence—Sufficiency.** Evidence held sufficient to sustain a verdict against defendant for damages by reason of the negligent operation of an automobile. *Little v. Maxwell*, 183—164.

**Instructions—Non-Applicability to Pleading.** When plaintiff and defendant both claim damages of the other by reason of the same transaction, and on the allegation by each that the other was negligent in said transaction, instructions which authorize the jury to allow both claims are wholly at war with any allowable theory of the law of negligence. *Dircks v. Tonne*, 183—403.

**No-Eyewitness Rule.** The presumption "of due care in the absence of eyewitnesses" cannot prevail when the undisputed physical facts demonstrate that the said presumption was not true in fact. So held where a mature man, in full possession of his senses and on a clear day, drove in front of a rapidly moving train, of which he had, for a distance of 230 feet from the track, an unobstructed view of 1,000 feet. *Sohl v. Chicago, R. I. & P. R. Co.*, 183—616.

**Evidence—Weight and Sufficiency.** Evidence reviewed, and held to present a jury question whether evidence of the violation of ordinance requirements in the use of a street cor-

## NEGLECT Continued

TO

## NEW TRIAL

ered the point in the street where plaintiff claims to have been injured. *Malloy v. Stoddard Cons. Co.*, 183—881.

**Negating Causes.** Testimony as to the proximate cause of an injury is not in equipoise on two opposing theories when one theory has such support in the evidence as would fairly justify an impartial jury in finding that such cause was established, while the other cause has no support in the evidence, and is wholly theorized as a possibility. *George v. Iowa & Southwestern R. Co.* 183—994.

**No-Eyewitness Rule.** Principle recognized that a presumption of due care arises, in the absence of eyewitnesses. *George v. Iowa & Southwestern R. Co.*, 183—994.

**Proximate Cause—Instructions.** An instruction to the effect that plaintiff may not recover unless he establishes (1) that defendant was negligent, (2) that such negligence was the proximate cause of the injury, and (3) that plaintiff did not, by his own negligence, contribute to his injury, sufficiently protects defendant on the subject of proximate cause. *Wine v. Jones*, 183—1166.

**Presumption—Speed of Automobile.** It may not be presumed that an automobile was moving at a rate of speed in excess of 25 miles per hour (Section 1571-m19, Code Supp., 1913), from the naked fact that, upon coming in contact with an object, the automobile moved the object a distance of 50 feet. *Larsh v. Strasser*, 183—1360.

**NEGOTIABLE INSTRUMENTS.** See **BILLS AND NOTES.**

**NEW TRIAL.** See **APPEAL AND ERROR**, 32—36.

**Grounds—Misconduct of Counsel—Improper Argument.** It is reversible error for counsel to *repeatedly* state to the jury that opposing counsel had objected to a jury trial (which statement was true in fact), and that said opposing counsel did not trust a jury, and fought to prevent a trial by jury. *Iowa Auto. & Supply Co. v. Manbeck*, 183—159.

## NEW TRIAL Continued

## TO

## NUISANCE

**Specifying Error.** A motion for new trial is sufficient in form  
 2 which simply asserts: (a) That the verdict is not sustained by sufficient evidence, and is contrary to the evidence and is contrary to law; and (b) that the court was in error in overruling a motion for a directed verdict, and in giving certain specified instructions, and, as reasons therefor, assigns, *by reference to the trial record only*, the same reasons which were there assigned, ample exceptions having been duly entered to all such actions by the court. (Sec. 3755, Code, 1897.) *Keeney v. Chicago, B. & Q. R. Co.*, 183—522.

**Specification of Error.** A motion for new trial is fatally lacking in certainty and definiteness which asserts "that the court erred in sustaining the objections of plaintiff to evidence offered by movant in each and every instance, as shown by the notes of the official shorthand reporter." *Wheeler v. Schilder*, 183—623.

**Interested Interpreter.** Basis for new trial is not furnished by  
 4 the fact that plaintiff, without conscious fraud, called and used, in the trial of the case, an interpreter who, unknown to the court, jury, and opposing counsel, was interested in the outcome of the suit, when it appears that the testimony interpreted (a) was correctly interpreted, (b) was not vitally material, and (c) was practically without dispute in the record. (Sec. 4091, Code, 1897.) *Paucher v. Enterprise Coal Mining Co.*, 183—1076.

**NOVATION.**

**Substitution of New Debtor—Surrender of Old Notes, Etc.** The act of a creditor in surrendering the notes of his debtor for a pre-existing indebtedness, and accepting the notes of a third party in lieu thereof, and placing said latter notes in judgment, and collecting thereon, as far as possible, works an irrevocable novation of the debt against said original debtor. *Watt v. German Sav. Bank*, 183—346.

**NUISANCE.**

**Removal of Natural Obstruction in Course of Natural Drainage.**  
 The removal of an obstruction which *nature* has built up

NUISANCE Continued TO PARTNERSHIP

in the pathway of natural drainage does not necessarily constitute a continuing nuisance—may not constitute a nuisance at all. *Taylor v. Frevert*, 183—799.

**PARENT AND CHILD.** See DESCENT AND DISTRIBUTION, 4, 5; DIVORCE, 1; INSURANCE, 15; LIBEL AND SLANDER, 2; WILLS, 1, 7, 8, 9, 12.

**PARTIES.** See APPEAL AND ERROR, 4.

**Defendants—Joinder—Tort.** Principle recognized that any number of parties may be joined as defendants in an action for damages for a negligence which is alleged to have been an omission or violation of the *joint and common duty of all defendants*, and that a recovery may be had against some of the defendants and not necessarily against all the defendants. *Freeby v. Town of Sibley*, 183—827.

**PARTNERSHIP.** See APPEAL AND ERROR, 1; BANKS AND BANKING, 2, 8; CORPORATIONS, 1.

**The Firm, Powers and Property—Distinct Entities.** A partnership is an entity, separate and distinct from the individual members thereof, and contract relations with the *individual* members, as such, create no privity of contract between the one so contracting and the partnership. *National Sewer Pipe Co. v. Smith-Jaycox Lbr. Co.*, 183—17.

**The Relation—Necessity for Contract Relation.** Principle recognized that, where the rights of third parties are not involved, a partnership cannot exist, in the absence of a contract so providing. *Lyons v. Van Oel*, 183—114.

**The Relation—Sharing Profits but Not Losses.** A sharing in both profits and losses is essential to the existence of a partnership. So held where one of the alleged partners received a stated wage, plus a percentage of *profits*, but in no wise bore any of the *losses*. *Williams v. Herring*, 183—127.

## PAYMENT

## TO

## PLEADING

**PAYMENT.** See **BILLS AND NOTES**, 11-15; **EVIDENCE**, 16; **EXECUTORS AND ADMINISTRATORS**, 7.

**Voluntary Payments—Drainage Assessments.** The payment of a drainage assessment to the county treasurer, under the distinct understanding that such payment was to be held subject to the outcome of pending litigation relative to the legality of such assessment, is not such a voluntary payment as will estop the one paying from demanding the return of the money after the assessment has been declared illegal; and especially so when such payment remains unexpended in the hands of the treasurer. *Lade v. Board of Supervisors*, 183—1026.

**PHYSICIANS AND SURGEONS.** See **EVIDENCE**, 22, 23, 30.

**Negligence—Unsuccessful Operation.** An action for damages for malpractice may not rest on a simple showing that the treatment or operation was not successful. The all-essential is a showing that the shortcoming in the treatment or operation was due to a failure on the part of the physician to employ that degree of skill ordinarily possessed by practitioners under like circumstances, in the locality in question. *O'Grady v. Cadwallader*, 183—178.

**PLEADING.** See **MASTER AND SERVANT**, 7, 16.

**IN GENERAL.**

**General Limited by Specific.** Broad and general allegations as  
1 grounds for recovery may be wholly eliminated by a subsequent pleading which specifies with particularity the grounds relied on for a recovery. So held where the original pleading claimed recovery on the sweeping allegation that the defending party had *breached* a contract; while a later pleading, filed to meet a motion for more specific statement, alleged *two* distinct grounds. *Koontz v. Iowa City State Bank*, 183—1353.



**PLEADING Continued**

**Mistake.** Mistake, as the basis for relief, must be distinctly  
2 pleaded, and accompanied with appropriate prayer and  
proof. *Koontz v. Iowa City State Bank*, 183—1353.

**MATTERS SPECIALLY PLEADABLE.**

**Orders, Etc., of Interstate Commerce Commission.** Whether a  
3 ruling by the Interstate Commerce Commission should be  
specially pleaded, *quaere*. *Keeney v. Chicago, B. & Q. R.*  
*Co.*, 183—522.

**DEMURRER.**

**Pleading Over.** Adverse rulings on demurrer are waived by  
4 answering over, unless the demurrer point is again raised  
in said answer, or at some subsequent and appropriate time  
in the proceedings. Pleading reviewed, and held to represent  
the demurrer point in the answer. *Wheeler v. Schil-*  
*der*, 183—623.

**MOTIONS.**

**Motion to Strike—Compromise and Settlement—Non-Defensive**  
5 **Matter.** An allegation that plaintiff and defendant had, at  
a time prior to the settlement sued on, fully settled and  
adjusted all their respective claims, constitutes no defense,  
and is properly stricken unless accompanied by an allega-  
tion that, *since* said former settlement, no bona-fide differ-  
ence has existed between the parties. *Urdangen v. Fryer*,  
183—39.

**Striking Non-defensive Matter—Master and Servant.** Nonde-  
6 fensive matter is properly stricken on motion. So held  
where, in an action for damages for the wrongful discharge  
of a servant, the master pleaded that, prior to the con-  
tract of employment, the servant had represented that he  
was a skillful salesman; but did not plead that the repre-  
sentation was *false*. *Redfield v. Boston P. & M. Co.*, 183—  
194.

## PLEADING Continued

**Answering Over.** Error in overruling motion to strike and to  
7 divide petition into counts is waived by answering over.  
Clark & Co. v. Monson, 183—980.

## ISSUE, PROOF, AND VARIANCE.

**Evidence Admissible.** Principle recognized that one may not  
8 prove that which he has not alleged. Redfield v. Boston P.  
& M. Co., 183—194.

**Issuance of Corporate Stock.** An issue on whether corporate  
9 stock was void because issued without authorization by  
the executive council (Sec. 1641-b *et seq.*, Code Supp., 1913),  
and because issued in excess of lawful authorization under  
its articles, necessarily involves the issue whether that  
which was issued was (a) *stock* or (b) merely evidence of  
a corporate debt. Wright v. Johnston, 183—807.

**PRESUMPTIONS.** See APPEAL AND ERROR; BANKS AND  
BANKING, 5, 6; BILLS AND NOTES, 5; CARRIERS, 4, 9,  
17; CONTRACTS, 5; CRIMINAL LAW, 4; EVIDENCE, 3; IN-  
TOXICATING LIQUORS, 1, 11; LIBEL AND SLANDER, 3;  
MASTER AND SERVANT, 5; NEGLIGENCE, 16, 19, 21;  
PRINCIPAL AND AGENT, 1; TRUSTS.

**PRINCIPAL AND AGENT.** See BROKERS; EVIDENCE, 3;  
NEGLECT, 12; TRIAL, 28.

**Implied Agency—Husband and Wife.** The act of a husband  
1 in personally attempting to exercise a right which he did  
not possess gives rise to no presumption that what he did  
was *on behalf of his wife*, who did possess such right. So  
held where a husband attempted the rescission of a con-  
tract, when such right rested only in the wife. Fulton  
Bank v. Mathers, 183—226.

**Negligence.** One may not be held liable for the results attend-  
2 ing the negligent act of another when, at the time of such  
acts, such negligent person was acting solely for a third  
party, even though, at times prior thereto, such negligent

PRINCIPAL AND AGENT Continued TO RAILROADS  
 person had acted for the one sought to be held liable. *Fer-  
 inac v. Italian Imp. Co.*, 183—991.

## PRINCIPAL AND SURETY.

**Discharge of Surety—When Liability Re-attaches.** When a  
 1 promissory note upon which one is liable as surety is sur-  
 rendered and cancelled by being computed and embraced  
 in a new note to the same payee, and signed by the same  
 principal and surety, and said new note never becomes ef-  
 fective against the surety, by reason of the nonfulfillment  
 of the condition upon which it was delivered, the former  
 liability of the surety under the old surrendered and can-  
 celled note immediately re-attaches (in equity). *Selma  
 Sav. Bank v. Hinkle*, 183—200.

**Burden of Proof.** A gratuitous surety may stand strictly on the  
 2 terms of his obligation, and the burden of proof is on the  
 one seeking judgment, to establish every fact upon which  
 liability depends. So held where a stockholder of a corpo-  
 ration was obligated as surety for the payment of money  
 which might be borrowed to carry on the "*present*" busi-  
 ness of the corporation, but liability was denied because of  
 absence of evidence whether the money was borrowed for  
 said purpose or for other lines of business subsequently  
 pursued by the corporation. *Foley v. Lyman*, 183—1306.

**Who are Principals.** One who, on a consideration running to  
 3 himself, agrees to pay a note and mortgage to which he  
 was not, originally, a party, is not a mere surety for the  
 original debtor. It follows that a release of the original  
 debtor works no release of the new promisor. *Mowbray  
 v. Simons*, 183—1389.

**QUIETING TITLE.** See JUDGMENT, 8.

**RAILROADS.** See CARRIERS; EVIDENCE, 32; MASTER AND  
 SERVANT, 3, 14; MUNICIPAL CORPORATIONS, 3, 4.

**Measure of Duty to Trespasser.** A railway company is under  
 1 no obligation, before it suddenly or violently moves its cars,

## RAILROADS Continued

(a) to provide a guard to warn unknown trespassers who may be on or about the cars, or (b) to inspect its cars in order to discover such trespassers, or (c) to give warning signals in order that such trespassers may be apprised of their danger. Duty of care toward a trespasser arises only after his position of peril is *actually* discovered. So held where a six-year-old boy was crawling under a car which blocked his passage. *Papich v. Chicago, M. & St. P. R. Co.*, 183—601.

**Temporary Withdrawal of License.** An implied license to cross  
2 a railway track is *ipso facto* withdrawn by the act of placing and maintaining cars on the track and across said licensed way. *Papich v. Chicago, M. & St. P. R. Co.*, 183—601.

**Scope of License.** Long-continued practice of allowing children to play within railway yards and to pick up coal that  
3 was dropped upon and along the side of the tracks may not be construed into a license or invitation to a six-year-old boy to crawl under the cars in order to reach his home. *Papich v. Chicago, M. & St. P. R. Co.*, 183—601.

**Licensees and Trespassers.** Bare licensees and trespassers stand  
4 on the same footing, as regards the care exacted in avoiding injury to them. *Papich v. Chicago, M. & St. P. R. Co.*, 183—601.

**Trespasser's Freedom from Contributory Negligence.** A child of  
5 tender years may be a trespasser, and dealt with accordingly, even though he is not guilty of contributory negligence. *Papich v. Chicago, M. & St. P. R. Co.*, 183—601.

**Contributory Negligence.** Contributory negligence *per se* results from the act of a mature man, in full possession of  
6 his senses, driving, on a clear day, upon a country railway crossing with which he was perfectly familiar, and in front of a rapidly approaching train, of which he had, for a distance of 230 feet from the track, an unobstructed view for at least 1,000 feet. *Sohl v. Chicago, R. I. & P. R. Co.*, 183—616.

## RAILROADS Continued

**Rate of Speed at Country Crossings.** One may not rely upon any

- 7 particular speed of trains at non-obscured, ordinary country railway crossings, and will not be permitted to escape the consequences of his negligence in gambling on his ability to pass ahead of trains, of the approach of which he has ample notice and knowledge. *Sohl v. Chicago, R. I. & P. R. Co.*, 183—616.

**"Grade" Crossings Not Universal Rule.** "*Grade*" crossings over

- 8 railway right of ways which divide the land of landowners are distinctly in favor and are, ordinarily, all the landowner may demand; yet the company may not so construct its embankments as to render a "*grade*" crossing impossible of construction wholly upon its right of way, and then insist on a "*grade*" crossing or no crossing at all, on condition that the landowner contribute the necessary land for approaches outside the right of way. *O'Malley v. Chicago, M. & St. P. R. Co.*, 183—749.

**Private Crossings—Application to Railroad Commission.** The

- 9 statutory duty of a landowner to apply to the railroad commissioners to settle disputes relative to private crossings applies only to those cases where the landowner already has one crossing and desires an *additional* one, either under, overhead, or grade. (Sec. 2022, Code Supp., 1913.) *O'Malley v. Chicago, M. & St. P. R. Co.*, 183—749.

**Private Crossings—Mandamus.** A landowner whose lands are

- 10 divided by a railway right of way has an absolute right, enforceable in the courts, *and without application to the Railroad Commission*, to at least *one* adequate crossing over such right of way to a grade crossing, if that be practicable, but, in any event, to an adequate crossing, even though it be an overhead or underground crossing. (Sec. 2022, Code Supp., 1913.) *O'Malley v. Chicago, M. & St. P. R. Co.*, 183—749.

**Negligence of Lessee—Liability of Lessor.** A railway company

- 11 may not lease or license its line of railway to another and escape liability for the negligence of the lessee or licensee in operating the trains, even though, by the terms of the license or lease, the owner retains no control over the operation of such trains. *Sorenson v. Chicago, R. I. & P. R. Co.*, 183—1123.

## RAILROADS Continued

TO

SALES

**Switch Tracks—Liability of Owner for Negligence of Licensee**

- 12 A railway company which, under command of Sec. 2113, Code Supp., 1913, furnishes switch track connections to another railway, is, under the terms of said statute, liable for the negligence of such connecting road in negligently operating its trains over such switch tracks. *Sorenson v. Chicago, R. I. & P. R. Co.*, 183—1123.

**Eminent Domain—Non-Existence of Right.** Lands may not be

- 13 condemned for street railway right of way, for the reason that the Eminent Domain Act does not so provide. *Des Moines City R. Co. v. City of Des Moines*, 183—1261.

**RECEIVERS.** See GARNISHMENT, 2.**REFORMATION OF INSTRUMENTS.**

**Insurance Policy—Mutual Mistake.** The right, on the ground of mutual mistake, to reform a policy of insurance, does not necessarily follow from the fact that the policy does not *literally* follow the insured's written application for the insurance. So held where the policy added, after the names of the beneficiaries, the words, "or to their executors, administrators, or assigns." *Condon v. New York L. Ins. Co.* 183—658.

**SALES.** See BROKERS; CONTRACTS, 4; FRAUD; GUARDIAN AND WARD; HOMESTEAD, 2, 3.**Rescission—Restoration of Status Quo.** One who would rescind

- 1 a contract of sale must first restore, or offer to restore, that which he has received under the contract. *Packers Nat. Bank v. Michener*, 183—122.

**Rescission by Buyer—Buyer Transferring Title—Effect.** A res

- 2 cede of personal property may rescind *after he has lost title to the property*, provided he is able to cause, and does cause, the property to be delivered or tendered on his behalf to the vendor. *Fulton Bank v. Mathers*, 183—226.

## SALES Continued

## TO

## SPECIFIC PERFORMANCE

**Rescission by Buyer—Nonavailability of Warranty to Buyer of a**

- 3 **Buyer.** A warranty to the vendee of property, and the right to rely thereon, with consequent right to rescind for breach of said warranty, do not pass to one who subsequently takes or purchases of said original vendee. *Fulton Bank v. Mathers*, 183—226.

**SCHOOLS AND SCHOOL DISTRICTS.****Tuitioning Pupils in Foreign District.** The power of a school

- 1 board to contract for the tuitioning of its pupils in the schools of another district depends on securing from the county superintendent authorization "to shorten" its statutory school year, and being thereby released from its obligation to maintain its school. But authorization to entirely *discontinue* a school, being a power not possessed by the county superintendent, will not open the door to such a contract. (Secs. 2773, 2774, Code, 1897.) *Peterson v. Pratt*, 183—462.

**Relief from Void Acts.** Relief from the *void* acts of a school

- 2 board may be had by direct appeal to the courts. (See Sec. 2818, Code, 1897.) *Peterson v. Pratt*, 183—462.

**Consolidated Districts—Size of District—"Section."** The word

- 3 "section," as used in the requirement as to the minimum size of consolidated school districts, is used in the sense of the ordinary *government* section, whether it be a full section of 640 acres or only a fractional section. (Sec. 2794-a, Code Supp., 1913.) *Powers v. Harten*, 183—764.

**SPECIFIC PERFORMANCE.****Contracts Enforcible—Contract of Exchange—Mutual Mistake in**

- 1 **Quantity of Land.** Evidence reviewed, and held sufficient to establish mutual mistake in the quantity of land actually conveyed, with consequent right to a decree of specific performance. *Waite v. Consigny*, 183—259.

**Contracts Enforcible—Exchange of Land—Definiteness.** A con-

- 2 tract by which one party is to receive, in exchange for certain land, double the area thereof, which latter is to be

## SPECIFIC PERFORMANCE Continued TO

## STATUTES

located between the extension of definite lines, is sufficiently definite to permit specific performance. *Waite v. Consigny*, 183—259.

**Defective Abstract of Good Title as Defense.** An abstract of 3 title sufficient to satisfy a contract calling for "good title" must show a fee—a marketable title, which can be again sold to a person of reasonable prudence. Record abstract of title reviewed, and held not good, because of (a) indefiniteness of title, (b) want of title (in part), and (c) an outstanding easement. *Upton v. Smith*, 183—588.

**Contract to Convey Lands Which Embrace Homestead.** A con- 4 tract to convey lands embracing an unadmeasured homestead may not be specifically enforced against the protest of the wife, when such contract is executed by the husband only, unless the one demanding such performance elects to take a conveyance exclusive of the homestead. *Murray Bros. & Ward Land Co. v. Keesey*, 183—739.

**Vendor without Title—Subsequent Acquisition.** One seeking spe- 5 cific performance of a contract for an exchange of lands must have title to his own lands, or at least some enforceable contract for title, *when the contract is made*. Subsequent acquisition of title will not suffice. *Murray Bros. & Ward Land Co. v. Keesey*, 183—739.

**Evidence—Sufficiency.** Uncertainty respecting the terms of the 6 contract sought to be specifically enforced, plus an element of inequity in the contract as alleged, demands the refusal of the relief sought. *Origer v. Kuyper*, 183—1395.

**STATUTES.** See NEGLIGENCE, 1.

**Construction—Avoiding Invalidating Construction.** Principle 1 again recognized that, of two possible constructions of a statute, that one will be approved which will least imperil the constitutionality of the statute. *Griffith v. Cole Bros.* 183—415.

**Construction—Subsequent Enactment on Same Subject-Matter.** 2 Principle recognized that a subsequently enacted statute



## STATUTES Continued

TO

## TAXATION

does not *necessarily* supersede a prior and still existing and more comprehensive statute on the same subject-matter. *Tusant v. Grand Lodge A. O. U. W.*, 183—489.

**Construction—Exceptions to Prohibitions.** When a statute  
3 sweepingly prohibits the doing of a dangerous thing in a certain place of work, and then *excepts* certain persons from such prohibition, the grave and ever-impending danger of doing said act under any circumstances may furnish strong justification for a very strict and literal interpretation of said exception. *Dennis v. Gibson*, 183—565.

**General Principles.** The following principles of statutory con-  
4 struction are recognized:

1. Specific statutes control general statutes on the same subject.
2. Statutes *in pari materia* must be construed as one statute.
3. All provisions of a statute must be given effect, if possible.
4. "Hereinafter," employed in a statute, cannot refer to a *preceding* statute.
5. The plea of unreasonableness can have no weight in the construction of a valid, unambiguous statute. *Great Western Acc. Ins. Co. v. Martin*, 183—1009.

**Unreasonableness.** The plea of unreasonableness can have no  
5 weight on the construction of a valid, unambiguous statute. So held where statutes authorized women to vote on bond issues, but provided, in effect, that *their* favorable vote might not be considered in determining whether the proposal had received the required favorable vote. (Sec. 1306-e, Code Supp., 1913.) *Sears v. City of Maquoketa*, 183—1104.

**TAXATION.**

**Collateral Inheritance Tax—Bank Deposits of Non-Resident.** Bank

- 1 deposits, in resident banks, of a deceased non-resident, whether represented by a "pass book" only or by negotiable certificates, are subject to the collateral inheritance tax law of this state, even though such tangible evidence of the deposits are kept, at all times, by the non-resident owner in

## TAXATION Continued

TO

TRIAL

the state of his residence, and even though such holding may lead to double taxation, to wit, a tax in this state and a tax in the state where such non-resident resided. (Sec. 1481-a, Code Supp., 1913.) Hoyt v. Keegan, 183—592.

**Recovery of Tax Paid—Mulct Tax.** The so-called "mulct tax," 2 provided by the Intoxicating Liquor Act (Chap. 6, Title XII, Code, 1897), is not a "tax," within the terms of Sec. 1417 of said Code, which provides for the repayment of illegally exacted "taxes." Des Moines Brewing Co. v. Polk County, 183—984.

**Corporate Stock—Mileage Basis.** The shares of stock of a do- 3 mestic accident and health insurance company should be taxed at the five-mill rate provided by Sec. 1310, Code Supp., 1913, and not on the basis of the tax rate on 25% of value, provided by Sec. 1305, Code Supp., 1913. Great Western Acc. Ins. Co. v. Martin, 183—1009.

**Exemptions—Railway Right of Way—Special Assessments.** Tax- 4 ation is the rule; exemption, the exception. And courts will not create the exception. So held where it was urged that a street railway right of way, owned in fee, ought, by reason of its use as a *right of way only*, to be held exempt from special assessments for paving. Des Moines City R. Co. v. City of Des Moines, 183—1261.

**TELEGRAPHS AND TELEPHONES.**

**Ordinance Authorization of Toll Lines.** Telephone toll lines— those operating solely between the cities and towns of the state—require no ordinance authorization as a condition precedent to the right to occupy streets and alleys. (See Secs. 776, 2158, Code, 1897.) Talmage v. Town of Washta, 183—792.

**TRIAL.** See BILLS AND NOTES, 9, 10; JURY; NEGLIGENCE, 14—21, NEW TRIAL.

**METHOD OF TRIAL.**

**Numerous Involved but Non-Mutual Accounts.** The mere fact 1 that issues will require an examination and consideration

**TRIAL Continued**

of an *exceptionally* large number of credit and debit items of non-mutual accounts presents no ground for transfer from law to equity. *Convenience* in trying the cause is not ground for transfer to equity. *Williams v. Herring*, 183—127.

**RECEPTION OF EVIDENCE.**

**Reception of Incompetent Testimony.** Prejudice from receiving  
2 incompetent testimony is not cured by admitting incompetent evidence over due objection. *Yarcho v. Chicago, R. I. & P. R. Co.*, 183—1180.

**Order of Proof—Belated Offer—Wills.** Evidence that contest-  
3 ant had defrauded testatrix may be admissible as bearing on the reason for ignoring contestant in the will, and as rebutting the plea of undue influence; yet such evidence is properly rejected when withheld by proponent until the rebuttal of the case. *Monahan v. Roderick*, 183—1.

**Motion to Strike—Excessive Motion.** Motions to strike the en-  
4 tire testimony of a witness which is in part competent and in part incompetent, are properly overruled. *Little v. Maxwell*, 183—164.

**Non-Explanatory Questions.** The exclusion of a question is jus-  
5 tified by the fact that it is wholly non-explanatory of the character or nature of the testimony sought to be introduced, and counsel fails to enlighten the court thereon. *Malloy v. Stoddard Cons. Co.*, 183—881.

**Objections—Waiver.** He who has his testimony rejected on the  
6 objection of only one of several defendants, each of whom pleads separate and distinct defenses, must insist on the admissibility of such testimony against the non-objecting defendants, or the objections will be waived. *Malloy v. Stoddard Cons. Co.*, 183—881.

**DIRECTED VERDICTS.**

**Repeating Request.** Overruling a motion for a directed verdict  
7 at the close of plaintiff's evidence is no bar to sustaining  
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## TRIAL Continued

such motion when repeated at the close of all the evidence.  
*Ferguson v. Ferguson*, 183—519.

**Waiver of Error in Declining to Direct Verdict.** Error in over-  
8 ruling a motion for a directed verdict is not waived by failure to renew the motion after the subsequent introduction of evidence *which in no wise warrants a reconsideration of said motion by the court*. *Keeney v. Chicago, B. & Q. R. Co.*, 183—522.

**Hostile Theories—Proximate Cause.** A jury question is necessarily presented on the issue of the proximate cause of an injury whenever the record reveals, to a reasonable certainty, that such injury resulted from *one* or the *other* of two hostile causes,—i. e., one which permits recovery and one which denies recovery,—and the record is such that the jury may fairly find therefrom that one cause is more *probable* than the other. *Carpenter v. Security F. Ins. Co.*, 183—1226.

## INSTRUCTIONS.

**Applicability to Evidence—Refusal to Submit Issue.** Issues  
10 wholly without support in the evidence must necessarily be withheld from the jury. *Packers Nat. Bank v. Michener*, 183—122.

**Form, Requisites, and Sufficiency—Duties of Pedestrians, Etc., on  
11 Public Streets.** A request for a specific instruction as to the relative duties of pedestrians and the drivers of conveyances on public streets is sufficiently met by a general line of instructions from which the jury could draw no conclusion other than that both said parties had the right to use the street, and what their relative duties were in the exercise of such use. *Little v. Maxwell*, 183—164.

**Sufficiency—Correct but Not Explicit.** Instructions which are  
12 correct but not explicit are sufficient, in the absence of a request for a more explicit instruction. *Little v. Maxwell*, 183—164.

## TRIAL Continued

**Construction as a Whole.** A clear and accurate statement of the  
13 law, once given, need not be repeated. *Scovel v. Monaghan*, 183—581.

**Exceptions—Waiver.** Instructions, unquestioned until motion  
14 for new trial is filed, are unassailable. (Sec. 3705-a, Code Supp., 1913,—now repealed.) *Allen v. City of Ft. Dodge*, 183—818.

**Applicability to Pleadings.** Instructions which specifically  
15 state the grounds of negligence alleged by the plaintiff, and explicitly limit the jury's consideration thereto,—in full keeping with the entire theory of the trial,—are not rendered erroneous because a hypercritical analysis of the language employed *might* lead the jury to infer that other grounds of negligence were embraced in the charge. *Allen v. City of Ft. Dodge*, 183—818.

**Joint Negligent Wrongdoers.** In an action against several al-  
16 leged negligent wrongdoers. the court must, on request, either in the instructions or in the forms of verdict submitted, plainly tell the jury that it may find against one defendant and in favor of another, even though it be alleged that the negligence complained of was an omission or violation of a *joint* duty. (See Sec. 3730, Code, 1897.) *Freeby v. Town of Sibley*, 183—827.

**When Requests are Timely.** The statutory requirement that re-  
17 quests for instructions must be made *before* the arguments are commenced (Sec. 3705-a Code Supp., 1913, now repealed), does not apply to an instruction which it is the duty of the court to give *without any request*, in order that the issues may be properly presented to the jury. So held where, *after* argument, the court was requested to charge that it might find against one of two alleged negligent wrongdoers and in favor of the other. *Freeby v. Town of Sibley*, 183—827.

**Verdict-Urging Instructions.** Verdict-urging instructions are ob-  
18 jectionable which assume to tell the jury, as a reason why an agreement ought to be reached, that, if the case is retried, such retrial must be on the same pleadings and evidence as the present trial, and that a retrial would simply

## TRIAL. Continued

add to the burden of the successful party. *Freeby v. Town of Sibley*, 183—827.

**Reciting Claims and Stating Issues.** It is not improper for the  
19 court to first state to the jury *all* that plaintiff claims, and  
then to state what items the jury may consider. *Powers*  
*v. Iowa Glue Co.*, 183—1082.

**Stating Ultimate Facts for Recovery.** A statement of the ulti-  
20 mate facts which must be established, in order to justify  
recovery, is not rendered erroneous because the court did  
not, *instantly* and in the same instruction, proceed to define  
the terms used therein,—i. e., negligence,—such matters  
being adequately covered in later portions of the charge.  
*Powers v. Iowa Glue Co.*, 183—1082.

**Omission in One Supplied by Insertion in Another.** An omission  
21 in one instruction may very properly be supplied in another.  
*Powers v. Iowa Glue Co.*, 183—1082.

**Conflicting Instructions.** When one instruction fails to contain  
22 a limitation on plaintiff's right to recover, but a later in-  
struction plainly states such limitation, it is quite hyper-  
critical to assert that the two instructions are in conflict.  
*Powers v. Iowa Glue Co.*, 183—1082.

**Submission of Issues.** An instruction which declares that plain-  
23 tiff may not recover if a certain condition,—i. e., the slip-  
periness of a walk,—was the result of plaintiff's own act,  
necessarily does not prevent the submission of the issue  
whether such condition did exist. *Powers v. Iowa Glue Co.*,  
183—1082.

**Inaccuracy Cured by Other Instruction.** An inaccurate instruc-  
24 tion as to the assessments due on a policy of insurance may  
be rendered harmless, in view of the real issues, by con-  
struing the instructions as a whole. *Retherford v. Knights*  
*and Ladies of Security*, 183—1099.

**Defining Terms.** Failure, in the absence of a request, to define  
25 the term "evasion of the statute," is not error. *State v.*  
*Fountain*, 183—1159.

**TRIAL. Continued**

**Refused Instructions Otherwise Covered.** Refusing instructions  
26 which dealt with the degree of care necessary under given conditions leaves no error, when the court adequately covered the same ground in its charge to the jury. *Wine v. Jones*, 183—1166.

**Failure to Except.** Failure to except to instructions prior to the  
27 reading to the jury precludes subsequent complaint that the instructions authorized an allowance of interest on an unliquidated claim. (Sec. 3705-a, Code Supp., 1913.) *Balen v. Colfax Cons. Coal Co.*, 183—1198.

**Non-Prejudicial Refusal.** On the issue whether a defendant was  
28 acting solely as agent of another or as a principal, the refusal of an instruction on the subject of agency is non-prejudicial, when the court very definitely instructed that defendant was not liable unless it were found that he acted with intent to be personally bound. *Bell v. Fisher*, 183—1208.

**VERDICT.**

**Excessiveness—\$5,750.** Verdict for \$8,750, reduced by the trial  
29 court to \$5,750 for personal injury, sustained. Plaintiff was run over by an automobile, received a severe nervous shock, suffered numerous bruises, had the mesentery torn loose, in part, from walls of abdomen, suffered an operation by reason thereof, and some possibility existed of some of her injuries' being permanent. *Little v. Maxwell*, 183—164.

**Quotient Verdicts.** A finding by the trial court, with fair sup-  
30 port in the evidence, that a verdict was not a "quotient" verdict, will not be disturbed on appeal. *Frahm v. Eggers*, 183—572.

**Excessiveness—\$1,250.** Verdict for \$1,250 for personal injury  
31 sustained. A bone in the arch of plaintiff's foot was slightly misplaced, with consequent swelling, pain, and lameness. A year after the injury, a full cure had not been effected, and probability existed that the defect would be permanent. *Malloy v. Stoddard Cons. Co.*, 183—881.

## TRIAL Continued TO VENDOR AND PURCHASER

**Excessiveness—\$6,000.** Verdict for \$6,000 for personal injury  
32 reduced to \$4,000. Powers v. Iowa Glue Co., 183—1082.

**Excessiveness—\$5,900.** Verdict of \$5,900 for personal injury re-  
33 duced to \$5,000. Plaintiff suffered a severe injury; but, at  
the time of trial, the limb was in such normal condition  
that all symptoms of pain were purely subjective. Brier v.  
Chicago, R. I. & P. R. Co., 183—1212.

**Verdicts in Disregard of Instructions.** Verdicts in disregard of  
34 *incorrect* instructions will be set aside. Erickson v. Maple  
Block Coal Co., 183—1292.

**TRUSTS.** See BANKRUPTCY, 2, 3; MORTGAGES, 4; WITNESSES,  
1, 2.

**Resulting Trusts—Husband and Wife.** A presumption of result-  
ing trust does not prevail from the fact that a husband  
pays for property with his own money, and causes the title  
to be taken in the name of his wife. On the contrary, a pre-  
sumption of gift or advancement to the wife does prevail.  
Mossestad v. Mossestad, 183—311.

**VENDOR AND PURCHASER.** See SALES, 2, 3.

**Curing Substantial Defects by Means of Affidavits.** A vendor  
1 obligated to furnish an abstract of title showing "good"  
title, may not, *by means of recorded affidavits*, purge his  
title of *substantial* defects. (See Sec. 2957, Code, 1897.) So  
held where the vendor sought, by means of recorded affi-  
davits, (a) to supply missing links of title, and (b) to es-  
tablish adverse possession. Upton v. Smith, 183—588.

**Disputing Vendor's Title.** A vendor's title may not be dis-  
2 puted by a vendee who is in possession by virtue of a con-  
tract with the vendor. McCreary v. McGregor, 183—732.

**Statement of Grounds of Rescission—Mending Hold.** One who  
3 assigns specified grounds for rescission may not later "mend  
his hold" and assign other or different reasons; but this  
rule is not applicable to a ground of which the one rescind-



## VENDOR AND PURCHASER Continued TO WATERS AND WATERCOURSES

ing had no knowledge at the time he did rescind. *Murray Bros. & Ward Land Co. v. Keesey*, 183—739.

**Rescission by Purchaser—Fraud—Non-Necessity to Show Scienter.** *Scienter* need not be proven, in order to effect a rescission for fraud. *Gray v. La Plant*, 183—844.

**Rescission by Purchaser—Laches—Change of Position.** Courts are prone to excuse a delayed rescission for fraud, when the position of the one against whom rescission is sought has not been changed (a) by the intervention of right in favor of third parties, (b) by the incurring of expense, or (c) by the loss of valuable evidence. So held where the rescission was delayed some fifteen months after possession of the land was taken. *Gray v. La Plant*, 183—844.

**False Representations as to Value.** Representations as to value, made as statements of fact and to be relied on and to induce a contract, furnish ample basis for a rescission of the contract, if such representations prove to be false. *Wokoun v. Jameson*, 183—956.

**Waiver by Laches.** Rescission for fraud must be made within a reasonable time after full discovery of the fraud, or the right will be irrevocably lost. So held where, after such full knowledge, the party held the contract and acted thereunder for more than two years, and then, after an abortive assignment of the contract, attempted to rescind. *Wokoun v. Jameson*, 183—956.

**WATERS AND WATERCOURSES.**

**Surface Waters—Artificial Courses—Rights of Public.** *Artificial*

1 ditches which materially divert the course of natural drainage do not, by any lapse of time, become *natural* watercourses, as far as the *public* is concerned. *Brightman v. Hetzel*, 183—385.

**Natural Obstruction in Course of Natural Drainage.** A domi-

2 nant landowner has a legal right to remove from the course of natural drainage an obstructing dyke or dam *formed wholly by nature*, no prescriptive right in the servient landowners appearing. *Taylor v. Frevert*, 183—799.

## WATERS AND WATERCOURSES Continued to

## WILLS

**Natural Obstruction in Course of Natural Drainage—Prescription.**

- 3 Whether a servient landowner may acquire, by prescription, the right to the undisturbed maintenance of dyke or dam *formed wholly by nature* in the natural course of drainage, *quaere*. If such right may be acquired, the time available commences to run "*when such dyke begins to act as a substantial barrier to natural drainage.*" Taylor v. Frevert, 183—799.

**Mutually Agreed Drainage—Damages.** Where, by *mutual agree-*

- 4 ment of two landowners, one of them installs an *agreed* drainage for the mutual benefit of both parties, and later, damage occurs to the one not installing, because the mutually installed drainage proves inadequate, the act of the parties in then mutually agreeing on a new or additional drainage constitutes a settlement of all prior claims for damages. Taylor v. Frevert, 183—799.

**WILLS.****TESTAMENTARY POWER.****Disinheriting Bastard.** Principle recognized that a duly ac-

- 1 knowledged illegitimate child, as well as a legitimate child may be disinherited. Norris v. Loyd, 183—1056.

**TESTAMENTARY CAPACITY.****Presumption and Burden of Proof.** Proponent's burden of proof

- 2 to prove testamentary capacity is met, in the first instance, by a showing, or concession, that testator had executed another will two months prior to the will in question, and was then possessed of testamentary capacity. Touhey v. Cooney, 183—1023.

**Evidence—Weight and Sufficiency.** The fact that a testatrix

- 3 was, at the time of the execution of a will, in pain, and possessed impaired mental faculties, does not necessarily stamp her as one lacking testamentary capacity. In re Will of Kester, 183—1336.

## WILLS Continued

## PROBATE, ESTABLISHMENT, AND ANNULMENT.

**Undue Influence—Jury Question.** Evidence concededly present-  
4 ing a jury question on the issue of testator's mental competency to execute a will, may strongly influence the submission of the issue of undue influence. *Monahan v. Rodrick*, 183—1.

## CONSTRUCTION.

**Life Estates—Power of Alienation.** The right of a life tenant  
5 (with remainder over) to sell the devised property, and even to consume the proceeds, does not carry an unexpended balance into the estate of the life tenant, to the defeat of the remaindermen. *In re Estate of Doore*, 183—152.

**Statutory Substitution—Predeceased Legatees—Legatee's Wife  
6 as Heir.** A devise or bequest to one who predeceases the testator passes, under Section 3281, Code, 1897, in the absence of a contrary intent, to the devisee's heirs; but the devisee's wife, in such case, is not an *heir* of devisee's. *McAllister v. McAllister*, 183—245.

**Share of Legatee—Decree—Effect.** A will-construing decree,  
7 *based solely on the effect of a purported cancellation and erasure*, and finding that said cancellation and erasure were nullities, and that the will should stand as originally executed, and ordering (a) that the wife of testator was entitled to one half of the estate, in accordance with the unquestioned provisions of the will, and (b) that the remaining one half, which was devised to testator's son, who predeceased testator, should pass "*to the heirs of said son*," is not a judicial determination that the one-half portion to the wife is the *full measure* of her right—is no impediment to the wife's taking also a portion of the share which would have passed to said issueless son, had he survived testator. *McAllister v. McAllister*, 183—245.

**Substitution—Stepmother of Predeceased Issueless Devisee.** A  
8 wife, upon the death of her testate husband without descendants, will take one half of a devise to her issueless

## WILLS Continued

stepson who predeceased her husband. (Sec. 3381, Code, 1897.) McAllister v. McAllister, 183—245.

**Substitution—Course of Descent.** A devise to a devisee who predeceases the testator passes, in the absence of a contrary intent in the will, in the following order:

First. To devisee's heirs, *to the exclusion of devisee's wife*. (Sec. 3281, Code, 1897.)

Second. To devisee's surviving parents in equal portions provided devisee has no issue. (Sec. 3379, Code, 1897.)

Third. To the surviving parent, provided one parent is dead. (Sec. 3380, Code, 1897.)

Fourth. To each deceased parent in equal portions, if both be dead, and from thence to the heirs of the deceased parents. (Sec. 3381, Code, 1897.)

Fifth. *To the wife of said predeceased devisee*, provided a deceased parent has no heir for his or her portion. (Sec. 3382, Code, 1897.) McAllister v. McAllister, 183—245.

**Equitable Conversion—Avoidance.** Directions in a foreign will to sell Iowa real estate and to divide the proceeds among named devisees do not, *ipso facto*, under the fiction of equitable conversion, necessarily and irrevocably fix the status of the property *as personality*, and work a transference of the property *as personality* to such foreign state, for distribution *as personality*, and according to the laws of such foreign state. The devisees may, by unanimous record agreement, take the land *as land*, and thereby cause the will to operate thereon *as land*, and according to the laws of this state; and this, too, over the protest of a nondevisee heir, who, under peculiar legal conditions, has been adjudged by the courts of such foreign state to be entitled to take a portion of the testator's estate *in spite of and in opposition to the will*. Norris v. Loyd, 183—1056.

## RIGHTS OF DEVISEES.

**Life Tenant Refusing Possession—Rents and Profits.** A life tenant who refuses to take possession of the devised property when such is his right, and the right is unobstructed, may not hold his testator's estate for rents and profits. And the life tenant's administrator has no greater right. In re Estate of Doore, 183—152.

## WILLS Continued

## TO

## WITNESSES

**Election—Estoppel.** A wife, by electing to take under the will  
12 of her husband, is not estopped to take, through her husband, a portion of an unexpired devise to the husband's predeceased issueless son by a former marriage. *McAllister v. McAllister*, 183—245.

**Non-Heir Devisee Contesting Subsequent Will.** A devisee who,  
13 without the will in his favor, would, under the laws of inheritance, take no part of testator's estate, may not contest a later will by testator, on the ground of mental incompetency of testator, without necessarily and unavoidably admitting that testator was fully competent to execute the will in his—contestant's—favor. It follows that such contestant will be limited to evidence of incompetency subsequent to the execution of the will in his favor. *Touhey v. Cooney*, 183—1023.

**WITNESSES.** See EVIDENCE.

## COMPETENCY.

**Transaction with Deceased—Assignees by Operation of Law.**

- 1 The statutory declaration (Sec. 4604, Code, 1897), that a party to an action is not a competent witness to detail personal transactions and communications against an assignee of a deceased person, does not apply when the assignee is such *by operation of law only*. So held where the assignee was a trustee in bankruptcy. *Barber v. Wiemer*, 183—72.

**Transactions with Deceased—Trustee in Bankruptcy as “As-**

- 2 **signee.”** A trustee in bankruptcy, in an action to enforce a trust in favor of the bankrupt, which trust, it is alleged, was granted to defendant by one now deceased, is not an “assignee” of the deceased grantor, either in *fact* or by *operation of law*; and therefore the defendant, who denies the trust, is a competent witness to testify against said trustee as to personal transactions with said deceased. *Barber v. Wiemer*, 183—72.

## WITNESSES Continued

## CROSS-EXAMINATION.

**Corrupt Conduct.** A witness may, on cross-examination, be impeached by a showing that he has been guilty of corrupt conduct,—for instance, attempted subornation of perjury,—in connection with the litigation on trial. *State v. Lawson*, 183—344.

**Scope.** Testimony by a witness based on an *assumption* of fact, does not open the door, on cross-examination, to show by the witness that the assumption is not true. So held where an expert witness testified to the value of land, on the assumption that it was infested with noxious weeds. *Wheeler v. Schilder*, 183—623.

**Contradictory Statements Out of Court.** A witness who, on cross-examination, denies having made certain material statements out of court contradictory of his material statements in court may, as a matter of right, be required to state *what he did state out of court*. *Clark & Co. v. Monson*, 183—980.

## CREDIBILITY, IMPEACHMENT, ETC.

**Bad Reputation—Time and Place of Acquiring.** A witness who for eight months preceding the trial, has resided in a populous locality, and has, apparently, acquired no reputation therein, may be impeached by a showing of his bad reputation at a time eight months preceding the trial, in the locality where he then resided. *State v. Bertinelli*, 183—1143.

**Depraved Habits, Antecedents, Etc.** The right, on cross-examination, to delve into the past depraved habits, antecedents, and character of a witness, by inquiry as to specific acts, in order to undermine his credibility, may always be carried as far into his past life as the examiner would be permitted to go were he inquiring as to reputation for truth or moral character. It seems to be an abuse of discretion for the court to permit a more remote inquiry, unless the remote facts inquired about have some fair relation to the material facts in issue. An inquiry into facts occurring eight years previous to the occurrence under con-

WITNESSES Continued TO WORKMEN'S COMPENSATION ACT  
sideration, with no showing of non-reformation during said  
following eight years, held too remote. State v. Dillman,  
183—1147.

### WORDS AND PHRASES.

“Value of Use”—“Rental Value.” “Value of use” of lands,  
and “rental value” of lands, are synonymous terms.  
Straight Bros. Co. v. Chicago, M. & St. P. R. Co., 183—934.

WORKMEN'S COMPENSATION ACT. See MASTER AND  
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*Ey J.M.*  
*11/17/19*



